REX NON POTEST PECCARE: THE UNSETTLED STATE OF SOVEREIGN IMMUNITY AND CONSTITUTIONAL TORTS

ABSTRACT

For centuries, English common law systems and their descendants in the colonies and around the globe have relied on a convenient loophole to protect their own governments from civil liability: Sovereign immunity. This ancient doctrine, which proclaims "the king can do no wrong," has carried over into U.S. legal systems to prohibit a state, city, or the United States from being dragged into court without its consent. Every state and the federal government now have statutory frameworks to determine exactly when the state gives its consent. However, the recognition of actionable torts under both the federal and various state constitutions has proposed a deeper question that exposes the flawed logic of state sovereign immunity in the modern era: How can a constitutional right be procedurally thwarted by a statute founded on extra-constitutional doctrine?

This Note attempts to answer that question by understanding the issue as a false conflict. Using secondary sources and primary documents from the founding and the ratification of the Eleventh Amendment, this Note will make the argument that there is no conflict because sovereign immunity should never have been construed to bar constitutional tort actions. Furthermore, this Note will localize the issue by examining recent key cases from the Iowa Supreme Court. Finally, this Note will suggest that it is time for the legal academy to reconsider the relevance and utility of traditional sovereign immunity theory in a modern and ever-changing world.

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I. INTRODUCTION

"[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[1] For more than two centuries, U.S. jurisprudence has advanced grounded in the foundational concept that legal remedies and legal rights are inextricably tied.[2] However, this fundamental principle is increasingly undermined in federal and state courts across the United States because of an ancient doctrine, adopted in U.S. law as a casualty of colonialism: Sovereign immunity.[3] The basis of the doctrine is an "ancient and fundamental principle of the English constitution, that the king can do no wrong," or *rex non potest peccare*.[4] Allowing the Crown to be dragged into court without its consent, Justice William Blackstone reasoned, would usurp the role of the throne and the sovereign itself.[5]

While application of the sovereign immunity doctrine is simple enough as applied to statutory claims or common law causes of action, the waters are muddied substantially by the introduction and increasing recognition of

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

2. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring).

3. *See* Nevada v. Hall, 440 U.S. 410, 414 (1979), *overruled by* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019); *see also* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443 (2005). Sovereign immunity as used in this Note is inclusive of the twin doctrines of sovereign immunity (which protects the state itself) and the related concept of individual immunity, which protects individual government actors.

4. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS: CLASSIFIED AND ILLUSTRATED 23 (Sweet & Maxwell, Ltd. 9th ed. 1924).

5. 1 WILLIAM BLACKSTONE, COMMENTARIES *234–35 ("[N]o court can have jurisdiction over him. For all jurisdiction implies superiority of power . . . .").

constitutional torts.[6] A constitutional tort, in the context of U.S. states, "is a claim that may be brought by a person for harms by government authorities arising from a violation of a rights creating provision" of a constitution.[7] These claims, which arise from provisions providing affirmative rights, such as the Due Process Clause, require no enabling legislation or statute to provide relief to a potential plaintiff: they are self-executing.[8] While a state may limit the procedures for which a person may file a constitutional tort claim, it may not, as a theoretical matter, limit the substantive scope of the right affected or the interest at issue by statute.[9] These torts provide causes of action against the state where statutes have failed to provide other available remedies.[10]

In the modern era, sovereign immunity theory and the constitutional tort model do not neatly mesh. The development of both doctrines has led to a clash in foundational legal principles: if a state or its actors are immune unless provided otherwise by statute, but the harm alleged arises from a constitutional provision, which principle takes precedence? Today, nearly all states expressly create exceptions to their own immunity via enabling legislation, providing by statute precisely when the state consents to be sued.[11] These statutes, which elucidate certain procedures and processes for a potential plaintiff to undergo in order to recover for an injury caused by the state, do little to assuage concerns of fairness or dispel the decidedly anti-democratic foundation of sovereign immunity doctrine. Indeed, in some cases, the procedural hoops of these statutes amount to a substantive limitation on the scope of constitutional remedy.

This Note will examine the foundational questions of legal theory presented by this apparent clash of doctrine. Part II, immediately following this Part, will address the historical background of sovereign immunity theory in the United States, specifically with respect to the adoption of the federal Constitution.[12] The Part will further ground the discussion in the historic reality that it is not so clear that the Framers intended to forcefully

6. "Constitutional tort," as used in this Note, is inclusive of all claims brought by individuals against government actors for a violation of a constitutional right.

7. Venckus v. City of Iowa City, 930 N.W.2d 792, 821 (Iowa 2019).

8. *See* Godfrey v. State, 898 N.W.2d 844, 847 (Iowa 2017).

9. *Id.* at 866–70.

10. *Id.*

11. *See, e.g.*, Iowa Tort Claims Act, IOWA CODE ch. 669 (2021).

12. *See infra* Part II.

adopt the English model.[13] Part III will detail the development of constitutional tort theory, beginning with U.S. Supreme Court jurisprudence on the matter, and then further localize the discussion by addressing the scope and availability of constitutional torts in the state of Iowa.[14] Part IV will bring these doctrines into discussion and explain the inherent conflict between them.[15] Finally, Part V will argue that it is past time to reexamine the purpose and function of sovereign immunity in the state of Iowa, and conclude with an appeal to the foundational principles enshrined in our state's founding document.[16]

II. HISTORICAL BACKGROUND OF SOVEREIGN IMMUNITY

The Supreme Court of the United States has generally found the doctrine of sovereign immunity to be implicitly enshrined in the text of Article III and within the contemplation of the Framers of the Constitution.[17] Relying on English history, the common law doctrine of sovereign immunity, and statements made by Alexander Hamilton, James Madison, and Chief Justice John Marshall, and the Eleventh Amendment, the Court has come to the conclusion that the underlying doctrine protects the federal government and individual states from suit without consent.[18] Each of these historic rationales will be addressed in turn.[19] Modern jurisprudence also identifies several non-historic rationales and explanations for the sovereign immunity doctrine, including that in early case law, promotion of government efficiency, and the separation of powers.[20] The thrust of the Supreme Court's understanding of the issue as articulated and resulting from these sources, is that the Constitution as written did not envision jurisdiction over non-consenting states in federal courts, including the federal government.[21]

13. *See* Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 3–4 (2002).

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. Randall, *supra* note 13, at 8–9.

18. *Id.* at 9; *see, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751–52 (2002); Alden v. Maine, 527 U.S. 706, 716–19 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. Randall, *supra* note 13, at 8–9.

A. *Historic Rationales for Sovereign Immunity*

The U.S. Supreme Court bases its sovereign immunity doctrine in both historic and non-historic rationales.[22] English common law and history, the extrinsic quotes and writings of Hamilton, Madison, and Chief Justice Marshall, and the Eleventh Amendment and its jurisprudence will be substantively addressed by the Part as historic, if not flawed, rationales for the doctrine.

1. *English Common Law*

The Supreme Court's modern understanding of immunity rests in part based on historical English common law.[23] The most common quotation cited with respect to the ancient English rule derives from Justice Blackstone's oft celebrated Commentaries on the Law of England (Blackstone's Commentaries).[24] A plain reading of Blackstone's Commentaries implies a sweepingly broad immunization of the English Crown against liability:

> [The King] owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch, shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment.[25]

Blackstone's Commentaries, which makes explicit overtures to divine right as the fundamental rationale to immunize the sovereign, is troubling for other reasons.[26] The work itself is self-contradictory: Justice Blackstone goes on to assert that the sovereign has a constitutional obligation to right

22. *See, e.g.*, *Alden*, 527 U.S. at 712–30.

23. *Id.* at 715 ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its courts.").

24. *See* Randall, *supra* note 13, at 26–30 (citing 1 BLACKSTONE, *supra* note 5).

25. 1 BLACKSTONE*, supra* note 5, at *235.

26. *Id.*

wrongs when called to do so.[27] Even Justice Blackstone acknowledges that the inherent purpose of a sovereign is the betterment and service of its constituents.[28] It cannot then logically follow, based on Justice Blackstone's assertions, that the sovereign prerogative is to do right by its people but may never be adjudged by a court of men without its own consent. After all, what kind of sovereign would consent to suit when it has clearly injured an individual? Though extensively cited, the discrepancies in Blackstone's Commentaries should cast some doubt on its value as a wholly dispositive statement of English common law, or at least give the jurists of today some pause in considering its modern applicability.

a. *Hamilton, Madison, and Chief Justice Marshall.* The Supreme Court, however, affords the greatest weight to the quotes of Hamilton, Madison, and Chief Justice Marshall, and they form the cornerstone of Supreme Court interpretation on the topic.[29] Hamilton, writing in *The Federalist No. 81*, wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[30] In the Virginia ratification debates, Madison made similar proposals: "It is not in the power of individuals to call any state into court."[31] Chief Justice Marshall, in the same ratification debate, suggested that "It is not rational to suppose that the sovereign power should be dragged before a court."[32] These statements, made by some of the most capable and qualified legal minds of the founding

27. 3 BLACKSTONE, *supra* note 1, at *255 ("[A]s [the law] presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course in the king's own name, his orders to his judges to do justice to the party aggrieved."); *see also* Randall, *supra* note 13, at 28–29.

28. 1 BLACKSTONE, *supra* note 5, at *239 ("[T]he prerogative of the crown extends not to do any injury; for being created for the benefit of the people, it cannot be exerted to their prejudice.").

29. *See* Randall, *supra* note 13, at 8–15; *see, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

30. THE FEDERALIST NO. 81 (Alexander Hamilton); *see also* Randall, *supra* note 13, at 71–79.

31. 3 JOHNATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Burt Franklin 2d ed. 1974); *see also* Randall, *supra* note 13, at 79–84.

32. ELLIOT, *supra* note 31, at 555; *see also* Randall, *supra* note 13, at 84–85.

era,[33] are entitled to some amount of deference in measuring the intent of the framing generation with respect to sovereign immunity.[34]

Yet even considering the unimpeachable constitutional qualifications of Hamilton, Madison, and Chief Justice Marshall, it is jarring to envision them making such anti-democratic and pro-sovereignty arguments. Indeed, the interpretation read from the plain words of the speakers contradicts the very purpose for drafting the federal Constitution, the ratified documents' text, and other contemporaneous interpretations of Article III.[35] Writing to Thomas Jefferson in October 1787, Madison criticized the judicial restraint against the states in the federal judiciary, claiming that "where the law aggrieves individuals, [they] may be unable to support an appeal [against] a State to the supreme Judiciary."[36] Even Madison was contemplating the potential of an individual citizen suing a state.[37]

b. *The Eleventh Amendment.* The Supreme Court's modern understanding of immunity further draws support from the Eleventh Amendment.[38] The Eleventh Amendment simply provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[39] A plain reading would suggest that the Eleventh Amendment simply purged

33. *See* Randall, *supra* note 13, at 12. Madison has been credited as the primary drafter of the Constitution of 1787 and served as co-author of The Federalist Papers. *Id.* Hamilton, who also co-authored The Federalist Papers, served at the federal constitutional convention and the New York Convention. *Id.* Marshall, who was the first Chief Justice of the U.S. Supreme Court, needs no additional adulation. *See id.*

34. *Id.* at 12–13.

35. *Id.* at 13.

36. *Id.*; THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 198 (Bernard Bailyn ed., The Libr. of Am. 1993).

37. Randall*, supra* note 13, at 13 n.53.

38. *Id.* at 93 n.429 (citing Alden v. Maine, 527 U.S. 706, 707, 713, 722–27 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54–75 (1996)).

39. U.S. CONST. amend. XI.

Article III of one of the original bases for federal jurisdiction within the Constitution: "between a State and Citizens of another State."[40]

For nearly a century, the Supreme Court took a narrow approach to the Eleventh Amendment, limiting its prohibition to the text: suits between citizens and a state not their own.[41] Chief Justice Marshall's 1821 opinion in *Cohen v. Virginia* supports the position that the amendment was adopted not to immunize states against a broad spectrum of suits, but merely to protect them as highly indebted entities.[42] However, the narrow approach was rejected by the Supreme Court in its 1890 decision in *Hans v. Louisiana*.[43] In 1890, the Court faced potentially existential challenges to its authority in the post-Reconstruction southern United States.[44] The question presented in *Hans*—whether a Louisiana citizen could sue his state in federal court to collect on a bond issued by Louisiana's reconstruction government—threatened to be politically explosive in the South,[45] and potentially unenforceable by the Court.[46] Considering the potential for long-lasting, institutional damage to the Supreme Court's ability to decide and enforce questions of law, the Justices on the *Hans* Court opted for a judicially prudent strategy of expanding the Eleventh Amendment.[47] Knowing that they needed to give the South a victory or else face non-

40. *Id.* art. III, § 2, cl. 1; Randall, *supra* note 13, at 93.

41. Randall, *supra* note 13, at 94–95 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 291 (1821)).

42. *Cohens*, 19 U.S. (6 Wheat.) at 406 ("That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued."); Randall, *supra* note 13, at 31.

43. Hans v. Louisiana, 134 U.S. 1, 19–21 (1890); Randall, *supra* note 13, at 95.

44. *See* Randall, *supra* note 13, at 95; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1990 (1983).

45. Randall, *supra* note 13, at 93–95.

46. *Id.* at 95 ("In 1878, the Congress had passed the Posse Comitatus Act, which prohibited United States Marshalls from using Army regulars to help enforce court orders. The President's power to use the Army to enforce the Court's rulings was also in question. . . . These actions effectively precluded enforcement of federal law against a resisting state.").

47. *Id.*; *Hans*, 134 U.S. at 1–21.

compliance, the Court chose "to rewrite the eleventh amendment and the history of its adoption."[48]

This expansion has subsequently been construed to immunize states against actions by their own citizens,[49] under federal question doctrine,[50] by foreign nations[51] or Indian tribes,[52] in admiralty,[53] administrative courts,[54] and even state court actions to enforce federal law.[55] This expansive reading has been challenged by many modern legal scholars and jurists.[56] Justice William Brennan succinctly identified the fundamental issue in the Court's jurisprudence on the issue, noting the "doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation."[57] Given the conditions under which the modern approach was adopted, the text of the Amendment, and originalist reasons to prefer a strict interpretation, a narrow reading of the Eleventh Amendment must be preferred (and is presumed in this Note).[58]

B. *Non-Historic Rationales for Sovereign Immunity*

The historic rationales as discussed above comprise only part of the underlying policy reasons the Supreme Court has upheld its sovereign immunity doctrine.[59] Many courts have articulated other contemporary

48. Gibbons, *supra* note 44, at 2000.

49. *Hans*, 134 U.S. at 1.

50. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

51. Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

52. Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991).

53. *Ex parte* New York, 256 U.S. 490 (1921).

54. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

55. Alden v. Maine, 527 U.S. 706 (1999).

56. Randall, *supra* note 13, at 95–96 nn.454, 455 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247–48 (1985) (Brennan, J., dissenting), *superseded by statute in part*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified as amended at 42 U.S.C. § 2000d-7), *as recognized in* Lane v. Peña, 518 U.S. 187 (1996); Gibbons, *supra* note 44; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987)).

57. *Scanlon*, 473 U.S. at 247–48 (Brennan, J., dissenting).

58. The Framers of the Constitution strongly preferred and adopted the importance of the federal judiciary over the states. Randall, *supra* note 13, at 20–21, 35, 96.

59. *Id.* at 96–97; *see, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

rationales for the continuation of the status quo jurisprudence.[60] Early federal case law, government efficiency, and the separation of powers are frequently cited as modern reasons to maintain the current immunity standards.[61] Each will be addressed in turn, but like their historical counterparts, each is problematic.

1. *Early Case Law*

Many early decisions of the U.S. Supreme Court simply refused to exercise jurisdiction over actions against a sovereign without consent without providing any logical justification or citation to authority to hold so.[62] Several decisions appeal to the "inherent right" of a sovereign to immunize itself against legal actions, but each fails to identify from what source such authority derives or why the Constitution does not explicitly provide for that authority.[63] In failing to so identify, these decisions implicitly rely on Justice Blackstone's circular style reasoning: "the king can do no wrong" because he has divine right, and he has divine right because he is the king.[64] It is troubling, to say the least, in the modern era for the strongest rationale for an ancient legal doctrine to be implicitly grounded in the governing maxim of European aristocracy.

The case of *The Siren* points to public policy and practicalities in defense of broad immunities:

> The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception.[65]

60. Randall, *supra* note 13, at 96–97.
61. *Id.* at 96–103.
62. *Id.* at 97–98 (citing United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850)).
63. *See* Randall, *supra* note 13, 97–98 (citing Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868)).
64. *See* 1 BLACKSTONE, *supra* note 5, at *238–39.
65. The Siren, 74 U.S. (7 Wall.) 152, 154 (1868); Randall, *supra* note 13, at 97–98.

While considerations of governmental efficacy can be compelling interests for a particular policy,[66] the total immunization from private actions of the government is indefensible on these grounds. The federal government is hardly the first defendant to claim "inconvenience" to avoid defending an action; and yet, because of the ancient immunity doctrine, the government may successfully thereby avoid an action.[67] After all, with all states and the federal government waiving their immunity in some instances by statute today, it cannot be the case that such a waiver wholly hinders the operation of the government.[68] Such a stated rationale is further inconsistent with the Framers' clear emphasis of separation of powers, which promotes both horizontal separation (branches of government checking one another) and vertical separation (states checking the federal government and vice versa).[69]

Accordingly, arguments supporting broad immunity in early authorities of the Supreme Court hold little water in recognition of the historical underpinnings of the doctrine and should be given little weight.

2. *Government Efficiency*

In order to promote efficient government and effective decisionmaking, this modern rationale reasons, government employees should not be held hostage to the threat of liability.[70] The thinking goes that preventing government employees and their employers from being held liable for their actions "protect[s] the judgment of executive or administrative actors, prevent[s] judicial second-guessing of such judgments, and protect[s] the government from" efficiency-impeding liability.[71]

To borrow a phrase from University of Alabama Law Professor Susan Randall, this justification is perverse.[72] As Professor Randall points out, accountability is at the heart of constitutional theory, and indeed is the premise underlying "both enacted and decisional law and much of legal

66. *See infra* Part II.B.2 for a discussion on government efficiency.

67. *See, e.g.*, *The Siren*, 74 U.S. (7 Wall.) at 154.

68. *See e.g.*, Iowa Tort Claims Act, IOWA CODE ch. 669 (2021).

69. Randall, *supra* note 13, at 98; *see infra* Part II.B.3 (discussing the separation of powers doctrine).

70. Randall, *supra* note 13, at 100.

71. *Id.* at 100 n.474 (citing United States v. Gaubert, 499 U.S. 315 (1991); Berkovitz v. United States, 486 U.S. 531 (1988); United States v. Varig Airlines, 467 U.S. 797 (1984); United States v. Muniz, 374 U.S. 150, 163 (1963)).

72. *Id.* at 100.

scholarship."[73] In nearly every other area of modern society, the looming threat of potential litigation and civil liability acts as an incentive to take *more* care for otherwise unaccountable actors; just ask any practicing physician what effect massive medical malpractice jury verdicts have on their practice.[74] What further frustrates this modern rationale is that it is entirely incongruent with contemporary government. More than 2.1 million people currently work for the federal government in some capacity.[75] If they have any accountability at all, it may only be to other unelected government employees higher up the chain.[76] Conversely, there are only 536 federally elected individuals who are truly accountable to the citizens of the United States, at least in a political sense.[77] If accountability is the foundational principle that belies the United States' democratic experiment, it reasons that isolating and immunizing oftentimes anonymous government actors from accountability may decrease the quality of government decision-making.[78] While this reasoning is held out as a modern rationale to promote traditional immunity doctrine, it was soundly rejected in English courts decades before the Constitution was adopted.[79]

73. *Id.*

74. *Id.*; *see also* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 343 (1995) ("Sovereign immunity is the major hurdle to government accountability.").

75. CONG. RSCH. SERV., FEDERAL WORKFORCE STATISTICS SOURCE: OPM AND OMB 1 (2019), https://crsreports.congress.gov/product/pdf/R/R43590/11.

76. Randall, *supra* note 13, at 100–01.

77. This accounts for 435 voting members of the U.S. House of Representatives, 100 members of the U.S. Senate, and 1 President of the United States. *Our Government: The Legislative Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/ [https://perma.cc/G8DG-AK43].

78. Randall, *supra* note 13, at 100–01; *see generally* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001).

79. Mostyn v. Fabrigas, 1 Cowp. 161, 175, 98 Eng. Rep. 1021, 1029 (K.B. 1774) ("Therefore to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."); *see also* Randall, *supra* note 13, at 101.

3. *Separation of Powers*

An important modern rationale for the maintenance of sovereign immunity is the foundational principle of both horizontal and vertical separation of government power in the United States.[80] Essentially, permitting civil liability for official government actions would place courts in a superior and, ultimately, supervisory position over legislative and executive branches.[81] Commitment to democratic—not judicial—policy decisionmaking and the maintenance of independent co-equal branches of government is undeniably an important objective that rests at the very heart of modern U.S. constitutional theory.[82]

Nevertheless, this important objective cannot be weaponized into total immunity from judicial review of government actions.[83] This bar of judicial review would undermine the essential function of separation of powers: "[T]o defend against governmental tyranny."[84] In an effort to balance the countervailing interests, the Supreme Court has developed the discretionary function exception to waivers of federal tort liability for those instances where the complained action is discretionary and based on public policy considerations.[85] This method appears to strike the right balance between protecting the policy of majoritarian rule and the necessity of judicial review and remedy for legal injury which undergirds the legal system.[86]

III. INTRODUCING CONSTITUTIONAL TORT THEORY

Nearly every first-year law student in the United States takes a course on torts: civil wrongs for which remedies can be obtained, generally excluding breaches of contract.[87] However, constitutional torts—that is,

80. Randall, *supra* note 13, at 102.

81. *Id.*

82. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521–35 (2003); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1529–30 (1992).

83. Randall, *supra* note 13, at 102.

84. Bandes, *supra* note 74, at 346.

85. Randall, *supra* note 13, at 102–03.

86. *See* Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991) (exploring sovereign immunity's foundation and the discretionary function exception in principles of justiciability and the political question doctrine); *see also* Randall, *supra* note 13, at 102–03 (citing *Tiffany*, 931 F.2d at 277).

87. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019). Samantha Weller, *First Year Law School Curriculum: What to Expect*, BARBRI L. PREVIEW (Mar. 29, 2021),

violation of one's constitutional rights by a government officer[88]—generally occupy a small fraction, if any, of time in the prototypical torts class syllabus.[89] Such a regrettable absence from the standard curriculum could be at least partially explained by the theoretical difficulties in analyzing constitutional torts, their relatively modern recognition, and the challenges in defining the scope of constitutional versus common law torts.[90] Furthermore, courts have struggled to define the line between those cases of clearly cognizable violations (facial breaches of the First Amendment, for example) and instances where the conduct complained of is not an infringement of any specific substantive constitutional right, but instead a violation of the Due Process Clause of the Fifth or Fourteenth Amendments.[91]

Nevertheless, constitutional torts remain an essential tool in protecting the essential rights of potential plaintiffs, suggesting a practical as well as theoretical importance in the use of constitutional torts.[92] Unlike common law or statutory torts, constitutional torts are immune from legislative abrogation or reformation of the right to recover, absent constitutional amendment procedures.[93] As a result, constitutional torts are powerful tools to remedy gaps in an injured person's ability to recover for harms suffered.[94] This Part will first explain the foundations of constitutional torts under federal law, arising generally under 42 U.S.C. section 1983[95] and the

https://lawpreview.barbri.com/law-school-curriculum/ [https://perma.cc/AP6X-624U].

88. Brown v. State, 674 N.E.2d 1129, 1132 (N.Y. 1996) ("A constitutional tort is any action for damages for [a] violation of a constitutional right against a government or individual defendants."); Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323–24 (1965) (coining, for the first time, the phrase "constitutional tort").

89. *See, e.g.*, VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 1053–73 (Found. Press 13th ed. 2015).

90. *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, 1527–49 (1997).

91. Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 201–05 (1984).

92. *Id.* at 201–02.

93. *Id.* (citing Martinez v. California, 444 U.S. 277, 284 (1980) (holding that a state law providing immunity for a defendant could not restrict a plaintiff's federal constitutional tort claim)).

94. Jefferson, *supra* note 90, at 1528.

95. 42 U.S.C. section 1983 is generally used for constitutional tort claims against

landmark U.S. Supreme Court case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[96] The substantive framework of a *Bivens*-type action will be discussed, as well as contemporary efforts to restrict the availability of such a remedy.[97] Next, the discussion will turn to constitutional torts under the Iowa Constitution with a specific discussion of the Iowa Supreme Court's 2017 decision in *Godfrey v. State*.[98] The discussion in both sub-parts will focus on the mechanics of a constitutional tort alleging not a substantive violation, but a Due Process violation, and the availability of damages as opposed to injunctive or equitable relief.

A. *Federal Constitutional Torts*

Fundamental rights enshrined in constitution-like documents have long been enforced and compensable in both in the United States and in England.[99] Violations of rights prescribed in the Magna Carta, such as impermissible search and seizure, were generally remedied by a traditional action for damages.[100] Despite the strong basis in English common law, the U.S. Supreme Court did not recognize a claim under the U.S. Constitution against federal agents for violating an individual's federal constitutional rights for nearly 200 years after the ratification of the Constitution.[101] That recognition came in the *Bivens* decision, where the Supreme Court reversed a dismissal of a complaint alleging unlawful search and seizure in violation of the Fourth Amendment.[102]

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state actors, while actions against federal agents typically rely on the implied *Bivens* cause of action. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 393 n.1 (2003).

96. *See infra* Part III.A.

97. *See id.*

98. *See infra* Part III.B.

99. Jefferson, *supra* note 90, at 1531; *see, e.g.*, Kelley Prop. Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 929 (Conn. 1993) (Berdon, J., concurring in part and dissenting in part) (citing Johnson v. Stanley, 1 Root 245 (1791); Waters v. Watermen, 2 Root 214 (1795); Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921, 923–24 (Md. 1984) (discussing individual rights under the common law of England)).

100. Jefferson, *supra* note 90, at 1531 n.25 (citing Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763) (awarding £1,000 in damages for unlawful search and seizure by a government agent); Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763)).

101. *Id.* at 1531 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

102. *Bivens*, 403 U.S. at 388–98.

The *Bivens* decision marked a dramatic change in the jurisprudential landscape.[103] While the Supreme Court had held previously that some suits could go forward against government actors for violations of constitutional rights, these suits proceeded by way of an enabling statute.[104] Indeed, *Bivens* differed from the prevailing class of constitutional tort litigation in that it proceeded against *federal* officials, rather than the kind of action against state officials permitted since Reconstruction.[105] *Bivens* marked a substantial change in the governing law because the plaintiff did not plead nor substantively rely upon[106] 42 U.S.C. section 1983[107]—the typical federal enabling statute—and instead argued successfully that the Fourth Amendment provided an implied cause of action.[108]

Bivens further was a substantial development because it covered a gap in remedy that developed after the *Monroe v. Pape* decision.[109] Because *Monroe* was pursuant to 42 U.S.C. section 1983, it was limited in scope to the conduct of officials acting "under color of law," and further only to state and

103. Jefferson, *supra* note 90, at 1528–29.

104. *Id.* at 1528–29, 1531–34; *see, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

105. *See* Jefferson, *supra* note 90, at 1531; 42 U.S.C. § 1983 (permitting actions against state officials for violations of the federal constitution).

106. Mr. Bivens, arguing that the district court had subject matter jurisdiction over his claim, cited to 42 U.S.C. section 1983, as well as several other statutes, notably 28 U.S.C. section 1331, federal question jurisdiction. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969), *rev'd* 403 U.S. 388 (1971). The district court declined to accept jurisdiction and further dismissed the case for failure to state a claim upon which relief can be granted. *Id.* On appeal, the Second Circuit reversed the jurisdictional determination, finding section 1331 properly confer subject matter jurisdiction. *Id.* Nevertheless, the Court of Appeals endorsed the district court's pleading determination and affirmed the dismissal. *Id.* at 726.

107. The statute reads, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, 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 . . . .

42 U.S.C. § 1983.

108. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971); *see also* Park, *supra* note 95, at 413, 418.

109. Park, *supra* note 95, at 417.

local officials.[110] *Monroe*-style actions, therefore, were limited in scope only to state and local government actors who violated federal constitutional rights.[111] *Bivens* presented a different fact pattern: misconduct by *federal* officials not authorized by statute.[112] By ruling in favor of Mr. Bivens, the Supreme Court closed the remedial loophole that allowed private suit against a *state* actor for violating constitutional rights but left the victim of a federal actor with no recourse.[113]

Bivens determined that an individual may state a claim for a violation of their constitutional rights, even if there is no federal statute expressly authorizing them to do so.[114] Because *Bivens* specifically dealt with a situation where the statute *failed* to cover the violation, the absence of an adequate statutory remedy became a necessary condition in order to be heard on a constitutional tort.[115] As a result, the Court later determined that two situations may vitiate an otherwise viable claim under the Constitution for damages: first, if defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress;"[116] and second, when defendants point to an alternative statutory remedy that is expressly declared to be substituting the Constitutional recovery framework.[117] Therefore, *Bivens*-style actions are only available where Congress has not spoken on a particular theory of recovery.[118]

In the years since the original decision, the Supreme Court has applied the *Bivens* framework to develop an implied right of action from the Due Process Clause of the Fifth Amendment for sex discrimination claims,[119] as well as the Eighth Amendment.[120] The *Bivens* framework has also been applied to protect the substantive due process rights, holding government actors accountable for "the most egregious official conduct"[121] that shocks

110. *Id.* at 416–17; Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

111. Park, *supra* note 95, at 417.

112. *Bivens*, 403 U.S. at 389.

113. Park, *supra* note 95, at 417.

114. *Bivens*, 403 U.S. at 389.

115. *See id.* at 396.

116. Carlson v. Green, 446 U.S. 14, 19 (1980) (citing *Bivens*, 403 U.S. at 396).

117. *Id.*

118. *See id.*; Davis v. Passman, 442 U.S. 228, 245–48 (1979).

119. *Davis*, 442 U.S. at 228.

120. *Carlson*, 446 U.S. at 19–20.

121. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

the judicial conscience.[122] Despite the strong language of the decision and history of expansion of *Bivens*-style actions, the Supreme Court has begun to read its precedent more narrowly in limiting the scope and substance of potential *Bivens* theories of recovery.[123] The long-term future of *Bivens*-style action remains uncertain as more rulings from the Supreme Court raise obstacles to plaintiff recovery.[124]

B. *Constitutional Torts in Iowa:* Godfrey & Baldwin

While it took nearly two centuries for the U.S. Supreme Court to accept the right of individuals to sue the federal government when their rights were trampled,[125] some states, including Iowa, beat them to the punch.[126] Iowa's long history of deciding controversial cases in favor of civil rights,[127] sometimes decades before the U.S. Supreme Court eventually adopted the same position.[128] It comes as no surprise then that the Iowa

122. Rochin v. California, 342 U.S. 165, 172 (1952).

123. Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1007–08 (2012); *id.* at 1007–08 n.26 (citing Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (noting "implied causes of action are disfavored" and rejecting supervisory liability without supervisory constitutional violations); Wilkie v. Robbins, 551 U.S. 537, 562 (2007) (refusing to apply *Bivens* to land use disputes); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (suggesting the court should limit *Bivens* and its progeny to the precise factual situation it involved)).

124. *See id.* at 1008 n.29 (citing cases limiting the applicability of 42 U.S.C. section 1983).

125. *See* Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

126. *See* McClurg v. Brenton, 98 N.W. 881 (Iowa 1904).

127. Godfrey v. State, 898 N.W.2d 844, 862–64 (Iowa 2017). For an in-depth and well-written discussion of Iowa's storied civil libertarian tradition, *see* Russell E. Lovell, II, *Shine on, You Bright Radical Star:* Clark v. Board of School Directors (of Muscatine)*—The Iowa Supreme Court's Civil Rights Exceptionalism*, 67 DRAKE L. REV. 175 (2019).

128. *Godfrey*, 898 N.W.2d at 862–64; *see, e.g.*, *In re* Ralph, 1 Morris 1 (Iowa 1839) (rejecting the reasoning adopted by the U.S. Supreme Court in Dred Scott v. Sandford, 60 U.S. 19 (1857), *superseded by constitutional amendments*, U.S. CONST. amends. XII, XIV); Clark v. Bd. of Dirs., 24 Iowa 266 (1868) (rejecting segregation in public schools 86 years before the companion federal case, Brown v. Bd. of Educ., 347 U.S. 483 (1954)); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (finding the right to marriage fundamental regardless of sex well in advance of the national case, Obergefell v. Hodges, 576 U.S. 644 (2015)).

Supreme Court decided a basic analogue of *Bivens* nearly seven decades before the U.S. Supreme Court reached its conclusion.[129]

However, Iowa was slower to the punch on recognizing an implied action for a deprivation of due process or equal protection under its constitution, which the Supreme Court recognized in the years following *Bivens*.[130] But in 2017 the Iowa Supreme Court decided *Godfrey*, holding for the first time that Article I, Sections 6 and 9 of the Iowa Constitution independently supported an action for equal protection and due process violations, respectively.[131]

The facts that lead to the *Godfrey* litigation were controversial and involved political intrigue and the highest-level players in Iowa politics over the course of nearly two decades.[132] Facially, *Godfrey* was a straightforward workplace discrimination claim under the Iowa Civil Rights Act, but the case also presented a question about whether the state workers' compensation commissioner could claim a due process right in his position, appointed to a term of years by Iowa statute.[133] Godfrey, who was then the first and *only* openly gay executive appointee in Iowa history,[134] pled that after the 2010 gubernatorial election, which saw Republican Terry Branstad defeat Democrat incumbent Chet Culver, the governor-elect asked Godfrey to resign despite the politically isolated nature of the office and the six year statutory term to which he was appointed, most recently in 2009.[135] The Governor eventually lowered Godfrey's salary to the statutory minimum and retaliated against Godfrey for the remainder of his time on the basis of his sexual orientation.[136] Godfrey then sued and pled several claims including statutory discrimination under the Iowa Civil Rights Act, but also previously

129. *See McClurg*, 98 N.W. at 882 (finding the search and seizure clause of the Iowa Constitution supported an action for damages without enabling legislation); *see also Godfrey*, 898 N.W.2d at 862–64.

130. *See* Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14, 19–20 (1980).

131. *Godfrey*, 898 N.W.2d at 864–72; IOWA CONST. art. I, §§ 6, 9.

132. *Godfrey*, 898 N.W.2d at 864–72.

133. *Id.*

134. *See* Stephen Gruber-Miller, *'Unwelcome and Unwanted': Jury Hears Case that Branstad Discriminated Against Gay Employee*, DES MOINES REG. (June 5, 2019), https://www.desmoinesregister.com/story/news/politics/2019/06/05/jury-hears-case-terry-branstad-discriminated-against-gay-employee-chris-godfrey-workers-compensation/1350754001/.

135. *Godfrey*, 898 N.W.2d at 845–47.

136. *Id.*

unrecognized constitutional claims for deprivation of due process.[137] A defense motion for summary judgement sent Godfrey to the Iowa Supreme Court in interlocutory appeal, where he eventually prevailed.[138]

The *Godfrey* decision is notable for two reasons. First, the plurality opinion authored by Justice Brent Appel and joined in part by Chief Justice Mark Cady is remarkable for its depth of analysis.[139] The plurality opinion begins by assessing the federal case law,[140] then turns to a detailed discussion of other state court questions analyzing the issue presented, and finally concludes with a recognition of the inherent right of injured people to seek redress, relying heavily on secondary authority on the topic.[141] Second, the decision is significant for the breadth which it interprets the availability of constitutional tort remedies under the Iowa constitution.[142] By noting that the rights to due process and equal protection occupy Article I of the Iowa Constitution, and were not later addendums as the Bill of Rights was to the federal Constitution, the Iowa Supreme Court properly recognized the importance of civil rights protections under the state's charter.[143] Furthermore, the Iowa Supreme Court in *Godfrey* noted the inherent conflict at the heart of this Note between government immunity and the primacy of constitutional rights, and it sided with constitutional rights.[144]

IV. The Inherent Conflict Between Constitutional Torts and Sovereign Immunity

By now, the issue presented by two essentially ancient legal doctrines is clear: how can a government claim to be immune from suit because of the

137. *Id.* In July 2019, a Polk County jury found in favor of Godfrey on all of his remaining claims and awarded him $1,500,000 in damages. Godfrey v. State, 2019 WL 3753974 (Dist. Ct. Iowa 2019), *rev'd*, 962 N.W.2d 84 (Iowa 2021). While Godfrey's jury verdict was later overturned on appeal, the Iowa Supreme Court left intact the constitutional tort scheme envisioned in the original *Godfrey* decision. *Id.* at 114.

138. *Godfrey*, 898 N.W.2d at 845–47.

139. *See id.* at 845–80.

140. *Id.* at 851–56.

141. *Id.* at 856–68.

142. *Id.* at 864–72.

143. *See* Robert Dalton & David L. Hudson, Jr., *Suffering Wrongs Without Remedies: Damages and the Tennessee Constitution*, TENN. BUS. J., Nov. 2018, at 14, 16 (citing *Godfrey*, 898 N.W.2d at 865).

144. *Godfrey*, 898 N.W.2d at 866 ("We cannot imagine the founders intended to allow government wrongdoers to set their own terms of accountability through legislative action or inaction.").

common law tradition of sovereign immunity, when fundamental rights are textually enshrined in constitutions which are held out as the highest law of the land?[145] This Part will attempt to answer this question in both the technical and policy sense. First, in order to answer how Iowa courts have actually applied the law with respect to this conflict, this Part will examine the Iowa cases discussing government immunity.[146] Second, this Part will undertake a discussion as to the competing policy interests at stake: should state and local governments be permitted to immunize themselves from suits alleging infringements of constitutional rights?

A. *Technical Application Under Iowa Law*

Godfrey was not the end of the story for this question. In the appeal, the defending State of Iowa presented an immunity argument to shield defendants from liability.[147] The Iowa Supreme Court punted on the question, and no answer was given.[148] Later, the Iowa Supreme Court has directly addressed the scope of government immunity from constitutional tort actions in a series of cases since *Godfrey* was decided in 2017.[149] *Baldwin v. City of Estherville* (*Baldwin I*) concerns claims against a city and its police officers related to the plaintiff's arrest for driving an all-terrain vehicle (ATV) in violation of a statute that officers mistakenly believed was incorporated into the ordinances of the city of Estherville, Iowa.[150] Mr. Baldwin was arrested by local police in a school parking lot, in front of his grandchildren, his wife, and a crowd of others.[151] However, the parties later agreed that Baldwin had not actually violated a city ordinance as it was not valid at the time Baldwin operated his ATV on the roadway.[152] The criminal charges against Baldwin were dismissed, and he later brought a civil suit

145. *See* Bandes, *supra* note 74, at 343.

146. *See infra* Part IV.A; *see, e.g.*, Baldwin v. City of Estherville (*Baldwin V*), 929 N.W.2d 691 (Iowa 2019).

147. *See Godfrey*, 898 N.W.2d at 880; *Id.* at 893–98 (Mansfield, J., dissenting).

148. *Id.* at 844–80 (majority opinion).

149. Removal to federal court and the certification of questions of law has ping-ponged Mr. Baldwin's case back and forth five times. *See* Baldwin v. Estherville, Iowa *(Baldwin I*), 218 F. Supp. 3d 987 (N.D. Iowa 2016); Baldwin v. City of Estherville *(Baldwin II*), 915 N.W.2d 259 (Iowa 2018); Baldwin v. Estherville, Iowa *(Baldwin III*), 333 F. Supp. 3d 817 (N.D. Iowa 2018); Baldwin v. Estherville, Iowa *(Baldwin IV*), 336 F. Supp. 3d 948 (N.D. Iowa 2018); *Baldwin V*, 929 N.W.2d 691.

150. *Baldwin V*, 929 N.W.2d at 693–94.

151. *Baldwin II*, 915 N.W.2d at 262.

152. *Id.* at 261.

against the officers for common law false arrest and claiming a violation of Article I, Section 8 of the Iowa constitution.[153] After the case was removed to federal court, United States District Court Judge Mark Bennett certified a series of questions of law to the Iowa Supreme Court.[154] This series of questions has given occasion for the Supreme Court to opine on pertinent issues to this discussion.[155]

As a background matter, government officials have historically been afforded a level of immunity in the performance of their duties if they perform discretionary functions.[156] In *Baldwin I*, the defense immunity issue was qualified immunity.[157] Although that doctrine has been deeply discussed at the federal level with respect to federal constitutional claims, there was less discussion on the topic at the state level.[158] Under Iowa law, tort claims against local and state governments and their actors are governed by the Iowa Tort Claims Act (ITCA) and the Iowa Municipal Tort Claims Act (IMTCA).[159] Both chapters contain references to a discretionary function exception which applies to "[a]ny claim based upon an act or omission of an employee of the state, *exercising due care*, in the execution of a statute . . ."[160] Essentially, the exception provides qualified immunity to state actors exercising a discretionary function if the actor took "due care."[161] Importantly, however, the ITCA and the IMTCA do not expressly apply to constitutional torts: their scope is limited to typical classes of statutory and common law torts.[162]

153. *Id.* at 264–65.

154. *See Baldwin IV*, 336 F. Supp. 3d 948.

155. *See Baldwin V*, 929 N.W.2d 691.

156. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.' . . . For executive officials in general, however, our cases make plain that qualified immunity represents the norm.").

157. *Baldwin I*, 218 F. Supp. 3d 987, 1001–03 (N.D. Iowa 2016).

158. *See* Steven Land, Comment, *State Constitutional Law—Qualified Immunity—Iowa Supreme Court Upholds Qualified Immunity for State Constitutional Tort Claims*, 72 RUTGERS U. L. REV. 1091, 1093–94 (2020).

159. IOWA CODE chs. 669, 670 (2021); Land, *supra* note 158, at 1094.

160. IOWA CODE §§ 669.14(1), 670.4(1)(c) (2021) (emphasis added in both); Land, *supra* note 158, at 1094.

161. *See* IOWA CODE §§ 669.14(1), 670.4(1)(c) (2021); Land, *supra* note 158, at 1094.

162. *See* IOWA CODE §§ 669.14(1), 670.4(1)(c) (2021); Land, *supra* note 158, at 1094.

Two points stand out as relevant to this discussion. First, *Baldwin II* answered a question left open by *Godfrey*, whether qualified immunity applied to constitutional tort claims.[163] The Iowa Supreme Court rejected, after a lengthy colloquy, a strict liability approach.[164] The court rejected strict liability on four grounds: (1) no other state applied strict liability to constitutional torts,[165] (2) previous constitutional tort cases in Iowa all involved instances of bad faith conduct,[166] (3) qualified immunity existed in some fashion for public officials at the time of the Iowa constitution's adoption,[167] and (4) adopting strict liability would chill public officials from competently completing their public duties.[168]

Second, the *Baldwin II* court rejected the notion that constitutional torts, despite their constitutional and not statutory or common law origins, are somehow set apart from the protections provided by the IMTCA.[169] The court put it thusly:

> Constitutional torts are torts, not generally strict liability cases. Accordingly, with respect to a damage claim under article I, sections 1 and 8 [of the Iowa Constitution], a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law.[170]

The court reached this conclusion in part by relying on sections of the IMTCA[171] and the ITCA.[172]

163. *Baldwin II*, 915 N.W.2d 259, 265 (Iowa 2018); Land, *supra* note 158, at 1095.

164. *Baldwin II*, 915 N.W.2d at 280–81; Land, *supra* note 158, at 1095–96.

165. *Baldwin II*, 915 N.W.2d at 275 ("[T]he other states that allow [constitutional tort] claims limit liability in some fashion, except for Montana and North Carolina. Those two states have not decided the issue yet."); Land, *supra* note 158, at 1095–97.

166. *Baldwin II*, 915 N.W.2d at 275–76 (examining cases in Godfrey v. State, 898 N.W.2d 844, 862–63 (Iowa 2017)); Land, *supra* note 158, at 1095–97.

167. *Baldwin II*, 915 N.W.2d at 276 (citing Hetfield v. Towsley, 3 Greene 584, 584–85 (Iowa 1852)); Land, *supra* note 158, at 1095–97.

168. *Baldwin II*, 915 N.W.2d at 277; Land, *supra* note 158, at 1095–97.

169. *Baldwin II*, 915 N.W.2d at 281.

170. *Id.*; Land, *supra* note 158, at 1097.

171. Iowa Code § 670.4(1) (2018) (immunizing municipal actors when exercising due care in the execution of a "statute, ordinance, or regulation.").

172. Iowa Code § 669.14(1) (2018) (providing immunity for state actors exercising due care in the execution of a "statute or regulation.").

The next year, the Iowa Supreme Court again clarified an issue with respect to immunity for constitutional torts in *Baldwin V*.[173] In Baldwin's second visit to the Iowa Supreme Court, the justices answered whether the immunity provided for those acting with "due care"—as set out in *Baldwin II*[174]—were vicariously applicable to the municipalities which employed those actors.[175] The Iowa Supreme Court began by examining the structure of constitutional torts, noting the difference between the Federal Tort Claims Act (FTCA) (at issue in *Bivens*) and the IMTCA.[176] In *Carlson v. Green*, the U.S. Supreme Court found the FTCA was not the exclusive avenue of recovery designed by Congress, and therefore the federal statute did not preempt a *Bivens*-style action.[177] The IMTCA expressly includes constitutional torts in its definition of tort, indicating the legislature meant for the statute to be the exclusive and substitute means for bringing constitutional claims against municipalities in Iowa.[178] Armed with this understanding, the Supreme Court had little to do but extend the holding in *Baldwin II* that the immunities available to individual government actors could be vicariously available to their government employers.[179]

On a procedural note, *Baldwin II* left open some important questions for Iowa constitutional litigators. Because the *Baldwin* action arose from the actions of *municipal* actors, the Court was technically only interpreting the rule under the IMTCA.[180] This, for a while, left an open question as to whether qualified immunity attached to similar (but not identical) portions of the ITCA.[181]

The Iowa Supreme Court seemingly closed the book on the issue in *Wagner v. State*.[182] *Wagner* was brought by Krystal Wagner, whose 19-year-

173. *Baldwin V*, 929 N.W.2d 691 (Iowa 2019).

174. *Baldwin II*, 915 N.W.2d at 260–61.

175. *Baldwin V*, 929 N.W.2d at 694 ("It is not clear whether *Baldwin II* addressed whether qualified immunity is available to government employers.").

176. *See id.* at 695–98.

177. Carlson v. Green, 446 U.S. 14, 18–19 (1980); *see also Baldwin V*, 929 N.W.2d at 697.

178. *Baldwin V*, 929 N.W.2d at 697–98; *see* IOWA CODE § 670.1(4) (2021).

179. *Baldwin V*, 929 N.W.2d at 698.

180. *See id.* at 697–99; Venckus v. City of Iowa City, 930 N.W.2d 792, 800 (Iowa 2019) (reaffirming the applicability of *Baldwin* only to claims under the IMTCA).

181. *Cf.* IOWA CODE § 670.4(1); *id.* § 669.14(1); *see* Wagner v. State, 952 N.W.2d 843, 852 (Iowa 2020) ("The ITCA and the IMTCA are worded somewhat differently.").

182. 952 N.W.2d 843 (Iowa 2020).

old son, Shane Jensen, was shot and killed by an armed Iowa Department of Natural Resources (DNR) officer during an armed standoff.[183] Jensen at the time was suicidal and suffered numerous mental health conditions.[184] During the standoff with local police, Jensen pointed a handgun at police officers multiple times but did not fire.[185] The officers knew of Jensen's condition, and they did not fire on him and instead sought cover in an attempt to avoid a tragic situation.[186] However, DNR officer William Spence did not hold his fire, and fired a single shot at Jensen, killing him.[187] Spence claimed that at the time he shot Jensen, Jensen was pointing the handgun at officers.[188] A video of the incident proved that was untrue.[189] Wagner brought a suit against the State of Iowa for a number of claims, including excessive and unjustified force, in violation of Article I, Sections 8 and 9 of the Iowa constitution.[190]

In a lengthy analysis, the majority opinion of *Wagner* came to the conclusion that constitutional torts in Iowa are covered by the ITCA.[191] In doing so, the court went to great lengths to explain why—although constitutional torts are not explicitly mentioned in the ITCA—the spirit or framework of the statute must implicitly cover them.[192] The court relied heavily on the above quoted passage from *Baldwin II*, that "Constitutional torts are torts."[193] While Wagner argued that the claims involved in her case fell outside the scope of the ITCA because they involved assault and battery (or their functional equivalents),[194] the court was able to sidestep this apparent inconsistency by relying on previous cases in which "functional

183. *Id.* at 847–48.
184. *Id.* at 848.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* Wagner also brought several other claims, involving failure to adequately train and supervise, failure to follow protocols, and failure to heed warnings. *Id.* These claims were not at issue in the Supreme Court's *Wagner* decision. *Id.* at 849.
191. *Id.* at 852–56.
192. *Id.* at 855–56.
193. *Id.*; *Baldwin II*, 915 N.W.2d 259, 281 (Iowa 2018); *see supra* Part IV.A.
194. *Wagner*, 952 N.W.2d at 855. Notably, the ITCA exempts claims for assault and battery from the immunity provisions. IOWA CODE § 669.14(4) (2021).

equivalent" claims were analyzed under the ITCA.[195] The court, therefore, assumed that Wagner's claims fell within the purview of the ITCA.[196]

The final piece of the *Wagner* puzzle, as it pertains to this topic, was whether ITCA procedures should apply to constitutional tort claims against the state.[197] The majority opinion found that the procedures should apply.[198] In doing so, the court relied less on specific case law, but instead upheld the proposition of honoring the legislative framework.[199] The court framed the issue thusly:

> Alternatively, the question can be viewed as one of the appropriate framework *we* should adopt for bringing constitutional torts. Should we use the existing statutory framework for other tort claims against the State? We think we should. For one thing, the legislature intended the ITCA to be the mechanism for suing the State in tort whenever tort suits were permitted. Also, not all constitutional tort causes of actions fall under an Iowa Code section 669.14 exception. Such tort claims must be brought under the ITCA, at least when state employees are named, even without considering issues of severability. In our view, it does not make sense to have two different procedural pathways for constitutional tort claims, with the potential for uncertainty in a given case as to which pathway applies.[200]

With that, the court essentially concluded the question in favor of the State, at least as it pertained to the procedural elements of the case.[201]

The majority's opinion was accompanied by a vigorous dissent penned by Justice Appel.[202] Justice Appel began with the foundational premise that the Iowa Bill of Rights—indeed, Article I, the premier provision—is not a mere "glittering generality."[203] Justice Appel placed the issue in context by

195. *Wagner*, 952 N.W.2d at 855–86 (citing Smith v. Iowa State Univ., 851 N.W.2d 1, 20–21 (Iowa 2014); Trobaugh v. Sondag, 668 N.W.2d 577, 584 (Iowa 2003); Hawkeye By-Prods., Inc. v. State, 419 N.W.2d 410, 411–12 (Iowa 1988); Greene v. Friend of Ct., 406 N.W.2d 433, 436 (Iowa 1987)).

196. *Wagner*, 952 N.W.2d at 856.

197. *See id.*

198. *Id.* at 856–59.

199. *Id.*

200. *Id.* at 858.

201. *Id.* at 858–59.

202. *See id.* at 865 (Appel, J., dissenting).

203. *Id.* at 866.

recognizing the importance of the *constitutional* nature of this case: the claims arise under a document which derives its authority from the Iowans who ratified it; not the legislature nor the courts.[204] Instead, Justice Appel criticized the majority opinion for allowing what is essentially a legislative abrogation of key provisions in the Iowa Bill of Rights, in clear contrast to the intention of the founders and ratifiers of the Iowa Constitution.[205] While Justice Appel agreed that a legislature may establish remedial structures to facilitate the adjudication of constitutional causes of action, he went further than the majority in asserting that such structures must do more than simply compensate victims of constitutional torts: they must "also vindicate the public's interest in constitutional enforcement."[206] Justice Appel concluded his dissent by encouraging a return to the tradition of *Wilkes v. Wood* at English common law, and the availability of exceptional remedies for exceptional constitutional harms.[207]

B. *Common Law Immunity is Incompatible with Constitutional Government*

"[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[208] "Constitutional rights do not exist in a vacuum,"[209] and if U.S. law is to continue under the thesis of *Marbury v. Madison*, that where there is injury there must be a remedy, then it is time to recognize the fundamental

204. *Id.* at 867.

205. *Id.* at 867–68 n.12 (citing Godfrey v State, 898 N.W.2d 844, 865 (Iowa 2017) (noting the Iowa Constitution of 1857 tended to limit the power of the legislature while it protected the independence of the judiciary); State v. Ochoa, 792 N.W.2d 260, 274–75 (Iowa 2010) (discussing the politics of the Jacksonian era and the importance the Iowa framers put on the Bill of Rights)).

206. *Wagner*, 952 N.W.2d at 870 (Appel, J., dissenting). One of the fighting issues in *Wagner*, although not discussed at length here, was the availability of punitive damages. *Id.* at 859–62 (majority opinion). The majority determined punitive damages were not available under the Iowa Constitution, falling within the framework established by the ITCA. *Id.* Justice Appel clearly believed that the bar for punitive damages creates a remedy that is not commensurate with the harm of a constitutional tort. *Id.* at 870 (Appel, J., dissenting); *see also Godfrey*, 898 N.W.2d at 876–79 (discussing Justice Appel's view of the importance of punitive damages in constitutional litigation).

207. *Wagner*, 952 N.W.2d at 883 (Appel, J., dissenting) (referencing Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763)).

208. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 BLACKSTONE, *supra* note 1, at *23).

209. Wells, *supra* note 123, at 1034.

incompatibility of sovereign immunity and a constitutional system. In doing so, the legal community and the courts should abandon the ancient doctrine that "the king can do no wrong,"[210] and instead reform the system in favor of greater individual liberties by strengthening and expanding the availability of constitutional tort actions.[211]

Justice Appel's erudite series of dissents in the Iowa constitutional tort line of cases lay bare the problematic approach taken by the Iowa Supreme Court majority in the years since *Godfrey*.[212] The first and the most apparent issue is the inherent nature of conflict between *constitutional* torts and *legislative* attempts to regulate those torts.[213] As Justice Appel repeatedly pointed out in his *Wagner* dissent and *Godfrey* decision, constitutional torts "are rooted in the core document approved by the people and are thus not subject to legislative alteration."[214] While the plurality opinion of *Godfrey* discusses at length what an "adequate remedy" is, Justice Appel's objection is to the procedural formalities which can so transform a constitutional claim as to render it no longer adequate.[215]

Indeed, the question raised here—concerning the relationship between constitutionally grounded torts and legislative or judicial encroachments on those rights—presents larger issues that go straight to the heart of what "constitutional democracy" really means. It seems, at least at a base level, incompatible with the purpose of constitutional governance and the rule of law to allow legislative bodies to abrogate or overrule substantive portions of constitutions, at least on the basis of sovereign immunity.[216] Proponents of the approach of the Iowa Supreme Court, to be fair, would likely argue that modest procedural guiderails like the ITCA and the IMTCA are hardly

210. BROOM, *supra* note 4, at 23.

211. Bandes, *supra* note 74, at 346.

212. *See, e.g.*, *Wagner*, 952 N.W.2d at 865 (Appel, J., dissenting).

213. *See id.* at 869.

214. *Id.*; Godfrey v. State, 898 N.W.2d 844, 869 (Iowa 2017).

215. *Godfrey*, 898 N.W.2d at 873.

216. Jefferson, *supra* note 90, at 1543 ("Sovereign immunity must give way in the face of a constitutional tort claim."); *see, e.g.*, Corum v. Univ. of N.C., 413 S.E.2d 276, 291–94 (N.C. 1992) (barring sovereign immunity applicability to direct constitutional claims on the basis that it would be a "fanciful gesture" towards civil rights); Smith v. Dep't of Pub. Health, 410 N.W.2d 749, 793–94 (Mich. 1987) (Boyle, J., concurring in part and dissenting in part) (stating sovereign immunity "lose[s] its vitality when faced with unconstitutional acts of the state"); Colman v. Utah State Land Bd., 795 P.2d 622, 630–35 (Utah 1990) (holding government immunity does not apply where claimant alleges State or state employee violated constitutional rights).

legislative encroachments of the substantive text; indeed, they would argue, those statutes govern only procedure and provide a fair and efficient means to adjudicate claims against the State while maintaining adequate remedies for litigants.[217] And yet, commentators (and Justice Appel) are left wondering whether such a remedy is actually adequate if entire classes of damages are left unavailable to plaintiffs, and where the court might choose to draw the line for adequacy in the future.[218]

It is that inability of an injured plaintiff to recover punitive damages that appears to be the biggest sticking point, at least in *Wagner*.[219] After all, constitutional injuries must be at least somewhat different than the kinds of injuries suffered by an ordinary tort victim.[220] Because the injuring party in constitutional tort cases is the State—the government itself—violations are by definition more egregious than a private actor doing the same conduct.[221] "[O]ne of the central pillars of a direct constitutional tort is to advance the public interest in constitutional enforcement and to deter future misconduct."[222] This aligns squarely with the theory of punitive damages in Iowa, which aims to punish a defendant and deter future misconduct.[223] By barring punitive damages, the approach of the Iowa Supreme Court closes the judiciary to the public as a means to express community outrage or to deter future misconduct against government actors. In short, the court clips its own wings when it comes to restraining the excesses of the other branches of government.

A second major issue with the Iowa Supreme Court's approach relates to remedial theory more generally. As quoted at the outset, a right without a remedy is no right at all.[224] A plaintiff who has suffered a legal wrong needs legal recognition of that injustice if only to give notice to society and the perpetrator that the law was indeed violated.[225] "A lack of remedy drives a

217. *See Wagner*, 952 N.W.2d at 856 (majority opinion) (defending the apparatus of litigating constitutional claims within the ITCA).

218. *See id.* at 869–70 (Appel, J., dissenting); Jefferson, *supra* note 90, at 1549–56.

219. *See Wagner*, 952 N.W.2d at 869–70 (Appel, J. dissenting).

220. *See id.* at 870–72.

221. *Id.* at 870–71 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92 (1971)).

222. *Id.* at 880 (citing Wilkes v. Wood, 98 Eng. Rep. 489, 498–99 (C.P. 1763)).

223. Ryan v. Arneson, 422 N.W.2d 491, 496 (Iowa 1988).

224. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 BLACKSTONE, *supra* note 1, at *23).

225. Jefferson, *supra* note 90, at 1549.

stake in the heart of a substantive legal doctrine."[226] By implicitly or explicitly limiting remedies available to plaintiffs injured by government actors, the Iowa Supreme Court has green-lit a steady chipping away of the rights enjoyed by Iowans under their own constitution. Simply put, the approach of the Iowa Supreme Court in denying plaintiffs an avenue to recover certain monetary damages for constitutional violations "is tantamount to denying their underlying constitutional rights," even if it is only punitive damages at issue.[227] Unfortunately, the Iowa Supreme Court is not the only court which has taken this rights-limiting approach.[228]

Fortunately, courts in Iowa and elsewhere need not continue to lock-step down this troublesome path. The modern state of sovereign immunity law in the United States is "a magnificent irony" that is a perversion of the English common law.[229] As a result of this series of wrong turns and missteps, the United States, "in freeing ourselves from the shackles of monarchy, . . . traded a system in which the King was accountable for one in which the government [is] above the law."[230]

V. CONCLUSION

The conflict between traditional notions of sovereign immunity and the supremacy of the U.S. Constitution has presented a challenge to constitutional tort litigators throughout the history of U.S. law. Through the long process of minor procedural hurdles, limits on damages here and there, and the determination of which remedies are "adequate," some courts have employed a slow-moving constitutional amendment project, which leaves few rights and fewer remedies available to plaintiffs injured by their own government. These projects stand in opposition to the majoritarian roots belying the U.S. legal system. Going forward, the Iowa judiciary and political branches should instead take pains to *expand* the availability of

226. *Baldwin II*, 915 N.W.2d 259, 284 (Iowa 2018) (Appel, J., dissenting); Land, *supra* note 158, at 1100.

227. Land*, supra* note 158, at 1100.

228. For the steady chipping away of *Bivens*-like actions under the federal constitution see, for example, Ashcroft v. Iqbal, 556 U.S. 662 (2009).

229. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963).

230. Bandes, *supra* note 74, at 344.

constitutional tort remedies in order to protect the individual rights of Iowans present and future.[231]

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231. *See id.* at 337–39.

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