

CHAPTER TWO

ENFORCING STATE CONSTITUTIONS THROUGH CONSTITUTIONAL TORTS

Federal civil rights have been in general retreat for roughly a half-century.¹ Seeing the beginnings of this trend in the mid-1970s following the end of the Warren Court, Justice Brennan published a short article in our pages.² He argued that the then-recent line of cases “foreclos[ing] federal remedies constitutes a clear call to state courts to step into the breach.”³ Specifically, he sought to direct attention to state constitutions as “a font of individual liberties” with “protections often extending beyond . . . the Supreme Court’s interpretation of federal law.”⁴

In the years since, states have been increasingly rising to the occasion. While many states still interpret their parallel constitutional provisions largely in lockstep with federal law,⁵ others have either retained rights that have been withdrawn from federal protection⁶ or expanded their protections to include civil rights never captured by the Federal Constitution.⁷

But even recognized state rights remain impotent without remedies to enforce them. Damages are often the only way to meaningfully redress constitutional violations.⁸ At the federal level, civil rights remedies have been eroded. Section 1983⁹ is a federal law that can provide damages

¹ See Sherrilyn Ifill, *Reviving the Promise of the 14th Amendment*, 68 HOW. L.J. 333, 341–42 (2025); Jacob Chabot, *Why Is Title VII in Retreat? A Socioeconomic Analysis of the Retrenchment of Contemporary Civil Rights Law*, 57 U.C. DAVIS L. REV. 2299, 2301 n.1 (2024) (collecting authorities).

² William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

³ *Id.* at 503.

⁴ *Id.* at 491.

⁵ Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1035 (2011).

⁶ For example, twelve “[s]tate high courts have recognized that their constitutions protect abortion rights independently from the federal constitution.” *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights> [<https://perma.cc/QUB2-BDL2>].

⁷ See, e.g., Bridget Lavender, *The Right to Petition in State Constitutions, Explained*, STATE CT. REP. (Apr. 1, 2025), <https://statecourtreport.org/our-work/analysis-opinion/right-petition-state-constitutions-explained> [<https://perma.cc/EC3D-N49B>] (explaining that the New Jersey Constitution has been interpreted to provide broader First Amendment protections because “it provides an ‘explicit affirmation of’ fundamental rights” (quoting *State v. Schmid*, 423 A.2d 615, 627 (N.J. 1980))).

⁸ See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 974 (2019) (arguing that damages remedies “should normally exist” for tort-like constitutional violations by executive officials because plaintiffs in cases involving past injuries often lack standing to seek injunctive relief).

⁹ 42 U.S.C. § 1983.

for violations of federal constitutional rights.¹⁰ But the Supreme Court has limited § 1983 through “[i]ts creation of qualified immunity, rigorous municipal liability standards, pleading requirements, . . . and caveats for plaintiffs’ attorneys’ entitlement to fees,”¹¹ leaving many plaintiffs whose federal constitutional rights have been violated without any federal damages remedy. And § 1983 provides no protection where someone’s state, but not federal, rights have been violated,¹² such as when those state rights are broader than their federal equivalents.¹³ Recognizing the need to provide independent redress, eight states have passed laws like § 1983, authorizing damages actions against state officers for violations of individuals’ *state* constitutional rights.¹⁴ But the vast majority of states have not done so, leaving state courts to reckon with whether to independently recognize rights of action — termed here as constitutional torts — for damages against state officers.¹⁵ Analogous to the *Bivens*¹⁶ remedy at the federal level, some state courts use constitutional torts to provide monetary damages without a statutory cause of action.¹⁷ At the moment, however, “[m]ost states have taken *no* measures to secure the enforcement of constitutional rights through constitutional tort litigation.”¹⁸

In 2021, Professors Alexander Reinert, Joanna Schwartz, and James Pfander proposed a series of “legislative and administrative solutions” to ensure remedies for state constitutional violations,¹⁹ including the enactment of state equivalents to § 1983,²⁰ better “budgeting and indemnification practices,”²¹ and more strategic “approaches to defending

¹⁰ *Id.* (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .” (emphasis added)).

¹¹ Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 757 (2021).

¹² See Gary S. Gildin, *A Primer on Advocating Independent State Constitutional Remedies*, STATE CT. REP. (Feb. 27, 2024), <https://statecourtreport.org/our-work/analysis-opinion/primer-advocating-independent-state-constitutional-remedies> [<https://perma.cc/AY9F-43SV>] (“Section 1983 does not apply to infringement of state constitutional rights.”).

¹³ For example, these states have recognized explicit rights to privacy in their state constitutions: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina, and Washington. See Tiffany C. Li, *State Constitutional Rights to Privacy* 6 (Jan. 31, 2025) (unpublished manuscript), <https://ssrn.com/abstract=5146734> [<https://perma.cc/JP9U-VQ3G>].

¹⁴ These states are Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Jersey, and New Mexico. Reinert, Schwartz & Pfander, *supra* note 11, at 760 & n.93.

¹⁵ See T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1535 (1997).

¹⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁷ Jefferson, *supra* note 15, at 1534–35.

¹⁸ Reinert, Schwartz & Pfander, *supra* note 11, at 743.

¹⁹ *Id.* at 749.

²⁰ *Id.* at 757.

²¹ *Id.* at 757–58.

against Section 1983 claims.”²² These reforms are much needed, as clear statutory and administrative procedures will best ensure the efficacy and predictability of state civil rights enforcement. But alongside advocacy for state legislative and administrative reform, litigants and judges in state courts have a role to play in securing damages for constitutional violations.

Some scholars have put forth a full-throated argument for why constitutional torts ought to be recognized in most, if not all, cases.²³ Others have suggested that it might be best for courts to abandon constitutional torts entirely.²⁴ This Chapter argues that the choice facing state courts is more nuanced than these two extremes: Instead of making an *ex ante* categorical determination, courts should fulfill a gap-filling function depending on the existing remedial scheme.

This Chapter proceeds in three sections. Section A argues that state courts should not default to operating in lockstep with the federal government when it comes to recognizing constitutional torts. Instead, many state courts may be obligated to recognize constitutional torts because of rights-to-remedies provisions in their state constitutions. Recognizing that state courts may face an increased institutional obligation, section B then provides a taxonomy for how state courts ought to proceed when faced with whether to recognize a cause of action for state constitutional violations. First, the case for recognizing constitutional torts is strongest when there is no alternative statutory or common law remedial structure. Second, when there is an existing common law remedy but no statutory one, the case is weaker but still present. Third, when the legislature has provided an alternative remedial scheme without explicitly foreclosing a constitutional tort, the court must determine whether the statutory remedy is adequate. Fourth, the court should almost always defer to a statutory remedy that explicitly forecloses any other remedial scheme. This section also discusses two other special considerations: sovereign and officer immunity and positive rights. Finally, section C defends against possible objections to state courts’ recognition of constitutional torts, arguing that providing damages for constitutional violations can spur legislative action and doctrinal refinement.

²² *Id.* at 758.

²³ See, e.g., Jefferson, *supra* note 15, at 1551 (“Constitutional torts are the only conventional remedy in the court’s repertoire which can affirm the rights of the plaintiff.”).

²⁴ See, e.g., E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 944 (2025) (raising the possibility that constitutional tort doctrine should be “reconsidered — and potentially repudiated” if the analogy to private law wrongs proves fundamentally unsound).

A. State Constitutional Torts: Not a *Bivens Redux*

The prospects of arguments for direct constitutional torts under the Federal Constitution have fallen to nearly futile over the past decades,²⁵ but their ultimate demise should not significantly affect parallel arguments under state constitutions. State courts are better positioned than their federal counterparts to administer constitutional torts, both as a matter of competence and for reasons of democratic legitimacy. And most state constitutions include a crucial provision the Federal Constitution lacks — a rights-to-remedies clause — which weighs in favor of providing damages.

1. *The Federal Constitution: The Rise and Fall of Bivens.* — In 1971, the Supreme Court first recognized “a cause of action for damages” when a “federal agent acting under color of his authority” violates an individual’s federal constitutional rights.²⁶ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the majority described the availability of damages as “hardly . . . a surprising proposition,” because they “have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”²⁷ It further noted that there were “no special factors counselling hesitation” in providing the remedy without “affirmative action by Congress.”²⁸ The case concluded by quoting *Marbury v. Madison*²⁹ for its famous declaration that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”³⁰ Justice Blackmun dissented, writing that he “had thought that for the truly aggrieved person other quite adequate remedies have always been available” for such violations, and that “[i]f not, it is the Congress and not this Court that should act.”³¹

Justice Blackmun’s dissent proved prescient. At first, the Court held a *Bivens* action to be foreclosed only when “Congress . . . provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”³² Over a period of fifty years, however, this standard has eroded to the point that any “alternative remedial structure”³³ forecloses a *Bivens*

²⁵ See Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1329 (2023); see also Curtis Bradley & Tara Leigh Grove, *Disfavored Supreme Court Precedent in the Lower Federal Courts*, 111 VA. L. REV. 1353, 1397–98 (2025) (tracking the declining success of *Bivens* claims over the past three decades).

²⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

²⁷ *Id.* at 395.

²⁸ *Id.* at 396.

²⁹ 5 U.S. (1 Cranch) 137 (1803).

³⁰ *Bivens*, 403 U.S. at 397 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

³¹ *Id.* at 430 (Blackmun, J., dissenting).

³² *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

³³ *Egbert v. Boule*, 142 S. Ct. 1793, 1804 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 137 (2017)).

remedy, whether provided by Congress or a federal agency.³⁴ Moreover, the Court has held that even “congressional inaction” may foreclose a remedy if “the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms.”³⁵

2. *State Constitutions: A More Hopeful Picture.* — Despite the erosion of direct constitutional torts at the federal level, the case for recognizing them at the state level remains strong. Scholars and judges have long criticized the *Bivens*-narrowing cases on their own terms,³⁶ and many of the same arguments for federal recognition of direct constitutional torts apply to state recognition: Compensating harm caused, deterring unlawful conduct, and putting damages on par with injunctive relief are arguments that should be similarly compelling at the state level.³⁷ But the argument in the states is not merely a *Bivens* redux. Instead, states are uniquely positioned to recognize damages remedies for state constitutional violations for three reasons: First, the courts themselves are significantly more politically accountable than their federal counterparts, as many use elections to either originally select or reelect judges.³⁸ Second, state courts are courts of general jurisdiction, more familiar with crafting common law rules that provide damages remedies without statutes in areas of contract, property, and tort law.³⁹ Finally, the lower barriers to amendment make it more possible for voters and state legislatures to amend their constitutions in response to unpopular state court interpretations of constitutional guarantees.⁴⁰

State courts that recognize direct constitutional torts have relied mainly on three lines of reasoning — often in a mutually reinforcing fashion — to assert that such a remedy, at least as an *a priori* matter, is allowed without a statutory cause of action. First, courts have held that

³⁴ *Id.* As Justice Sotomayor put it, the Court’s standard permits a “nonbinding administrative investigation process, internal to the agency and offering no meaningful protection of the constitutional interests at stake” to foreclose a *Bivens* remedy. *Id.* at 1819–20 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

³⁵ *Id.* at 1808 (majority opinion) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

³⁶ See, e.g., Henry Rose, *The Demise of the Bivens Remedy Is Rendering Enforcement of Federal Constitutional Rights Inequitable but Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 240 (2022) (arguing, for example, that “[w]hen the Supreme Court declines to recognize a *Bivens* remedy . . . it loses the opportunity to interpret the constitutional provisions at issue”).

³⁷ *Id.* at 239.

³⁸ See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), <https://www.brennancenter.org/judicial-selection-map> [<https://perma.cc/YSF8-Y52U>]; Richard Loren Jolly, *Judges as Politicians: The Enduring Tension of Judicial Elections in the Twenty-First Century*, 92 NOTRE DAME L. REV. ONLINE 71, 74 (2017).

³⁹ *State Courts vs. Federal Courts*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/student-center/organization-of-the-federal-courts/state-courts-vs-federal-courts> [<https://perma.cc/DS8T-ZTYV>]. Federal courts, by contrast, have long disclaimed the existence of “federal general common law.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁴⁰ Alicia Bannon, *Learning from State Constitutional Amendments*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM (Apr. 18, 2023), <https://nyujlp.org/quorum/bannon-learning-from-state-constitutional-amendments> [<https://perma.cc/VN63-C949>] (“[S]tates’ amendment processes are both less burdensome and closer to the people.”).

at least some constitutional provisions are “self-executing”⁴¹ or *were intended* to provide a damages remedy⁴² — thus imposing immediate, judicially enforceable duties on state officials without requiring legislative action. Second, courts have relied on section 874A of the Restatement (Second) of Torts, which states that “[w]hen a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may . . . accord to an injured member of the class a right of action, using suitable existing tort action or a *new cause of action analogous to an existing tort action*.”⁴³ Finally, courts have looked to antecedent English common law, where violation of constitutional rights could be remedied by a traditional trespass action for damages.⁴⁴

But aside from these existing interpretations, there is another pathway to recognizing state constitutional torts. Most state constitutions include a crucial provision lacking from the Federal Constitution: a rights-to-remedies clause. State rights-to-remedies clauses are drawn from “one of the oldest of Anglo-American rights, rooted in Magna Carta.”⁴⁵ The 1225 version of the Magna Carta guaranteed that “[t]o no one will we sell, to no one will we deny, or delay right or justice.”⁴⁶ Six states included constitutional provisions resembling this language before the ratification of the U.S. Constitution,⁴⁷ and similar provisions are now contained in forty state constitutions, with thirty-five expressly

⁴¹ See, e.g., *Godfrey v. State*, 898 N.W.2d 844, 847–48 (Iowa 2017) (“The United States Supreme Court declared in *Davis v. Burke* that a constitutional provision may be said to be ‘self-executing’ if it ‘supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.’” (quoting *Davis v. Burke*, 179 U.S. 399, 403 (1900))), *overruled by*, *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023); *id.* at 848 (“[T]he purpose of constitutional provisions such as the equal protection clause was to place certain subjects beyond the reach of the elected branches and instead entrust their enforcement to the courts.”); *Zullo v. State*, 205 A.3d 466, 483 (Vt. 2019) (holding that search and seizure provisions are paradigmatically self-executing because they “provide[] sufficient direction by which the right at issue might be protected”).

⁴² See, e.g., *Katzberg v. Regents of the Univ. of Cal.*, 58 P.3d 339, 350 (Cal. 2002) (“[W]e shall inquire whether there is evidence from which we may find or infer, within the constitutional provision at issue, an affirmative intent either to authorize or to withhold a damages action to remedy a violation.”).

⁴³ RESTATEMENT (SECOND) OF TORTS § 874A (A.L.I. 1979) (emphasis added); see, e.g., *Godfrey*, 898 N.W.2d at 858 n.4 (invoking the Restatement); *Binette v. Sabo*, 710 A.2d 688, 693 (Conn. 1998) (same); *Dorwart v. Caraway*, 58 P.3d 128, 135 (Mont. 2002) (same); *Katzberg*, 58 P.3d at 355 (same).

⁴⁴ See, e.g., *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921, 924 (Md. 1984) (recognizing existence of common law action for monetary damages, citing English common law and the Magna Carta); *Moresi v. Dep’t of Wildlife & Fisheries*, 567 So. 2d 1081, 1092 (La. 1990) (same, relying on Framers’ intent and English common law); *Brown v. State*, 674 N.E.2d 1129, 1133 (N.Y. 1996) (same, relying on English common law antecedents).

⁴⁵ Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1310 (2003).

⁴⁶ *Id.* n.4 (quoting MAGNA CARTA, ch. 29 (1225), translated in WILLIAM F. SWINDLER, MAGNA CARTA 244, 316–17 (1965)).

⁴⁷ *Id.* at 1323–24.

guaranteeing a remedy for legal injuries.⁴⁸ While the language of these remedies provisions varies somewhat, they tend to guarantee that “every [person,] for . . . injury done [to person, property, or reputation] . . . shall have remedy” in court.⁴⁹ Eleven states further require this access to judicial remedy be “complete[],”⁵⁰ and Louisiana requires it to be “adequate.”⁵¹ Rights-to-remedies clauses have played an active role in state supreme courts’ analyses of both “procedural impediments to judicial access” and “substantive modifications to . . . remedies.”⁵²

Courts have differed in how they have interpreted the scope of these provisions. Some courts have interpreted them to require courts to provide a remedy when they determine that a right has been violated. For example, in *Skelly Oil Co. v. Universal Oil Products Co.*,⁵³ the Illinois Court of Appeals held that its rights-to-remedies clause provided a “clear mandate to the courts, that wherever the legislature has failed to provide a remedy, the courts must.”⁵⁴ The *Skelly* court noted that in the case of constitutional violations, the court should not be afraid to provide a remedy “as it has in many instances under the common law and equitable principles.”⁵⁵ Employing a more conservative approach, other courts have interpreted the remedy to restrict legislatures only from altering or amending a “well-established” common law remedy.⁵⁶ In

⁴⁸ The thirty-five state constitutional provisions explicitly discussing remedies include: ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Declaration of Rights, art. 19; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. Bill of Rights, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W. VA. CONST. art. III, § 17; and WIS. CONST. art. I, § 9. The five parallel provisions that do not mention remedies explicitly are: ARIZ. CONST. art. II, § 11; FLA. CONST. art. I, § 21; GA. CONST. art. I, § 1, para. XII; WASH. CONST. art. I, § 10; and WYO. CONST. art. I, § 8.

⁴⁹ CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; IND. CONST. art. I, § 12; MISS. CONST. art. 3, § 24; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; W. VA. CONST. art. III, § 17; *accord* ALA. CONST. art. I, § 13; NEB. CONST. art. I, § 13.

⁵⁰ *See* ARK. CONST. art. II, § 13; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; ME. CONST. art. I, § 19; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I, § 8; N.H. CONST. Bill of Rights, art. 14; OR. CONST. art. I, § 10; R.I. CONST. art. I, § 5; VT. CONST. ch. I, art. 4; WIS. CONST. art. I, § 9.

⁵¹ LA. CONST. art. I, § 22.

⁵² Phillips, *supra* note 45, at 1311.

⁵³ 86 N.E.2d 875 (Ill. App. Ct. 1949).

⁵⁴ *Id.* at 878.

⁵⁵ *Id.*

⁵⁶ Phillips, *supra* note 45, at 1337 (quoting *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994)).

Moreno v. Sterling Drug, Inc.,⁵⁷ the Texas Supreme Court held that a litigant had to “show that he has a well-recognized common-law cause of action that is being restricted; and second, he must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.”⁵⁸ Finally, some courts have read the remedies clause not as an enforceable mandate, but as merely a declaration of broad principles of natural rights and justice.⁵⁹ The Minnesota Supreme Court in *Allen v. Pioneer Press Co.*⁶⁰ held that there was “unquestionably a limit” on this clause, stating that the rights-to-remedies clauses at issue could not be “so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power.”⁶¹

Despite significant discussion of these provisions in other areas of litigation as described above, they have been largely absent from considerations of constitutional torts. However, rights-to-remedies clauses may require recognizing remedies to constitutional violations. Indeed, then-Chief Justice Phillips of the Texas Supreme Court suggests that a “close reading of history” may provide a “definite, but limited, role for the guarantee in curbing legislative excess.”⁶² In particular, he notes that “Blackstone considered the primary absolute rights — personal security, personal liberty, and property — to be protected by the subordinate absolute rights, such as the right to a remedy.”⁶³ On this view, though many relative rights might fall outside the scope of the clause, absolute rights enshrined in state constitutions must either be remedied by courts or “protected through administrative schemes or alternate dispute resolution mechanisms, so long as these procedures adequately protect[] claimants’ remedies.”⁶⁴ State constitutional rights to a remedy therefore compel court-recognized remedies, including damages remedies, when no other redress is available.⁶⁵

B. Taxonomy for Recognizing Constitutional Torts

Though state courts may have an increased institutional obligation to recognize constitutional torts as compared to federal courts, they still must balance this consideration with the policymaking function of the

⁵⁷ 787 S.W.2d 348 (Tex. 1990).

⁵⁸ *Id.* at 355 (citing, inter alia, *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988)).

⁵⁹ See, e.g., *Allen v. Pioneer Press Co.*, 41 N.W. 936, 938 (Minn. 1889); *Conley v. Conley*, 15 P.2d 922, 926 (Mont. 1932).

⁶⁰ 41 N.W. 936 (Minn. 1889).

⁶¹ *Id.* at 938.

⁶² Phillips, *supra* note 45, at 1344.

⁶³ *Id.* at 1344–45 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *140–41).

⁶⁴ *Id.* at 1345.

⁶⁵ See, e.g., *Dorwart v. Caraway*, 58 P.3d 128, 137 (Mont. 2002) (noting that two state statutes, in light of Montana’s rights-to-remedies clause, “permit[ted] no other result” than recognizing a constitutional tort).

legislature. Thus, when deciding whether to recognize and how to craft constitutional torts for state constitutional violations, state courts should consider existing remedies. The relevant considerations depend on whether (1) no remedial scheme exists, (2) a common law but no statutory scheme exists, (3) a statutory remedial scheme exists with no explicit preemption of constitutional torts, or (4) a statutory scheme directly preempts constitutional torts. Special considerations also arise when (5) sovereign and officer immunities or (6) positive constitutional rights are at issue.

These considerations cannot completely explain the apparent conflict over constitutional torts among state courts. Even within a given circumstance, some courts have recognized expansive damages remedies while others have been more restrained. We refer to the ends of this spectrum as the maximalist and minimalist positions, respectively. We argue that while maximalist approaches are more appropriate without existing remedies, separation of powers concerns justify minimalism in the presence of contrary legislative action. This section considers each circumstance in turn, describing cases that have adopted maximalist and minimalist positions, and using these cases to distinguish and advocate for our favored, gap-filling approach.

I. No Existing Remedial Scheme. — Without either a common law or statutory remedial scheme, courts have split. Some have recognized an expansive judicial remedy, others have tried to construct the least intrusive remedy while still remedying the violation, and still others have refused to recognize a constitutional tort altogether. We argue that without an existing remedial common law or statutory scheme, courts ought to feel most empowered to recognize constitutional torts, as that circumstance is least likely to implicate separation of powers concerns, and the administrative burden is minimal.

One of the most widely cited cases recognizing an expansive constitutional tort without an existing alternative remedy is *Brown v. State*.⁶⁶ There, the New York Court of Appeals considered whether to provide a remedy to a class of plaintiffs who had been subjected to allegedly unconstitutional searches.⁶⁷ The *Brown* court held that it could recognize a damages remedy even without an existing scheme, as “implying a damage[s] remedy . . . [was] consistent with the purposes underlying the duties imposed by” the constitutional provisions and was “necessary and appropriate to ensure the full realization of the rights they state.”⁶⁸ In particular, it emphasized that the provisions at issue involved “clearly define[d] duties” imposed on state officers, so the officers could be fairly held to these standards.⁶⁹ The court rejected the notion that a damages

⁶⁶ 674 N.E.2d 1129 (N.Y. 1996).

⁶⁷ *Id.* at 1131.

⁶⁸ *Id.* at 1139.

⁶⁹ *Id.* at 1140.

remedy should “depend[] upon the availability of a common-law tort,” as “[c]ommon-law tort rules are heavily influenced by overriding concerns of adjusting losses and allocating risks, matters that have little relevance when constitutional rights are at stake.”⁷⁰ As such, the court independently recognized a constitutional tort for illegal searches.⁷¹ This reasoning is not unique to New York, as Maryland’s Supreme Court similarly held, twelve years earlier, that “a state constitutional provision may recognize and preserve an interest that is wholly unprotected under state common law and statutes.”⁷²

Still, other courts have been more conservative in creating a damages remedy when no alternative remedy exists. The North Carolina Supreme Court in *Corum v. University of North Carolina*⁷³ held that a plaintiff whose free speech rights had been violated had a direct cause of action under the state constitution against governmental defendants.⁷⁴ In that case, there was no alternative statutory scheme, and a common law remedy was barred by sovereign immunity.⁷⁵ As such, the court noted that because “constitutional rights are a part of the supreme law of the [s]tate,” it needed to construct a remedy.⁷⁶ However, the court noted a critical limitation: “[T]he judiciary must minimize the encroachment upon other branches of government — in appearance and in fact — by seeking the *least intrusive remedy* available and necessary to right the wrong.”⁷⁷

Finally, some courts have simply refused to recognize a damages remedy entirely, often citing policy considerations, termed “special factors,” following *Bivens*.⁷⁸ In *Kelley Property Development, Inc. v. Town of Lebanon*,⁷⁹ the Connecticut Supreme Court stated that “special factors” counseled against applying a monetary damages remedy against town officials after the claimant’s application for subdivision approval was denied.⁸⁰ In doing so, the court stated that the dispute was “a political one” that ought to be resolved “within designated political channels.”⁸¹

To be sure, state judiciaries administering direct causes of action without a statute must consider a large set of policy questions that they may be ill-suited to balance. Only able to take cases as they come, courts are unable to access the same broad view that legislatures can in

⁷⁰ *Id.*

⁷¹ *See id.* at 1141.

⁷² *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921, 928–29 (Md. 1984).

⁷³ 413 S.E.2d 276 (N.C. 1992).

⁷⁴ *Id.* at 289.

⁷⁵ *See id.* at 291–92.

⁷⁶ *Id.*

⁷⁷ *Id.* at 291 (emphasis added).

⁷⁸ *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

⁷⁹ 627 A.2d 909 (Conn. 1993).

⁸⁰ *Id.* at 921.

⁸¹ *Id.* at 924.

balancing policy considerations.⁸² These considerations often arise in the difficult line-drawing questions involved in determining the nature of constitutional injuries. For example, in the context of rights against unreasonable searches and seizures, determining monetary damages for an unlawful search or seizure raises intricate questions about what constitutes the injury — the invasion of privacy itself, emotional distress, reputational harm, or downstream consequences like evidence suppression — and how those harms should be valued.⁸³ Similarly, when considering state due process claims, quantifying damages for arbitrary governmental deprivation of property or liberty requires judgments about systemic practices and individual burdens that state courts can struggle to make.⁸⁴ Thus, because constitutional torts often involve diffuse, policy-laden harms rather than discrete economic losses, state judiciaries are not the best-positioned institutions to create constitutional damages remedies.

But when the other branches have failed to create any alternative remedies, administrative challenges should not prevent courts from recognizing constitutional torts. Many courts, particularly those that engage in “special factors” analyses, appear to treat the availability of a remedy as a policy question when in fact it should be seen as continuous with the interpretation of the relevant constitutional provision.⁸⁵

While “special factors” may have been first noted in *Bivens* simply as a way of accommodating potentially conflicting precedent that refused to recognize constitutional damages remedies,⁸⁶ it has become a justification for refusing a remedy in the presence of “any reason to think that Congress might be better equipped” “to weigh [the] policy considerations” involved in “creat[ing] a damages remedy.”⁸⁷ But to even engage in “special factors” analysis is to have already decided the fundamental question, concluding that the relevant constitutional provision grants courts discretion to fashion a remedy subject to their policy judgments.

And there are good reasons to think that whether to extend a remedy is not a policy question. If it were, then the enforcement of constitutional rights would be contingent on that enforcement aligning with the public interest. But rights are enshrined in constitutions precisely to elevate them above this contingency. At the very least, holding that

⁸² See, e.g., AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 14–15 (2006) (“[A] judge should beware of evaluating complex, polycentric questions of economic or social policy that require specialized expertise and knowledge and that may rely on assumptions concerning issues with which he is unfamiliar.” (footnote omitted)).

⁸³ See, e.g., *Hicks v. Ferreyra*, 582 F. Supp. 3d 269, 292–95 (D. Md. 2022) (scrutinizing and upholding an award for emotional injury caused by Fourth Amendment violations).

⁸⁴ See *id.*

⁸⁵ See, e.g., *Kelley Prop. Dev., Inc.*, 627 A.2d at 923 (determining that “[a]s a matter of policy, the existing remedies, although they may not afford as complete relief[,] . . . [were] . . . appropriate”).

⁸⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

⁸⁷ *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).

enforcement of the constitutional right is subject to mere policy judgments is a controversial interpretation that cannot be taken for granted.

Instead, remedies should be required by the associated rights themselves, without requiring additional policy analysis. Such was the case (albeit briefly⁸⁸) with the exclusionary rule for Fourth Amendment violations. *Mapp v. Ohio*⁸⁹ held that the rule was “an essential ingredient of the Fourth Amendment,” or in other words, “part and parcel” of the right.⁹⁰ The same reasoning was applied to require monetary compensation in Takings Clause cases.⁹¹ If other state constitutional provisions include damages remedies as an essential ingredient of the right they articulate, then courts need not — and indeed cannot — condition the provision of damages on policy balancing.

To be sure, it is possible that some state constitutional provisions may not include any particular remedy within the right, but rather require judges to fashion a common law remedy appropriate to vindicate the right. This is what § 1983 does when making state officials “liable . . . in an action at law.”⁹² It is also what the North Carolina Supreme Court held to be the source of the damages remedy in *Corum*.⁹³ Reverting to common law remedies, however, does not require determining what, if any, remedy is best as a matter of public policy. *Corum* recognized this pairing of power with responsibility when it acknowledged both the court’s “inherent constitutional power to fashion a common law remedy”⁹⁴ and its “responsibility to protect the state constitutional rights of the citizens.”⁹⁵ So while “the trial judge . . . craft[s] the necessary relief,” the court still recognized some relief as *necessary*.⁹⁶ That determination remains a matter of constitutional interpretation, even if the means of fulfilling it are left to the judge.

2. *Common Law, No Statute.* — In some cases, courts may face a situation where there is an existing common law remedy, but no relevant statute. Courts have split in these situations. In *Mack v. Williams*,⁹⁷ the Nevada Supreme Court recognized that a constitutional tort “to vindicate violations of search-and-seizure rights [existed] under the Nevada

⁸⁸ The rights-based approach lasted for thirteen years, from its original articulation in *Mapp v. Ohio*, 367 U.S. 643, 651 (1961), to its overruling in *United States v. Calandra*, 414 U.S. 338, 348 (1974) (holding the exclusionary rule to be a matter of policy rather than right).

⁸⁹ 367 U.S. 643 (1961).

⁹⁰ *Id.* at 651.

⁹¹ See, e.g., *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (holding that the Takings Clause is “self-executing” and requires that the government pay just compensation when it has taken property, even if there is no statutory cause of action (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980))).

⁹² 42 U.S.C. § 1983.

⁹³ 413 S.E.2d 276, 290–91, 294 (N.C. 1992).

⁹⁴ *Id.* at 291.

⁹⁵ *Id.* at 290.

⁹⁶ *Id.*

⁹⁷ 522 P.3d 434 (Nev. 2022) (en banc).

Constitution.”⁹⁸ In doing so, it first determined that the court could act without legislative action because “[c]onstitutional rights must remain enforceable in the absence of some action by the Legislature, or risk that constitutional rights become all but ‘a mere hope.’”⁹⁹ It then held that existing common law remedies were insufficient, because “state tort law ultimately protects and serves different interests than such constitutional guarantees.”¹⁰⁰ In other words, vindicating the right required constitutional torts where common law remedies proved inadequate.¹⁰¹

Other courts have rejected this analysis. The California Supreme Court in *Katzberg v. Regents of the University of California*¹⁰² determined that common law defamation tort remedies were sufficient to compensate for the claimant’s due process injury.¹⁰³ It determined that even though the court had the ability to recognize monetary damages for the constitutional harm, it would refrain from doing so based on the following factors: “deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages.”¹⁰⁴

In these situations, the case to recognize constitutional torts is weaker than when no remedial structure exists, but courts still play a role in ensuring that claimants receive adequate relief. As the Montana Supreme Court has noted, there are good reasons to believe common law remedies are likely insufficient because of the “distinction between wrongs committed by one private individual against another and wrongs committed under authority of the state.”¹⁰⁵ And there are no unique separation of powers issues in the common law remedy context since these are creations of the courts to begin with. When a common law remedy exists, but no statutory one, courts should still craft constitutional remedies when necessary to ensure adequate rights enforcement.

3. *Relevant Statute Might Imply Foreclosure.* — The most complex situation arises when there is an existing legislative remedy. We argue that when the legislature has provided some remedy for a constitutional violation, courts should take those legislative judgments into account by asking two questions: First, did the legislature intend to foreclose a constitutional tort by providing an alternative remedy? A court is free to fashion a constitutional remedy if there is no intended foreclosure. Second, even if foreclosure is intended, the court may still need to create a constitutional remedy. Courts have an independent duty to determine

⁹⁸ *Id.* at 439.

⁹⁹ *Id.* at 446 (quoting *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 869 (Mich. 2022)).

¹⁰⁰ *Id.* at 448.

¹⁰¹ *Id.*

¹⁰² 58 P.3d 339 (Cal. 2002).

¹⁰³ *Id.* at 356.

¹⁰⁴ *Id.* at 350.

¹⁰⁵ *Dorwart v. Caraway*, 58 P.3d 128, 137 (Mont. 2002); see *Mack*, 522 P.3d at 448.

if foreclosure is constitutional, though they should give significant deference to the legislature when doing so. The next set of cases turns on the threshold inquiry: Was foreclosure intended, and if so, is that foreclosure constitutional?

Even in the presence of an existing legislative remedy, some state courts have still opted to craft an expansive constitutional tort. In *Godfrey v. State*,¹⁰⁶ the Iowa Supreme Court considered whether to recognize a constitutional tort for employment discrimination.¹⁰⁷ Although the court recognized that the legislature could unequivocally create, modify, or abolish common law or statutory rights at will, it determined that it was *the court's* role to determine whether “an established statutory remedy [was] sufficient to vindicate the constitutional interests of the people.”¹⁰⁸ Despite admitting that “[t]he Iowa Civil Rights Act [was] a substantial remedy,” as it “allow[ed] recovery for back wages, front wages, emotional distress, and attorneys’ fees,”¹⁰⁹ the court held that this statutory scheme was still insufficient because, among other reasons, it did not provide punitive damages.¹¹⁰

In contrast, facing similar scenarios, other courts have determined that the mere presence of an “adequate remedy” precludes constitutional torts.¹¹¹ For example, in *Washington v. Cline*,¹¹² the North Carolina Supreme Court held that the violation of the plaintiff’s right to a speedy trial — including a five-year delay and a year of pretrial detention¹¹³ — was adequately remedied when the state “set aside [his] criminal convictions.”¹¹⁴ The majority described an “adequate remedy” as one that provides the plaintiff “access to court to raise the constitutional violation, and the court can provide some form of relief for that violation.”¹¹⁵ In doing so, it distinguished this threshold of an “adequate remedy” from a “complete remedy” that would “make the plaintiff whole again.”¹¹⁶ To justify its decision not to completely remediate the harm, the court noted that “it must bow to established claims and remedies where these provide an alternative to the *extraordinary exercise* of its inherent constitutional power.”¹¹⁷

We argue that *Godfrey* and *Washington* fall on either side of the court’s proper analysis. While *Godfrey* attempted to reserve the question of the

¹⁰⁶ 898 N.W.2d 844 (Iowa 2017), *overruled by*, Burnett v. Smith, 990 N.W.2d 289 (Iowa 2023).

¹⁰⁷ *Id.* at 845.

¹⁰⁸ *Id.* at 873.

¹⁰⁹ *Id.* at 876.

¹¹⁰ *Id.* at 877, 879.

¹¹¹ *Washington v. Cline*, 898 S.E.2d 667, 669 (N.C. 2024).

¹¹² 898 S.E.2d 667 (N.C. 2024).

¹¹³ *Id.* at 682 (Earls, J., dissenting).

¹¹⁴ *Id.* at 669 (majority opinion).

¹¹⁵ *Id.* at 671.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (emphasis added) (quoting *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 291 (N.C. 1992)).

appropriate remedy entirely to the court,¹¹⁸ *Washington* seemed to treat *any* available remedy as adequate, thereby foreclosing a constitutional tort.¹¹⁹ This latter trend was adopted by federal courts, which originally insisted that the alternative remedy be “equally effective” to preclude a constitutional tort.¹²⁰ Federal courts have since entirely dropped the effectiveness requirement for alternative remedies and now accept any adequate remedy as precluding a constitutional tort.¹²¹

A court should settle for an adequate remedy in lieu of a constitutional tort only where the legislature intended remedy foreclosure. This is a question of statutory interpretation. In the federal context, courts have conducted a similar inquiry to determine if a remedial scheme was intended to foreclose a § 1983 action. There, the question primarily turns on “the nature and extent of [the alternative] remedial scheme.”¹²² Where it has “unusually elaborate enforcement provisions”¹²³ or a “detailed remedial scheme,”¹²⁴ that is good evidence that Congress intended that remedy to be exclusive. “Where the contours of [the constitutional and statutory rights] diverge in significant ways,” however, intent to foreclose is less likely.¹²⁵ Something like this analysis is appropriate for constitutional torts, where the provision of a statutory remedy does not necessarily foreclose a constitutional remedy.

But unlike the § 1983 analysis, the inquiry cannot end when an intent to foreclose is found. While Congress is entirely free to foreclose, and even repeal, statutes such as § 1983, a state legislature is not necessarily at liberty to define the scope of self-executing constitutional rights.¹²⁶ The questions facing the court are then the same as if the legislature had explicitly foreclosed the constitutional tort, the subject of the next section.

4. *Relevant Statute Explicitly Forecloses.* — State legislatures have sometimes reacted to expansive recognitions of constitutional torts by explicitly foreclosing them.¹²⁷ When they do so, courts are faced with the separation of powers question directly: Who decides how to remedy state constitutional violations? At this juncture, all state courts faced

¹¹⁸ See *Godfrey v. State*, 898 N.W.2d 844, 873 (Iowa 2017), *overruled by*, *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023).

¹¹⁹ See *Washington*, 898 S.E.2d at 669.

¹²⁰ *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

¹²¹ *Egbert v. Boule*, 142 S. Ct. 1793, 1804 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 137 (2017)). The notion of adequacy is now maintained only when examining congressional *inaction*. See *id.* at 1808 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

¹²² *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 253 (2009).

¹²³ *Id.* (quoting *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 13 (1981)).

¹²⁴ *Id.* at 254 (citing *Smith v. Robinson*, 468 U.S. 992, 1011 (1984)).

¹²⁵ *Id.* at 252–53.

¹²⁶ See *Alper v. Clark County*, 571 P.2d 810, 810–11 (Nev. 1977) (holding that rights guaranteed by “self-executing” constitutional provisions, *id.* at 810, “cannot be abridged or impaired by statute,” *id.* at 811).

¹²⁷ See, e.g., IOWA CODE ANN. § 669.26 (West 2025) (effective June 17, 2021) (explicitly denying waiver of sovereign immunity for money damages claims brought under the Iowa Constitution).

with the question have deferred to the legislature.¹²⁸ But even in doing so, they have occasionally recognized that the court is not necessarily bound to defer, and that it must still exercise its independent judgment to an extent.¹²⁹ In other words, the court still has a role to play in determining whether gaps exist even when the legislature claims to have filled them.

The Iowa Supreme Court most recently addressed explicit statutory foreclosure of a constitutional tort in *Burnett v. Smith*.¹³⁰ Following the expansive recognition of constitutional torts in *Godfrey*,¹³¹ the state legislature amended the Iowa Civil Rights Act to assert that it should not be read as “a waiver of sovereign immunity for a claim for money damages under the [Iowa] Constitution.”¹³² *Burnett* responded by describing the problem facing courts as follows: “Courts have neither the freedom and flexibility they enjoy with normal common law development nor the specific mandate that a statute provides. Meanwhile, the legislature has a ‘say’ regarding the constitutional damages remedy, but its authority to legislate is circumscribed by adequate-remedy limits which are difficult to delineate.”¹³³ The court concluded that “[t]hese inevitable and unpredictable forays by each branch into the other’s territory violate separation of powers,”¹³⁴ and overruled *Godfrey* on these grounds.¹³⁵

Burnett described the difficulty admirably but took from it the wrong result. The situation confronting the court is simply the difficulty of constitutional interpretation. Courts interpreting constitutional text in any situation must recognize that the legislature has a “say” in how to operate within certain constitutional limits. And *Burnett*’s proposed solution, that a constitutional tort is available only if provided by the constitution’s “express terms,”¹³⁶ does not avoid the difficulty. By imposing a clear statement rule, the court simply creates a substantive canon of construction against a damages remedy.

Remedies do not pose separation of powers issues fundamentally different from those posed by interpreting the scope of rights themselves. In both cases, courts cannot interpret entirely without reference to legislative action, and yet they simultaneously cannot defer completely to the legislature’s judgments. Even if this position requires careful navigation, it is no excuse to abandon the project in the name of separation of powers.

¹²⁸ See, e.g., *Burnett v. Smith*, 990 N.W.2d 289, 298 (Iowa 2023) (overturning precedent providing for implied causes of action under the Iowa Constitution).

¹²⁹ See, e.g., *id.* (stating that Iowa’s sovereign immunity statute was not “binding” on the court).

¹³⁰ 990 N.W.2d 289 (Iowa 2023).

¹³¹ See *Godfrey v. State*, 898 N.W.2d 844, 873 (Iowa 2017), *overruled by*, *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023).

¹³² Act of June 17, 2021, ch. 183, §§ 13, 15, 2021 Iowa Acts 715, 719 (codified at IOWA CODE ANN. § 669.26 (West 2025)).

¹³³ *Burnett*, 990 N.W.2d at 305.

¹³⁴ *Id.* (citing IOWA CONST. art. III, § 1).

¹³⁵ *Id.* at 307.

¹³⁶ *Id.*

In an oblique way, the *Burnett* court recognized its gap-filling responsibility, noting that the legislature's action was not "binding" on the court's decision,¹³⁷ and that the difficulties it faced "might not be sufficient reason to overrule [*Godfrey*] if the case were filling a significant gap in [its] jurisprudence."¹³⁸ The *Burnett* court was thus exercising independent judgment, determining whether the legislative remedies met some adequacy threshold, even if it refused to recognize this role.¹³⁹

Courts should be willing to frankly admit that they retain this responsibility even in the face of legislative opposition. They should be willing to accept remedial schemes perhaps much different than those the court itself would have crafted because the legislature is better suited to consider the necessary trade-offs, for reasons previously discussed.¹⁴⁰ But that does not mean that the court must accept *any* scheme. While the appropriate adequacy standard will depend on the specific provision at issue, the difficulty involved in crafting one is not a justification for refusing to do so.

5. *Immunities*. — The presence or absence of existing remedies should inform constitutional tort interpretation, but there is also another set of hurdles: immunities. Sovereign immunities apply to suits against a state, and by extension, its subdivisions and officers sued in their official capacities.¹⁴¹ Officer immunities, by contrast, apply to individuals, including state and municipal officers sued in their individual capacities.¹⁴² Some state officers, such as legislators and judges, are granted absolute immunity in their official acts.¹⁴³ Others are granted qualified immunity, which can be overcome by various showings.¹⁴⁴ The extent to which sovereign and officer immunities do and should bar damages relief depends on their source — common law, statute, or the constitution. With respect to officer immunity, this section focuses on qualified rather than absolute immunity, as qualified immunity is often granted to state officers violating individuals' constitutional rights.¹⁴⁵

¹³⁷ *Id.* at 298.

¹³⁸ *Id.* at 301.

¹³⁹ See *id.* at 301–03 (defending its decision on the grounds that *Godfrey* claims either did not allege an "underlying constitutional violation," *id.* at 301 (emphasis omitted), or overlapped with § 1983).

¹⁴⁰ See *supra* notes 82–84 and accompanying text.

¹⁴¹ *State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Oct. 7, 2025), <https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART-3.pdf> [<https://perma.cc/5SXZ-2XRJ>]. Some states distinguish between sovereign immunities, which apply only against the state and its departments, and governmental immunities, which apply against its political subdivisions. *Id.* This section will consider "sovereign immunity" to cover both.

¹⁴² Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1361 n.136 (2021).

¹⁴³ *Id.* at 1355, 1357.

¹⁴⁴ See, e.g., *id.* at 1358–59 (explaining, for example, that common law qualified immunity "could be overcome if a plaintiff established clear evidence of subjective malice," *id.* at 1359).

¹⁴⁵ *Id.* at 1340.

(a) *Sovereign Immunity*. — State constitutional provisions establish a spectrum of defaults regarding sovereign immunity. Most expansively, Alabama retains complete sovereign immunity, requiring that “the State of Alabama shall never be made a defendant in any court of law or equity.”¹⁴⁶ This immunity extends to “State officials acting in their official capacities”¹⁴⁷ and “cannot be waived by the Legislature or by any other State authority.”¹⁴⁸ Other state constitutions simply grant immunity determinations to the legislature, permitting suits “against the State in such manner and in such courts as the Legislature may by law direct.”¹⁴⁹ Finally, some states create a constitutional presumption against sovereign immunity, whether by requiring the legislature to “establish procedures for suits against the State,”¹⁵⁰ or, more aggressively, by abolishing sovereign immunity except where adopted by a supermajority of the legislature.¹⁵¹

Courts are thus limited both by the baseline constitutional provision and, where the legislature is given authority to alter this baseline, by its subsequent decisions. Where the constitution does not explicitly grant the legislature such power, however, state courts can, and have, refused to recognize “sovereign immunity . . . as a barrier to . . . remedy[ing] violations of” state constitutional rights.¹⁵² But because of the prevalence of sovereign immunity as a barrier to recovery directly against the state, suing state officers in their individual capacities will often be a more reliable route to recovery. Such suits often face the less significant, though still formidable, barrier of qualified immunity.

(b) *Qualified Immunity*. — While sovereign immunity is well-established and longstanding within the states, qualified immunity is not. Various common law immunities have historically protected state officers, but these immunities, while often “qualified” in the sense that they were not absolute, did not resemble qualified immunity in its modern form.¹⁵³ This latter doctrine emerged in 1982 in the Supreme Court’s decision in *Harlow v. Fitzgerald*.¹⁵⁴ The *Harlow* Court created qualified immunity as an “attempt to balance competing values” involved in claims against federal executive officers.¹⁵⁵ Having already interpreted § 1983 to incorporate a “good faith and probable cause”

¹⁴⁶ ALA. CONST. art. I, § 14.

¹⁴⁷ Ala. State Univ. v. Danley, 212 So. 3d 112, 124 (Ala. 2016).

¹⁴⁸ *Id.* at 122 (quoting Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002)).

¹⁴⁹ TENN. CONST. art. I, § 17; *see, e.g.*, CAL. CONST. art. III, § 5; DEL. CONST. art. I, § 9; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16 (using almost identical language).

¹⁵⁰ ALASKA CONST. art. II, § 21.

¹⁵¹ *See* MONT. CONST. art. II, § 18.

¹⁵² *See* Corum v. Univ. of N.C., 413 S.E.2d 276, 291 (N.C. 1992).

¹⁵³ *See* Keller, *supra* note 142, at 1345–46.

¹⁵⁴ 457 U.S. 800 (1982).

¹⁵⁵ *Id.* at 807; *see also id.* at 818 n.30 (stating that while the “case involves no issue concerning . . . immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983,” the same rationale should apply).

defense under then-existing federal common law,¹⁵⁶ the Court first applied the *Harlow* qualified immunity standard to state officers just two years later.¹⁵⁷ Even as applied to state officers, however, this remained a standard of federal, not state, law.

In the years since *Harlow*, many states have adopted the federal qualified immunity standard, some by statute and others by judicial interpretation. The Iowa legislature, for example, explicitly incorporated the federal standard for suits against state and local officials following the judiciary's recognition of constitutional torts.¹⁵⁸ In other states, such as West Virginia, courts have adopted the federal qualified immunity standard independently, citing *Harlow* and the policy concerns it considered to replicate the federal standard through state case law.¹⁵⁹

Other state legislatures and courts have sought to limit qualified immunity. Two states have recently passed laws creating causes of action for damages arising from violations of state constitutional rights, removing qualified immunity as a defense. In 2020, Colorado became the first state to pass such legislation — limited to actions against police officers — stating that “[q]ualified immunity is not a defense to liability.”¹⁶⁰ A year later, New Mexico passed similar but broader legislation applying to public officials generally,¹⁶¹ which expressly “[p]rohibit[s] the use of the defense of qualified immunity.”¹⁶² These developments apply only to statutory causes of action but indicate a shift away from qualified immunity among the states.

Meanwhile, some state courts have refused to recognize qualified immunity as a defense without any legislation. The Maryland Supreme Court rejected qualified immunity for violations of the Maryland Constitution because it “would be inconsistent with the purpose of the constitutional provisions” to “leave an individual remediless” for such violations.¹⁶³ The Montana Supreme Court reached the same conclusion by other means.¹⁶⁴ It focused on the state constitution’s abrogation of sovereign immunity, which prohibits immunity for “[t]he state, counties, cities, towns, and all other local governmental entities.”¹⁶⁵ The court interpreted this provision and the state’s rights-to-remedies

¹⁵⁶ *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

¹⁵⁷ *See Davis v. Scherer*, 468 U.S. 183, 194 n.12, 197 (1984).

¹⁵⁸ Act of June 17, 2021, ch. 183, §§ 12, 14, 2021 Iowa Acts 715, 719 (codified at IOWA CODE ANN. §§ 669.14A, 670.4A (West 2025)); *see Burnett v. Smith*, 990 N.W.2d 289, 307 (Iowa 2023).

¹⁵⁹ *See, e.g., Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 (W. Va. 1996).

¹⁶⁰ *See Act of June 19, 2020*, ch. 110, § 3, 2020 Colo. Sess. Laws 445, 452–53 (codified as amended at COLO. REV. STAT. ANN. § 13-21-131 (West 2025)).

¹⁶¹ New Mexico Civil Rights Act, ch. 119, 2021 N.M. Laws 1849 (codified at N.M. STAT. ANN. §§ 41-4A-1 to -13 (West 2025)).

¹⁶² *Id.* § 4 (codified at N.M. STAT. ANN. §§ 41-4A-4 (West 2025)).

¹⁶³ *Clea v. Mayor of Baltimore*, 541 A.2d 1303, 1314 (Md. 1988).

¹⁶⁴ *Dorwart v. Caraway*, 58 P.3d 128, 139 (Mont. 2002) (quoting *Clea*, 541 A.2d at 1314).

¹⁶⁵ *Id.* at 140 (quoting MONT. CONST. art. II, § 18).

clause¹⁶⁶ to bar qualified immunity for individual officers for violations of the state constitution, even as it recognized qualified immunity under § 1983 in the same case.¹⁶⁷ Nevada followed suit in 2022, describing qualified immunity as a “federal, judicially created doctrine” that does not apply to state law claims unless “state law authorizes” it.¹⁶⁸ Because “the Legislature ha[d] not provided for a state-law equivalent of qualified immunity,” even as it expressly waived sovereign immunity, the court held that “qualified immunity is not a defense to a private damages action under”¹⁶⁹ the state constitutional protection “against unreasonable seizures and searches.”¹⁷⁰

In states where the applicability of qualified immunity to these cases is an open question, there should not be a presumption for the doctrine. As explained above, in the domain of constitutional violations, it is the *court’s* responsibility to determine how and to what extent to remedy the violation as a question of constitutional interpretation. Thus, unless the legislature has explicitly told the court that state officials enjoy qualified immunity — thereby signaling a policy judgment that officials ought to be shielded in some cases from liability — the court should assume that it can recognize constitutional torts. Where the legislature *has* explicitly granted qualified immunity by statute, the court should be particularly hesitant to overrule that decision, but — as with legislative provision of exclusive alternative remedial schemes — the court must still independently address the question of whether such immunity is consistent with the state’s constitutional structure, including, where applicable, its rights-to-remedies clause.

6. *Positive Rights.* — In contrast to immunities, positive rights are another factor that can weigh in favor of recognizing constitutional torts. Unlike the Federal Constitution, which consists only of negative rights (freedom from state interference),¹⁷¹ nearly every state constitution also includes positive rights (guarantees of state action).¹⁷² It may seem like the case for recognizing constitutional torts is weaker for positive rights, as the cost of remedying violations will presumably be much higher — more substantively implicating the separation of powers and policy challenges discussed earlier. Upon closer examination, however, it is not clear that this ought to be the case, especially when it comes to state courts.

¹⁶⁶ MONT. CONST. art. II, § 16 (guaranteeing a “speedy remedy . . . for every injury of person, property, or character”).

¹⁶⁷ See *Dorwart*, 58 P.3d at 140.

¹⁶⁸ Mack v. Williams, 522 P.3d 434, 450 (Nev. 2022) (en banc).

¹⁶⁹ *Id.* at 451.

¹⁷⁰ NEV. CONST. art. 1, § 18.

¹⁷¹ Dustin Coffman, *Pathways to Justice: Positive Rights, State Constitutions, and Untapped Potential*, 24 MARQ. BENEFITS & SOC. WELFARE L. REV. 181, 190–91 (2023).

¹⁷² *Id.* at 203–19 (explaining, for example, that most states have common school provisions in their state constitutions, *id.* at 205).

Many state courts have consistently applied *injunctive* relief to enforce positive rights — arguably as intrusive as damages remedies.¹⁷³ For example, in *Campaign for Fiscal Equity v. State*,¹⁷⁴ a New York lower court found that the State had for many years “consistently violated the Education Article of the N.Y. Constitution by failing to provide the opportunity for a sound basic education to New York City public school students.”¹⁷⁵ The court noted that it would not “prescribe a detailed remedy for these violations,” in part because “[t]he legislature [was] in a better position to gauge the effects of reform on the State as a whole.”¹⁷⁶ However, its “deference to the coordinate branches of State government [was] contingent on these branches taking effective and timely action,”¹⁷⁷ and it would “not hesitate to intervene if it [found] that the legislative and/or executive branches fail to devise and implement necessary reform.”¹⁷⁸ Accordingly, the court set out detailed parameters to guide reform.¹⁷⁹

The expansive nature of *Campaign for Fiscal Equity*’s prescribed relief demonstrates that the distinction between injunctive and damages relief — essentially the difference between prospective and retrospective relief — is largely artificial. As Justice Douglas wrote in dissent in *Edelman v. Jordan*,¹⁸⁰ in both cases, the state treasury ultimately pays, so courts cannot credibly claim the distinction changes the real financial effect.¹⁸¹ Indeed, recognizing this fiction, the Supreme Court in *Milliken v. Bradley*¹⁸² even held that prospective orders could include compensatory damages.¹⁸³ Though there is justifiably more concern for encroachment on the legislative branch when it comes to retrospective damages, awarding them would significantly extend state courts’ remedial powers.

C. General Objections

1. *Policy Concerns.* — Even though the recognition of constitutional torts is not properly viewed as a policy question in the first place, it is still worth responding to some of the primary policy concerns with extending such remedies. “[F]inancial ruin and overdeterrence have

¹⁷³ See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (holding that the Kentucky General Assembly had not fulfilled its constitutional mandate “to establish an efficient system of common schools throughout the Commonwealth,” thus “plac[ing] an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth”).

¹⁷⁴ 719 N.Y.S.2d 475 (Sup. Ct. 2001).

¹⁷⁵ *Id.* at 549.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 550.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 550–51.

¹⁸⁰ 415 U.S. 651 (1974).

¹⁸¹ *Id.* at 682 (Douglas, J., dissenting).

¹⁸² 433 U.S. 267 (1977).

¹⁸³ *Id.* at 282, 290.

been the primary arguments against reforms to civil rights enforcement” more generally,¹⁸⁴ so it should not be surprising that these same concerns are presented by litigants and invoked by state courts to justify restricting constitutional remedies.¹⁸⁵

One basic response is that, at least for compensatory damages, any costs shifted to state or local governments would simply end the current practice of “requir[ing] victims to subsidize local governments and the public by bearing the financial losses inflicted by police-involved violence and other constitutional torts.”¹⁸⁶ This reallocation makes sense, in part because the government is the cheapest cost avoider for the harms of constitutional violations.¹⁸⁷

Moreover, to the extent that state judiciaries struggle to design coherent and administrable damages remedies for constitutional violations, their efforts nonetheless play an important systemic role: They create a feedback loop that helps legislatures refine the boundaries of constitutional enforcement. Through inequities produced by ad hoc remedies, courts reveal the need for legislative intervention. Legislatures, with their broader policymaking capacity and factfinding ability, can respond by codifying clearer standards for liability or expressly foreclosing judicially created causes of action.¹⁸⁸ Thus, the judiciary’s shortcomings serve as signals that guide legislative recalibration rather than as institutional failures in themselves. Indeed, this iterative process underscores a healthy interbranch dialogue. Judicial attempts to provide redress — even imperfectly — keep constitutional values visible and urgent within the legal system. Legislatures can then deliberate and respond. In this way, the judiciary’s limited competence in policymaking paradoxically strengthens the broader constitutional framework. Far from undermining constitutional governance, the courts’ constrained role in crafting remedies ensures that responsibility ultimately returns to the politically accountable branches.

2. *Hydraulic Rights and Remedies.* — The judicial recognition of constitutional torts presents another kind of concern: that the scope of the rights will constrict in response to the expansion of remedies to enforce them.¹⁸⁹ In other words, it is easier to recognize rights when they do not have bite. While there are more persuasive responses to this

¹⁸⁴ Reinert, Schwartz & Pfander, *supra* note 11, at 785.

¹⁸⁵ See, e.g., *Bd. of Cnty. Comm’rs v. Sundheim*, 926 P.2d 545, 553 n.13 (Colo. 1996) (citing a “chilling effect” on local officers and a “substantial financial burden on local governments” to refuse recognizing a constitutional damages remedy).

¹⁸⁶ Reinert, Schwartz & Pfander, *supra* note 11, at 784.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Burnett v. Smith*, 990 N.W.2d 289, 290–91 (Iowa 2023).

¹⁸⁹ See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 684–85 (2006).

concern in statutory and administrative civil rights reform,¹⁹⁰ it remains a concern for judicial recognition of constitutional torts.

But a fear of hydraulic retrenchment should not, by itself, dissuade litigants from bringing damages claims, especially in conjunction with broader efforts toward civil rights reform. State courts' flexibility in fashioning the remedy available for constitutional violations may actually allow them to preserve expansive rulings on the substantive scope of the right by trimming the remedy rather than denying it entirely. Advocating for a "least intrusive remedy," like the one the *Corum* court fashioned, is useful in this regard because it would avoid the force of the hydraulic effect.

Conclusion

Civil rights reform should not be pursued exclusively, or even primarily, through litigation. When impact litigation efforts too far outpace changes in public opinion, legislation, and constitutional text, they become vulnerable to powerful backlash effects. Iowa's sharp reversal from recognizing broad-ranging constitutional torts to precluding them entirely within a mere six years — following closely on the heels of the legislature's reassertion of sovereign immunity for such claims — could be seen as a cautionary tale demonstrating this vulnerability.¹⁹¹ An appropriate caution, however, is fully compatible with the conviction that litigation should continue alongside such efforts even as they fall short.

Other papers have more fully explored "legislative and administrative solutions" to the gaps between state constitutional rights and remedies.¹⁹² The normative project of this Chapter has simply been to argue that existing state constitutional law often already authorizes, or even requires, constitutional torts and to suggest a framework for how such claims can be considered. Ideally, this discussion will encourage coordination between litigation and other reform efforts in service of making remedies for state constitutional violations more meaningful.

¹⁹⁰ See Reinert, Schwartz & Pfander, *supra* note 11, at 786–87.

¹⁹¹ See *Burnett*, 990 N.W.2d at 298.

¹⁹² Reinert, Schwartz & Pfander, *supra* note 11, at 749.