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Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity

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GOVERNMENT OFFICIAL TORTS AND THE TAKINGS CLAUSE: FEDERALISM AND STATE SOVEREIGN IMMUNITY†

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Sovereign and official immunities allow state officials[1] to inflict tortious injuries with impunity when similar conduct by private parties would result in tort liability. Whether the Constitution requires states to compensate their tort victims lies at the heart of much litigation under 42 U.S.C. § 1983.[2] Several recent cases, in both the Supreme Court and the lower federal courts, have addressed the extent to which the federal courts should super-

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[1] For the purposes of this article, the words "state" or "state official" encompass all branches of state and local government and officials of those bodies whose activities would constitute state action for the purposes of the fourteenth amendment. I only briefly address special issues concerning whether local governments and officials are amenable to suit, or contrasting the differences in amenability to suit between states and their officials, and local governments and their officials. The eleventh amendment bars suits directly against states. Local governments, however, may be sued in federal court under 42 U.S.C. § 1983, and have no immunity from such suits. *See* Owen v. City of Independence, 445 U.S. 622 (1980) (rejecting lower court's award of qualified or good faith immunity to a municipality sued under § 1983 for a fourteenth amendment liberty deprivation). This article attempts to find a substantive basis in federal constitutional law for a § 1983 suit against the state or a state official for conduct that is tortious under state law.

[2] 42 U.S.C. § 1983 (1982) [hereinafter § 1983] provides:

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

vise state policy concerning such immunities.[3] This complex issue has implications far beyond the rather mundane or even absurd situations that often give rise to the cases.[4] The federal courts have failed to solve the constitutional problems underlying these cases because they have not addressed directly the constitutionality of the immunities.[5] Instead, the courts have implicitly sanctioned the use of such immunities by denying remedies to plaintiffs on other grounds.

In recent years, federal courts have become increasingly reluctant to grant remedies to plaintiffs in official tort suits.[6] This has been motivated by

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[3] *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[4] The most famous case in this line, Parratt v. Taylor, 451 U.S. 527 (1981), arose when a prison employee negligently lost a prisoner's hobby kit worth $23.50. Many of the cases involve small losses of property or minor contractual disputes and thus do not look like the paradigm civil rights case over which the federal courts should have jurisdiction. *See, e.g.*, Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983) (plaintiff claiming deprivation of property interest in accrued vacation time for county sheriff's police). But these mundane or absurd fact patterns should not belittle the importance of the issues being addressed, for they all concern the general issue of how states should treat victims of officially inflicted torts, an issue that deserves federal court attention. *See infra* notes 190-99 and accompanying text.

[5] *See Daniels*, 474 U.S. at 333 n.1 ("[W]e need not decide whether . . . the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy 'inadequate' . . . ."); *id.* at 336 (Stevens, J., concurring in the judgments in *Daniels* and *Davidson*) (defense of sovereign immunity does not render state procedure unfair); Martinez v. California, 444 U.S. 277 (1980) (holding that state grant of absolute immunity to parole officers for torts arising out of parole decisions does not violate due process); Davidson v. O'Lone, 752 F.2d 817, 830 (3d Cir. 1984) (en banc) (finding that state remedy is adequate despite defense of sovereign immunity), *aff'd on other grounds sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986).

[6] This growing reluctance by federal courts to provide remedies to victims of official torts can be seen in the courts' growing reliance on principles of federalism to reduce the scope of federal court jurisdiction. For instance, in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court refused to assume jurisdiction over plaintiff's claim that an officer's improper stranglehold on the plaintiff deprived him of his liberty interest in protection from bodily harm. The Court reasoned that, among other things, plaintiff failed to establish the irreparable injury necessary to give the federal courts power to issue an injunction against the state. *Id.* at 101-13. Three years later, in *Daniels*, 474 U.S. at 327, the Court refused to hear the plaintiff's claim that the state deprived him of the same liberty interest on the grounds that the fourteenth amendment did not contemplate protection from the negligence of state officials.

Breach of contract cases against local government agencies do not seem to be suffering a similar fate in the Supreme Court. *See, e.g.*, Loudermill v. Cleveland Bd. of Educ., 470 U.S. 532 (1985) (holding that public school employees have a property interest in continued employment sufficient to trigger due process safeguards). *But see, e.g.*, Brown v. Brienen, 722 F.2d 360, 363-65 (7th Cir. 1983) (doubting whether accrued vacation time constituted a constitutionally protected property interest). In

contemporary conservative federalism ideology, which embraces a fundamental revulsion against federal control over state official conduct. The Supreme Court has indicated that the federal Constitution should be read to curb only abuses of state power, not the everyday torts of state officials, and that state law on official torts should not be turned into a federal body of law.[7] State sovereignty[8] is threatened, the argument continues, if federal courts employ federal law to force states to compensate their tort victims. The Court, however, has encountered tremendous difficulty not only in constructing a theoretical justification for keeping tort cases against state officials out of the federal courts,[9] but also in distinguishing factually between cases that belong in the federal courts and those that do not.[10]

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this article I specifically address tort claims against local governments and their officials. Similar analysis applies to contract claims.

[7] Paul v. Davis, 424 U.S. 693, 701 (1976) (refusing to turn the fourteenth amendment into a "font of tort law to be superimposed upon whatever systems may already be administered by the states"). The image in *Paul* of the fourteenth amendment turning into a font of tort law has appeared in a number of subsequent cases. *See, e.g., Daniels*, 474 U.S. at 332; Parratt v. Taylor, 451 U.S. 527, 544 (1981).

[8] In this article, the terms "sovereign" and "sovereignty" are used in a very weak sense, referring only to authority that the state purports, attempts, or desires to possess. Sovereign immunity means the immunity that the state enjoys because it is a state not because it is in some absolute sense a sovereign. Because the Constitution's supremacy clause subjects states to federal law, states are not "sovereign" in any absolute sense; however, in our federal system, state authority within protected spheres is thought of as a vestige of prefederal or nonfederal sovereignty. *See* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 346-59. Rapaczynski persuasively argues that federalism discourse would be enhanced if the rhetoric of state sovereignty were abandoned because "the array of traditional meanings" of sovereignty simply do not apply to states in the American federal system. *Id.* at 346. His discussion goes far toward explaining the relationship between the states and federal government both in terms of contemporary distribution of power and the constitutional structure.

[9] The Supreme Court granted certiorari three times on the issue of whether negligence could give rise to a civil rights cause of action under § 1983. *See Parratt*, 451 U.S. at 532 (noting that in each of the two earlier cases, Procunier v. Navarette, 434 U.S. 555 (1978), and Baker v. McCollam, 443 U.S. 137 (1974), the Court had found it unnecessary to decide whether negligence gave rise to a § 1983 action). It finally answered this question affirmatively in *Parratt*; but later, the Court overruled, or at least avoided, its conclusion in *Parratt*, holding that even if negligence can violate § 1983, the negligent deprivation of property or liberty was not a deprivation under the fourteenth amendment's due process clause. *See Daniels*, 474 U.S. at 332-33.

[10] The Supreme Court itself has difficulty deciding whether a given set of facts should give rise to a federal claim against state officials. *Compare* Smith v. Wade, 461 U.S. 30 (1983) (holding that federal court may award punitive damages for prison guard's failure to protect state prison inmate from hostile fellow inmate) *with* David-

The Supreme Court has not directly addressed the connection between its official tort cases and state sovereign immunity.[11] Only Justices O'Connor and Stevens, in separate opinions, have discussed how federal civil rights jurisdiction in tort cases interacts with the immunity of the states and state officials.[12] Justice O'Connor believes that in some circumstances a state's refusal to provide a remedy for a state-inflicted tort may create a federal constitutional claim, but only perhaps after the victim has first sought redress in the state courts and been refused.[13] Justice Stevens, on the other hand, argues that state sovereign immunity is largely constitutional, unless it protects "conduct that violates a federal constitutional guarantee."[14]

Numerous moral, political, and social issues inform the question whether

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son v. Cannon, 474 U.S. 344 (1986) (holding that essentially same facts did not give rise to federal claim).

[11] The term "sovereign immunity" is intended in this article as shorthand for states' authority to set the rules governing the tort liability of itself and its officials. Through constitutions, statutes, and common law, states employ doctrines such as sovereign immunity and official immunity to limit the liability of themselves and their officials.

The academic literature concerning *Parratt* has, to some extent, recognized that the constitutionality of immunities is at stake in the cases. For discussions of the connection between federal constitutional tort litigation and state sovereignty in this sense, see Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 996 & n.109 (1986); Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. ILL. L. REV. 831, 875-77; Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 209, 221 (1984); *see also* P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 47-51 (1983). For discussions of the connection between suits against government officials and sovereign immunity generally, see Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Note, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

[12] *See* Hudson v. Palmer, 468 U.S. 517, 537-40 (1984) (O'Connor, J., concurring); *Daniels*, 474 U.S. at 336-43 (Stevens, J., concurring in the judgment).

[13] *Hudson*, 468 U.S. at 540 (O'Connor, J., concurring).

[14] *Daniels*, 474 U.S. at 342-43 (Stevens, J., concurring). Read out of context, this statement seems tautological: sovereign immunity is constitutional unless it is not constitutional. What Justice Stevens means, I think, is that state-created sovereign immunity itself does not violate the Constitution; but if a specific constitutional provision, such as the fourth amendment, is violated, sovereign immunity cannot prevent a remedy. The distinction between general due process violations and violations of other constitutional provisions has been important to the development of federal supervision of state tortious conduct. *See infra* notes 200-07 and accompanying text.

the states, or state officials, should compensate victims of state inflicted torts. In this article, I address only the special problem of federally compelled compensation for parties injured by state government. I will assume that there is general agreement on the desirability of compensation in tort.[15] Special problems arise, however, if *federal law* requires compensation against state wishes. If state political systems are working well,[16] and the

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[15] Such agreement might not extend to compensation for government-inflicted torts. The issues concerning compensation for government-inflicted injuries are often the same as in private tort situations. Arguments that liability makes government functions too expensive to perform, and results in overdeterrence, resemble arguments that tort liability makes the provision of goods and services in the private sector too risky. But government liability also presents special problems, because government may perform functions that are too risky and too important for the private sector; the cost of overdeterrence, therefore, may be higher. Note, *Local Government Sovereign Immunity: The Need for Reform*, 18 WAKE FOREST L. REV. 43, 54-56 (1982). Some arguments for government liability depend on the special nature of government, such as the value of government accountability, the great potential for harm by government, the moral view that government should set an example by strict adherence to legal norms, and the superior ability of government to spread losses. *See* Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683, 697-98 (1983) (arguing that the risk of harm by government is greater than from private entities because of government's right to use coercive power); *see generally* P. SCHUCK, *supra* note 11. The long history of state and official immunity stands against these arguments, but recent literature questions its pedigree in the United States. For a list of arguments for and against sovereign and official immunity, see Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI. KENT L. REV. 61, 70-71 (1986). Numerous scholars agree that the American common law of sovereign immunity mistakenly assumed that government in England did not routinely pay damages for injuries it caused to subjects. *See, e.g.*, Jaffe, *supra* note 11, at 1-19 (tracing the history of English sovereign immunity law and concluding that the doctrine was vague, without determinative impact, and largely used as a procedural bar); Note, *supra* note 11, at 1060 n.2. (citing sources supporting the contention that the concept on which sovereign immunity is based, that "the king can do no wrong," is inapplicable to the United States, and its development in England was based on a misconception of early law and practice).

[16] The assumption here is a big one. Victims of state torts are unlikely to be part of a group that could easily organize itself politically and, although it is sometimes asserted, it is by no means clear that state government is very responsive to individual interests. Mark Tushnet has argued that the growth of local government and an evolving political system that allows national political figures to bypass local offices altogether has made local government less accessible and responsive than adherents of contemporary federalism claim. Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981, 991-93 (1985).

Nevertheless, Rapaczynski has argued, in an excellent description of post-*Garcia* federalism, that the presence of separate local and national spheres of authority opens the political system to a wider variety of group interests. Rapaczynski, *supra*

political community has decided that victims of state torts should not receive compensation, then federal intervention might frustrate the political community's chosen course and have consequences beyond the mere payment of money from the local treasury.[17]

Professor Schuck has persuasively argued that government liability be expanded by allowing vicarious liability under § 1983 and eliminating the eleventh amendment defense.[18] Official tort plaintiffs have usually sought compensation under the due process clause, but current due process clause interpretations have made recovery against government by private parties more difficult.[19] Another doctrinal basis for such recovery must be found to ensure that plaintiffs can be compensated by the state for abuses of state power.

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note 8, at 395. He argues that distribution of governmental authority to units in the federal system protects against tyranny by protecting geographically defined minorities, facilitating group organization, and shielding against national government attack on individual liberties. *Id.* Rapaczynski's analysis, however, neglects the changed perspective on protection of individual liberties that emerged after the Civil War. One important lesson garnered from the post-Civil War amendments and civil rights legislation is that active federal involvement is necessary to protect federal rights against abuses of state power. Federalism discourse suffers from its inability to reconcile the pre-Civil War fear of the national government with the post-War federal attack on state government oppression. *Compare* Younger v. Harris, 401 U.S. 37 (1971) *with* Mitchum v. Foster, 407 U.S. 225 (1972).

[17] The electorate might, for a variety of reasons, choose a system in which the state is not required to compensate tort victims. Jaffe argues that requiring government to pay when it damages property does not threaten government functions so long as government retains the power of eminent domain. Jaffe, *supra* note 11, at 24. In his pathbreaking article on just compensation, Professor Michelman argues that stringent compensation requirements may sometimes do more harm than good and that the community will not demand compensation if the gains from a system of noncompensation outweigh the losses from uncompensated takings. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1222 (1967).

[18] *See* P. SCHUCK, *supra* note 11, at 118-21 (arguing that liability should be placed on entities and not individuals, and recommending changes to the Federal Tort Claims Act and to the Supreme Court's application of § 1983 regarding state and local liability). The Court has interpreted § 1983 to not allow liability for government entities under a theory of *respondeat superior*. *See* Monell v. Department of Social Servs. of New York, 436 U.S. 658, 690-95 (1978). The Court has also held that the eleventh amendment bars state liability for damages in § 1983 cases unless the state consents to suit. *See* Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

[19] *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (holding that negligence by state officials did not constitute a deprivation within the meaning of the fourteenth amendment).

Justice O'Connor has identified the takings clause of the fifth amendment as a possible constitutional basis for compensating victims of state torts.[20] The takings clause could be read to require states to compensate their tort victims. However, the Court's reservations, as developed in the due process cases, must first be overcome. For example, a state's refusal to compensate tort victims must be considered a taking of property within the meaning of the takings clause. The Court might decide to read the fifth amendment's prohibition against uncompensated takings—as it has the fourteenth amendment's due process clause—not to address the accidental destruction of property.[21] Refusal to compensate tort victims must be considered an abuse of state power. Finally, it must be established that forcing states to compensate their tort victims will not inevitably lead to a federal body of official tort law.

In this article, I argue that state sovereign and official immunities, insofar as they bar recovery when private parties would be liable for similar conduct, are unconstitutional under the takings clause of the fifth amendment, as applied to the states under the fourteenth.[22] A state's refusal to compensate plaintiffs for the tortious damage or destruction of property should be redressed by the federal courts in civil actions brought under § 1983.

Section I of this article provides background through a discussion of the Supreme Court's treatment of the problem of torts committed by government officials, primarily in procedural due process cases. This section illustrates that procedural due process analysis is a dead end, incapable of

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[20] The takings clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Justice O'Connor's theory of using the takings clause as a basis for recovery on official tort claims was proposed in Hudson v. Palmer, 468 U.S. 517, 537-40 (1984) (O'Connor, J., concurring). Her concurring opinion could be read to argue that an uncompensated government tort constitutes a violation of the takings clause.

[21] *See* Daniels v. Williams, 474 U.S. at 332-33 (holding that property loss occasioned by state official negligence is not a deprivation under the due process clause of the fourteenth amendment). Likewise, although the takings clause has not been confined to proper eminent domain proceedings, it might not be extended to cover negligent property loss. Such loss may not constitute a taking for a "public use." *See* Comment, *Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491 (1986) (arguing against recent expansions of takings analysis beyond eminent domain context). Professor Epstein, on the other hand, argues that government torts should be subject to the requirements of the takings clause and governments should also be required to compensate for any conduct that would be considered tortious between private parties. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 37-39 (1985).

[22] *See* First English Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).

solving the problem of whether the federal courts (and federal law) should defer to state immunity decisions. Section II demonstrates how the takings clause can be interpreted to require states to compensate tort victims whenever similar conduct would give rise to liability between private parties. Under this theory, sovereign and official immunities would be unconstitutional to the extent they prevented state tort victims from receiving compensation. Section III addresses implementation concerns that comprise the technical body of federalism doctrine—that is, whether legal rules that limit access to federal courts should bar enforcement of the takings clause in federal court. I conclude that deference to state prerogatives requires at most that the state courts be allowed the initial opportunity to provide a remedy, but that ultimately the federal courts should be allowed to use the takings clause to overrule the state courts' refusal to provide compensation to victims of state-inflicted torts.

I. STATE TORTS AND FEDERAL DEFERENCE

The § 1983 action is the primary vehicle by which state tort victims have attempted to vindicate federal rights against state officials.[23] In § 1983 cases, the tort victim usually alleges that his or her property or liberty was taken by the tortious conduct of state officials without due process of law.[24] Typically, the due process allegation directs the court's focus to the procedures surrounding the deprivation.[25] Herein lies the problem: most plaintiffs are not really complaining about the lack of procedural safeguards; rather, they are complaining about the absence of compensation for a loss that has been inflicted tortiously by a state official.[26]

Plaintiffs have not succeeded in shifting the courts' attention away from the procedural aspects of their claims. Some plaintiffs have explicitly dis-

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[23] P. SCHUCK, *supra* note 11, at 119. For an illuminating study of the workings of § 1983 actions in federal court, see Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (providing an empirical study of constitutional tort litigation in federal court, and concluding that the image of the civil rights litigation explosion is exaggerated).

[24] *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 527 (1981); Paul v. Davis, 424 U.S. 693 (1976). By tortious conduct, I mean conduct that does not arguably violate any constitutional provision other than the due process or takings clauses. Thus, I am not including cases like Monroe v. Pape, 365 U.S. 167 (1961), in which the defendants violated the plaintiff's fourth amendment rights.

[25] *See, e.g., Parratt*, 451 U.S. at 543 (applying balancing test from Mathews v. Eldridge, 424 U.S. 319 (1976), to determine whether post-deprivation remedy for loss of property satisfied due process).

[26] *See, e.g.*, Davidson v. Cannon, 474 U.S. 344, 348 (1986) (noting that although plaintiff described "his claim as one of 'procedural due process, pure and simple,' " what he really wanted was compensation for the loss he suffered) (citation omitted).

claimed reliance on the procedural aspects of the due process clause, and have argued that tortious conduct by state officials violated substantive due process in that the official conduct is unreasonable and does not advance a legitimate state interest. Such a substantive claim would allow the federal court to focus on the constitutionality of the refusal to compensate instead of on the procedural issue. The Supreme Court, however, has refused to consider whether tortious conduct by state officials can violate substantive due process if it does not violate any other consitutional provision.[27] Subsequently, a federal court has interpreted this refusal to mean that substantive analysis is "inapplicable" to some undefined category of liberty and property deprivations.[28]

Courts addressing due process claims under § 1983 have not directly addressed the propriety of state government treatment of its tort victims and the appropriate federal response. Rather, the cases have turned on apparently technical applications of the due process clause.[29] In § 1983 cases alleging constitutional violations other than denial of due process, however, the courts have confronted more directly the propriety of the challenged conduct and the appropriate federal response.[30] These cases are united by an undercurrent of concern over the appropriate federal response to state conduct that causes injury to private parties.

Since the birth of the modern civil rights action in *Monroe v. Pape*,[31] the

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[27] *See, e.g.*, Whitley v. Albers, 475 U.S. 312 (1986) (holding prisoner's substantive due process rights to be coterminus with his eighth amendment rights); Ingraham v. Wright, 430 U.S. 651 (1977) (granting certiorari on procedural due process issues but not substantive due process claim).

[28] In Brown v. Brienen, 722 F.2d 360, 368-69 (7th Cir. 1984), Judge Flaum, in his concurring opinion, did not analyze whether a state breach of contract violated substantive due process even though the plaintiffs raised a substantive due process claim. He reasoned that because the Supreme Court had addressed only procedural claims in *Parratt* and *Logan*, "substantive due process is inapplicable here." *Id.* The majority ruled against the substantive due process claim by denying that bare property deprivations, without an additional constitutional violation such as a first amendment or fourth amendment violation, can create substantive due process violations. *Id.* at 367. The Supreme Court has not directly addressed whether tortious conduct by state officials can violate substantive due process.

[29] *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (holding that negligent infliction of injury is not a "deprivation" within the meaning of the due process clause); Parratt v. Taylor, 451 U.S. 527 (1981) (holding that postdeprivation remedy satisfies due process in cases of random and unauthorized deprivations).

[30] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (holding use of excessive force by police in arresting a burglary suspect violated fourth amendment); Monroe v. Pape, 365 U.S. 167 (1961) (holding that petitioners subjected to an illegal break-in and strip-search by state police had made out a successful § 1983 action alleging violations of their fourth amendment rights).

[31] 365 U.S. 167 (1961). Two propositions originating with *Monroe* seem clear:

federal courts have struggled to create a boundary between state and federal power over tortious conduct by state officials.[32] Although the conflict between federal constitutional norms and state autonomy has been largely solved for cases raising claims other than procedural due process, the due process cases are still in search of a coherent theoretical foundation.

Traditionally, states have possessed the authority to decide matters of substantive tort law and immunity.[33] Consequently, state autonomy is threatened in two distinct ways by federal court § 1983 suits against state governmental units and officials. First, federal norms might subsume state tort law, in effect setting federal standards and rules concerning duty of care,

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federal law grants a cause of action in federal court against state officials for violations of at least those constitutional rights enumerated in the Bill of Rights, and the existence of state remedies is irrelevant to these causes of action. *Id.* at 183. If there is also a remedy in state court, the litigant is free to choose between the state and federal remedies.

A point about terminology is in order here. In the literature, a distinction has been made between "substantive" constitutional rights—basically any constitutional right except due process—and the right to due process. Consequently, scholars and judges have argued that *Monroe* stands for the proposition that the victim of a "substantive" constitutional right violation may bring immediately to federal court a § 1983 action, while a due process claimant may first need to prove that state remedies are inadequate. I resist using such terminology because the rhetorical relegation of due process to a second-class status obscures the question whether due process should be treated differently than other constitutional rights.

[32] One example of this struggle is the difficulty the federal courts have had in shaping the contours of municipal liability. In Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1978), the Court held that a municipality can be held liable under § 1983 if it is found to have unconstitutuional policies or customs. Since *Monell*, though, the federal courts have struggled to determine what constitutes a municipal policy or custom. The Court itself is split on the issue. *See* City of St. Louis v. Praprotnik, 108 S. Ct. 915, 922-28 (1988) (plurality opinion) (arguing for new, more restrictive standard for municipal liability); *id.* at 928-36 (opinion concurring in the judgment) (finding no municipal liability under current standard); *id.* at 936 (Stevens, J., dissenting) (finding municipal liability under current standard).

[33] Nothing in the Constitution specifically allocates to state government power over tort law and immunity. Also, I do not mean to claim that traditional state functions are shielded from federal intervention. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (abandoning the "traditional" and "nontraditional government function" distinction in the commerce clause context). Rather, federalism should be viewed in a functional manner, with states assuming those functions that they can best serve. *See* Rapaczynski, *supra* note 8, at 357. It is no more than a hunch, perhaps a generally shared one, that leads me to believe that, in most situations, allocations to the states of authority over tort policy is appropriate. The inability to carve out definite spheres of state autonomy has been a recognized failure of federalist rhetoric. *Id.* at 344.

causation, and the like. Second, federal intervention may threaten to undermine the policy choices underlying state tort law, especially in the area of immunizing government units and officials from suit.[34]

Concern for state autonomy over decisions regarding tortious conduct by state officials militates against a policy of allowing victims of constitutional torts to sue the state or state officials in federal court. In *Monroe*, the defendant argued that because a remedy was available in state court under state law, the plaintiff should use the state remedies.[35] In his dissent in *Monroe*, Justice Frankfurter, recognizing that more than forum selection was at stake, rejected the majority's decision to allow the federal action despite the availability of the state remedy.[36] He observed that state law, not federal law, creates whatever tort law rights exist for redress of injuries.[37] He then reasoned that, as long as the states provide a mechanism to vindicate rights created by their law, federal jurisdiction should not exist. Justice Frankfurter was motivated by the concern that federal court decisions would conflict with state policy.[38] He argued that the federal courts should intervene only if the Illinois state courts had refused relief to the petitioners because "the official character of the respondents clothed them with civil immunity."[39]

Justice Frankfurter's concern for state authority over official tort policy captures the essence of the federalism arguments against expansive federal civil rights jurisdiction. He recognized, however, that to maintain the supremacy of federal law and the federal Constitution under the supremacy clause,[40] the state courts, and state law, should not have the final say on whether a state official had violated federal constitutional norms. The tension in Frankfurter's argument is apparent: he would not leave the states free from federal supervision; rather, he would just delay the day of reckoning. If a federal court, applying federal law, overrules a state's decision against

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[34] While it is important to assume, for the purposes of this federalism discussion, that state tort law reflects conscious policy choices, it is more realistic to recognize that state common law is often merely an aggregation of conflicting policy preferences established by various tribunals at various times. At least since Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), federal courts have treated these loosely aggregated decisions of state courts as authoritative pronouncements of state policy.

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

[36] Justice Frankfurter dissented from the Court's holding that § 1983 reaches conduct that violates state law as well as federal law. *Id.* at 202-59 (Frankfurter, J., dissenting in part).

[37] *Id.* at 245 (Frankfurter, J., dissenting in part).

[38] *Id.* at 242-43 (Frankfurter, J., dissenting in part).

[39] *Id.* at 211 (Frankfurter, J., dissenting in part).

[40] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land[.]" U.S. CONST. art. VI, cl.2.

liability, the state's freedom to set standards of conduct through its tort law necessarily will be compromised.

It is easy to understand why state autonomy over official tort policy should yield to federal law when there is a violation of a constitutional right such as the fourth amendment's guarantee of freedom from unreasonable searches and seizures. In such cases, the supremacy of federal law over state law is at stake. Because the federal constitutional provision is specific and limited, relative to the vague and general words of the due process clause, the potential for displacement of state authority is not so great. Striking a balance in the due process area between federal supremacy and state authority has been difficult because all state tort victims can allege colorable due process claims, since their property or person has been damaged or injured at the hands of a state official without notice or a prior hearing.[41]

The Court repeatedly has held that every common law tort committed by a state official does not create a due process-based § 1983 suit. The Court fears both that federal law would subsume state tort law and that the federal courts would be flooded with what the Court views as ordinary tort cases against state officials.[42] No solid doctrinal basis exists, however, for keeping state official tort cases out of the federal courts. The failure of different Supreme Court attempts to create a doctrinal basis illustrates the problem.

In *Paul v. Davis*,[43] the Court held that defamation of an individual by a government official did not deprive the individual of liberty or property under the fourteenth amendment.[44] The Court's holding in *Paul* was motivated primarily by the fear that "such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[45] The Court's apparent

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[41] *See* Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 266 (1986).

[42] *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 332 (1986) (warning that the fourteenth amendment should not become a "font of tort law"); Parratt v. Taylor, 451 U.S. 527, 544 (1981) (same); Paul v. Davis, 424 U.S. 693, 701 (1976) (same).

There is a widely shared perception that federal courts are flooded with § 1983 cases and, implicitly, that the increase in § 1983 litigation has been greater than increases in federal litigation generally. This perception may not be accurate. According to Eisenberg and Schwab's study of constitutional torts in the federal system, the amount of litigation under § 1983 has not increased more than the amount of federal litigation generally. *See* Eisenberg & Schwab, *supra* note 23, at 693-95.

[43] 424 U.S. 693 (1976).

[44] The plaintiff in *Paul* was a victim of a local police effort to control shoplifting. The local police produced and distributed to area merchants a list, with photographs, of "active shoplifters." Davis, who had been charged of shoplifting, was on this list. He alleged that the defamation violated due process because the defamation had deprived him of his liberty interest in his reputation without a predeprivation hearing. *Id.* at 694-96.

[45] *Id.* at 701.

concern in *Paul*, then, is that federal standards would subsume state tort law if the Court were to find a § 1983 violation for defamation actions against state officials.

Doctrinally, *Paul* is incoherent because it provides no basis for determining whether a liberty or property interest has been affected by state official conduct. The Court in *Paul* did acknowledge that many "liberty" and "property" interests are first created by state law and then protected by the procedural guarantees of the fourteenth amendment,[46] but it then held that conduct which abridges an interest protected under state law does not necessarily deprive a person of liberty or property in a constitutional sense just because the tortfeasor is a state official. According to the Court, any interest affected is "simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions."[47] The Court does not explain which rights recognized by state tort law are sufficient to create liberty or property interests and which are not. State tort law creates property rights through causes of action such as trespass and conversion. It should not matter, for purposes of determining whether a constitutionally protected interest exists, what remedy the state extends.[48] Following the Court's

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[46] *Id.* at 708-11; *accord* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[47] *Paul*, 424 U.S. at 712.

[48] A majority of the Supreme Court has consistently rejected the argument that procedural law limits the substance of a property right. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (" 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."); Arnett v. Kennedy, 416 U.S. 134, 166-67 (1974) (Powell, J., joined by Blackmun, J., concurring in part and concurring in result in part) (recognizing that substantive law, and not procedure, shapes the contours of a property interest under the fourteenth amendment); *id.* at 177-78, 185 (White, J., concurring in part and dissenting in part) (same); *id.* at 211 (Marshall, J., joined by Brennan and Douglas, JJ., dissenting) (same). Thus, if state law creates a legitimate expectation of continued enjoyment of a property right, as a matter of federal constitutional law it makes no difference that the state provides no remedy if the interest is damaged. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-33 (1982) (holding that statutory limitation of 120 days within which to hold a hearing is a procedural limitation which does not affect plaintiff's substantive claims). This dichotomy between procedure and substance reduces state sovereignty over tort policy because it exposes state procedural regulations to federal due process scrutiny. State substantive law, however, is not subjected to this scrutiny: if a state does not create a cause of action as a remedy for certain deprivations, there is no property interest for fourteenth amendment purposes.

This dichotomy has its appeal as a matter of common sense. People expect to be compensated when their property is damaged. These expectations probably do not arise from an understanding of procedural bars and immunity defenses, which may prevent plaintiffs injured by tortious action by a state official from receiving compensation or even a reasonable opportunity to seek redress. Whether federal due process will allow a state immunity to defeat claims against the state altogether remains

reasoning in *Paul*, state common law would be insufficient to create a property interest, but the Court expressly denies this reasoning elsewhere in the opinion.[49]

Finding state common law insufficient to create a property interest also contradicts the Court's holding in *Board of Regents v. Roth*.[50] *Paul* neither recognizes that state tort law creates federally protected property rights nor appreciates the distinction between substance and procedure developed in the line of cases beginning with *Goldberg v. Kelly*,[51] and including *Goss v. Lopez*.[52] In those cases, the Court held that property and liberty interests are created by state substantive law: if state substantive law creates an expectation that an interest is protected, the interest is protected by the due process clause.[53] That the state law in *Paul* protected the plaintiff's reputation through a defamation action should have been enough to create a property or liberty interest. The action of the defendants, as local officials, constituted state action and action under color of law, thereby satisfying the requirements of the fourteenth amendment and § 1983. The only remaining question would be whether the state tort action satisfied due process.[54] This is pre-

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unsettled. *See* Martinez v. California, 444 U.S. 277, 282 n.5 (1980) (suggesting that state immunity could be considered part of the definition of the property interest).

[49] It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by *state law*, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Paul, 424 U.S. at 710-11 (emphasis added) (footnote omitted); *see also id.* at 709-10 (recognizing that defamation which results in the termination of employment or expulsion from public school affects a property right under the fifth and fourteenth amendments).

[50] Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also* Bishop v. Wood, 426 U.S. 341, 344 (1976) (noting that state common law of implied contract may create protected property interest).

[51] 397 U.S. 254 (1970).

[52] 419 U.S. 565 (1975).

[53] *See id.* at 572-76 (holding that public high school student has a constitutionally recognized property interest in his public education); *Roth*, 408 U.S. at 577 (holding that state law provides the source of constitutionally protected property interests).

[54] *See Paul*, 424 U.S. at 717 (Brennan, J., dissenting) ("The only issue properly presented by this case is whether petitioners' intentional conduct infringed any of respondent's 'liberty' or 'property' interests without due process of law, and that is the question to be addressed.").

cisely the tack the Court took in *Parratt v. Taylor*.[55]

The failure of *Paul* to provide a coherent basis for rejecting state tort claims, as well as the Court's focus on the technicalities of due process, forced the Court to look elsewhere to keep state tort claims out of federal court. The Court next attempted to construct a coherent doctrine to keep state tort cases out of federal court by reasoning that due process might be satisfied by postdeprivation state remedies. According to the Court, the due process clause does not require that procedures precede the deprivation: states might, in some circumstances, satisfy the due process rights of their tort victims by providing a remedy after the fact.[56]

Several reasons can be advanced for encouraging reliance on postdeprivation state remedies before allowing a federal § 1983 suit in some state tort cases. First, allowing an immediate federal court suit presumably would cause a flood of litigation in the federal courts, especially if the tortious activity is not amenable to a predeprivation hearing.[57] Second, the federal court, in determining whether a protected interest has been damaged, might be forced to decide issues of state tort or property law.[58] Finally, the federal courts might substitute their judgment for that of the state courts, thereby reducing state autonomy over tort law. For example, in *Ingraham v. Wright*,[59] the Court held that the due process clause did not require a

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It is not surprising that Justice Rehnquist's opinion for the majority in *Paul* conflicts with the distinction made in the *Goldberg* line of cases between substantive and procedural law; he does not agree with that distinction:

> Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement.

Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (Rehnquist, J., announcing the judgment of the Court).

[55] 451 U.S. 527, 537 (1981) ("Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law.").

[56] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 672-82 (1977) (finding that traditional postdeprivation common law remedies afforded due process in cases involving corporal punishment in public schools); Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that due process does not require an evidentiary hearing prior to the termination of social security disability benefits). The Court reaffirmed these holdings in Parratt v. Taylor, 451 U.S. 527, 541-44 (1981) (holding that postdeprivation procedure afforded by Nebraska tort claims procedure provided due process to prisoner deprived of his hobby kit).

[57] This view was expressed by Justice Scalia in one of his first speeches as a Supreme Court Justice. *See Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. Times, Feb. 16, 1987, § 1 at 1, col. 1.

[58] While the Court did not articulate its reasoning this way, it seems that where state tort law does not condemn the particular injury-producing conduct, then no federally protected interest has been damaged.

[59] 430 U.S. 651 (1977).

prepunishment hearing for school children who were subjected to corporal punishment.[60] Because state tort law regulated corporal punishment, the Court held that the postpunishment state tort remedy for unreasonable punishment provided all the process that was due.[61] The Court thought that forcing students to bring claims in state court under state tort law was the best way to allow the state to decide the propriety of corporal punishment. This way, state law decides which interests are to be protected from government invasion.

Paul and *Ingraham* resulted in the following paradox. Recall Justice Frankfurter's call in *Monroe* for exhaustion of state remedies before a federal § 1983 suit may be brought.[62] An exhaustion requirement could work with non-due process claims, because whatever the decision in the state court, the underlying constitutional violation will still have occurred. With due process cases, however, a state decision against the plaintiffs might indicate that no protected interest was damaged. For example, in *Brown v. Brienen*,[63] the plaintiffs, county sheriff's police, sued because they were not allowed to take their accrued vacations at the time the county had promised. They alleged that they had a property interest in the accrued vacations and that the property was taken without due process. The Seventh Circuit held that state contract remedies provided all the process that was due.[64] The court doubted that the claimed deprivation was final because the plaintiffs had not sued in state court for damages or for an order allowing them to take their accrued time off.[65] The court's observation is paradoxical: state law creates the entitlement, yet the federal court will provide relief for the deprivation of that entitlement only if the state court denies relief, presumably on some state law grounds. If state law provides no relief, however, perhaps there is no entitlement in the first place.

In an attempt to sort out the procedural due process mess left by *Paul* and *Ingraham*, the Court developed a theory to identify cases in which state postdeprivation remedies alone satisfied due process. Undoubtedly, there

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[60] *Id.* at 678-82. The Court denied certiorari on the question whether the corporal punishment violated substantive due process. *Id.* at 659 n.12; *see* Wells & Eaton, *supra* note 11, at 216 (arguing that the Court's decision in *Ingraham* should be understood only in procedural terms, and not as a substantive constitutional limitation on the right to be protected from corporal punishment).

[61] 430 U.S. at 672.

[62] *See supra* notes 36-40 and accompanying text.

[63] 722 F.2d 360 (7th Cir. 1983).

[64] The court doubted that a state contractual right to the vacations was property within the due process clause, but it rested its decision on the adequacy of state contract remedies. *Id.* at 365. The court also observed that contract disputes between local government and employees have "nothing to do with civil rights as ordinarily understood." *Id.* at 362-63.

[65] *Id.* at 366.

are some instances in which predeprivation process is required by the due process clause,[66] yet *Ingraham* and *Paul* do not help identify them. In *Parratt v. Taylor*,[67] *Hudson v. Palmer*,[68] and *Logan v. Zimmerman Brush Co.*,[69] the Court attempted to construct a theory for determining when due process required a predeprivation hearing and when a postdeprivation hearing would suffice.

Parratt arose from the negligent loss of a prisoner's hobby kit by state prison employees. The Court held that the negligent destruction of the property was a deprivation of that property within the meaning of the fourteenth amendment. But the Court also noted that it would be fanciful to expect the state to provide predeprivation process when the deprivation arose from the negligence of a state official.[70] Consequently, the Court shifted its focus to whether the state's postdeprivation remedies satisfied the requirements of due process.[71] In *Logan*, the Court attempted to clarify

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[66] *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-45 (1985) (holding that a pretermination hearing is required where a public employee can be fired only for cause).

[67] 451 U.S. 527 (1981).

[68] 468 U.S. 517 (1984).

[69] 455 U.S. 422 (1982).

[70] *Parratt*, 451 U.S. at 537-41 (holding that due process guarantees nothing more than that a state cannot deprive a person of liberty or property without providing a meaningful opportunity for the victim of the deprivation to be heard).

[71] *Id.* at 541-44. Under the due process analysis established in *Parratt*, adequate postdeprivation remedies satisfy due process in cases of "random and unauthorized" deprivations. The characterization "random and unauthorized" attaches to deprivations that, according to the Court, cannot be preceded by a predeprivation hearing because the state cannot anticipate the occurrence in time to hold a hearing. Thus, the Court considered the negligent loss of property in *Parratt* as random and unauthorized. *Id.* at 540-45. Similarly, in Hudson v. Palmer, 468 U.S. 517 (1984), the intentional destruction of a prisoner's property by a prison guard was considered random and unauthorized because the Court felt that the state should not have to anticipate the intentional torts of low level officials. Under the *Parratt-Hudson* analysis, due process requires states to convene predeprivation hearings only in cases where the state itself is implicated. Subsequently, the Court has held that when a deprivation of property occurs through operation of the state system itself, the state must hold a predeprivation hearing. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). How these distinctions operate is not self-evident.

Another argument in favor of a predeprivation hearing arises when a high level official commits the tort. It might be expected that a prison guard would not hold a hearing before maliciously destroying an inmate's property. But a warden's torts could be considered torts committed directly by the state, because the warden is a party within the system who would be expected to convene a hearing when required. It may be practicable for a warden to hold a hearing before committing a tort. This analysis is analogous to the standard some courts have used to determine whether an official's conduct should be considered municipal policy for the purposes of imposing

Parratt by confining *Parratt*'s rule to random and unauthorized deprivations. According to the Court, if state policy required the destruction of the property then the due process clause required a predeprivation hearing.[72] But *Hudson* extended the *Parratt* holding to cover intentional deprivations resulting from the random and unauthorized conduct of state officials.[73]

Facially, the *Parratt-Hudson* doctrine defers to state authority over tort policy because it directs official tort cases to the state courts. The tone of the *Parratt* opinion, and its references to *Ingraham* and *Paul*, also indicate that the Court sought a rule that would increase state autonomy in these matters.[74] But the Court could not simply banish to state courts all due process cases, for due process guarantees that some procedure must be available to redress harm to protected interests. If, for example, the state provided no procedure for redress of constitutional deprivations, then due process would mandate that federal courts provide one. Likewise, if the state's postdeprivation remedy is inadequate, then the holding in *Parratt* mandates that the plaintiff's constitutional claim is redressable in federal court in a § 1983 suit. The issue of state authority over official tort policy is thus shifted to defining "adequate state remedy."

If one interprets *Parratt* to require an adequate state remedy which cannot be defeated with an immunity defense, then state authority over official tort policy is threatened: if the state decides not to provide a remedy, the federal court, under the due process clause, will.[75] This interpretation of *Parratt* would effectively overrule state immunities to the extent that the immunities barred any opportunity to receive compensation for the tortious injury.[76]

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§ 1983 liability. *See supra* note 32. Yet, the Eleventh Circuit rejected the analogy between the standard for municipal liability and the predeprivation hearing requirement standard in Rittenhouse v. DeKalb County, 764 F.2d 1451, 1456 n.5 (11th Cir. 1985).

[72] *Logan*, 455 U.S. at 435-36.

[73] 468 U.S. 517 (1984). *Hudson* arose from an illegal shakedown search, in which prison officials found a ripped pillow in Palmer's trash can, and subsequently brought proceedings against him for destroying state property. Palmer brought and won a § 1983 action at the trial level, claiming the shakedown search—done intentionally to harass him—violated his fourteenth amendment rights. The Supreme Court reversed on the ground that state postdeprivation remedies provided all the process due.

[74] *See, e.g., Parratt*, 451 U.S. at 542-44.

[75] *Parratt* has proven to be a very difficult case to interpret and I will not attempt to construct an interpretation. Professor Monaghan catalogs several possible interpretations and ultimately concludes that *Parratt* holds that a random and unauthorized tort committed by a state official does not constitute state action under the fourteenth amendment if the state provides adequate remedies. *See* Monaghan, *supra* note 11, at 998-99.

[76] See *Parratt*, 451 U.S. at 550 (Powell, J., concurring in the result). Justice Powell read the majority opinion in *Parratt* to require states to provide a remedy for official torts, thus overruling state immunities. Although he concurred in the result, Powell

Yet, some lower courts, influenced by the Court's rhetoric favoring state autonomy over official tort policy, have held that state immunities, even if they completely bar recovery, do not render the state remedy inadequate.[77]

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argued that negligent acts do not "constitute a deprivation of property within the meaning of the Fourteenth Amendment." *Id.* at 546. Justice Powell's argument later found its way into *Daniels*, which overruled *Parratt* on this issue. *See* Daniels v. Williams, 474 U.S. 327, 330-31 (1986).

Professor Smolla also interprets *Parratt* to mean that if the state fails to provide a remedy, a § 1983 due process action will provide one. Smolla, *supra* note 11, at 872-73. Smolla also insightfully adds that the state might be required to provide the remedy itself because of its duty to enforce federal law under Testa v. Katt, 330 U.S. 386 (1947). *See* Smolla, *supra* note 11, at 873 n.183.

The Court has addressed the constitutionality of state immunities and upheld them as a defense to a state court case, not a federal constitutional claim. *See* Martinez v. California, 444 U.S. 277, 282-83 (1980) (holding that federal courts should respect state grant of official immunity unless "wholly arbitrary or irrational"). Smolla argues that *Parratt* and *Logan* overrule *Martinez* to the extent that *Martinez* allows state immunities to bar recovery in official tort situations: "[I]f the immunities doctrines eviscerate common law rights without a sufficiently strong state reason, the 'adequacy' concept of *Parratt* and *Zimmerman Brush* should be triggered to create a due process violation." Smolla, *supra* note 11, at 880.

[77] *See* Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985). In *Rittenhouse*, the court held that states are free to grant immunities even if the immunities completely foreclose tort recovery as long as the immunities are not wholly arbitrary or irrational. *Id.* at 1458 (citing Martinez v. California, 444 U.S. 277 (1980)); *accord*, Davidson v. O'Lone, 752 F.2d 817, 830 (3d Cir. 1984) (en banc), *aff'd on other grounds sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986); *see also* Bacon v. Patera, 772 F.2d 259, 264 n.2 (6th Cir. 1985) (indicating that police chief may be able to assert qualified immunity even if plaintiff's procedural due process rights have been violated); Al-Mustafa Irshad v. Spann, 543 F. Supp. 922, 928-29 (E.D. Va. 1982) (finding Virginia's immunity defense does not violate due process by drawing parallel to federal immunity defense in § 1983 actions); Juncker v. Tinney, 549 F. Supp. 574, 579-80 & n.10 (D. Md. 1982) (holding that Maryland's qualified good faith immunity does not violate due process requirements).

Only one court has held that adequate postdeprivation remedies might not exist where state immunities bar recovery. *See* Lambert v. MacFarland, 612 F. Supp. 1252, 1267-68 (N.D. Ga. 1984). Other courts have intimated that state remedies may not be adequate if immunity bars tort recovery, but have avoided addressing the question directly by finding either that state immunity was inapplicable to the case at bar, *see, e.g.*, Rheuport v. Ferguson, 819 F.2d 1459, 1465-67 (8th Cir. 1987), or that even if the named defendant is immune, state remedies are adequate so long as there is some unimmunized party who *could* have been sued, *see, e.g.*, Economic Dev. Corp. v. Stierheim, 782 F.2d 952, 955 & n.4 (11th Cir. 1986). These cases raise the question of whether the takings clause should require parties who can be sued for private torts to be equally amenable to suit in government tort cases. For example, it is unclear whether the takings clause allows government to exempt itself from vicarious liability on the same terms as private employers. The Supreme Court, in

Once again, the Court's focus on technical applications of the due process clause, best captured in the distinction the Court draws between random and unauthorized acts and established state procedures, allowed the Court to duck the larger issue of the constitutionality of sovereign immunity from tort actions. Following *Parratt*, one could argue that when state tort law denies a claim on the basis of sovereign immunity, the system itself has caused the deprivation.[78] Because the procedural requirements of due process may have been satisfied by the state court hearing in which the immunities were applied, the Court would be forced to confront the substantive issues of the constitutionality of the immunity under the "adequate state remedy" doctrine.[79]

As noted, *Parratt* shifted the Court's attention from state liability for official torts to whether a state remedy was adequate despite state immunities.[80] The Court was presented directly with the question in *Daniels v. Williams*.[81] *Daniels* presented the Court with a choice: it could bite the bullet on federalism and hold that states must provide remedies for official torts, or it could hold that a state remedy is adequate even if state immunities prevented any realistic chance for the state tort victim to recover. The former possibility did not comport with the Court's basic view of federalism. The latter, however, seemed illogical. Under this second choice, the Court would be holding that a remedy that is in fact nonexistent is an adequate one.[82]

Monell v. Department of Social Servs. of New York, 436 U.S. 658, 691 (1978), held that local governments were not subject to vicarious liability under § 1983. However, serious takings problems could arise if government tort victims were unable to recover for their injuries because the officials could not satisfy judgments and governmental units exempted themselves from vicarious liability. While this article does not address these problems, the existence of vicarious liability could be important to the adequacy of any remedy for government torts.

[78] This is the reasoning the Court used in Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-38 (1982).

[79] [T]he mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate. There is no reason to believe that the Due Process Clause of the Fourteenth Amendment and the legislation enacted pursuant to § 5 of that Amendment should be construed to suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair.

Daniels v. Williams, 474 U.S. 327, 342-43 (1986) (Stevens, J., concurring in the judgment).

[80] *See supra* notes 70-71 and accompanying text.

[81] 474 U.S. 327 (1986).

[82] *See* Note, Parratt v. Taylor *Revisited: Defining the Adequate Remedy Requirement*, 65 B.U.L. REV. 607, 623-27 (1985) (arguing that state remedy is not adequate if relief is barred by immunity defense); *see also* Monroe v. Pape, 365 U.S. 167, 174 (1961) (holding state remedies must be adequate in fact). The Court reiterated the "adequacy in fact" requirement in Mitchum v. Foster, 407 U.S. 225, 242 (1972).

The Court, in *Daniels* and its companion case, *Davidson v. Cannon*,[83] skirted the issue of the immunities' constitutionality by holding that negligent conduct cannot effect a deprivation of an interest protected by the fourteenth amendment.[84] Although the lower courts in both *Daniels* and *Davidson* had held that a state remedy is adequate despite the sovereign immunity defense,[85] the Supreme Court did not address the constitutionality of the immunities. Instead, the Court reiterated the concerns it raised in *Paul* that the states should maintain their autonomy over tort law and federal freedom from "trivial" tort cases motivated its decision.[86] According to the Court:

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[83] *Daniels*, 474 U.S. at 327; Davidson v. Cannon, 474 U.S. 344 (1986). In *Daniels*, the prisoner was injured when he slipped and fell on a pillow left by a guard on the stairs of the jail. In *Davidson*, the plaintiff alleged that prison officials failed to protect him from another inmate who was known to have the threatened the plaintiff with violence.

[84] *See Daniels*, 474 U.S. at 327; *Davidson*, 474 U.S. at 344. Justice Stevens, relying on his opinion for the Court in *Martinez*, would have found the immunities constitutional. *Daniels*, 474 U.S. at 342-43 (Stevens, J., concurring in the judgment). Justice Stevens thinks that the immunities are constitutional so long as they meet minimal substantive due process scrutiny—that is, they must rationally relate to a legitimate state interest. *Id.*

The Court characterized Davidson's claim as founded on negligence. Justice Blackmun argued in his dissent that the prison officials may have been reckless in placing the plaintiff in a cell with an inmate who had threatened the plaintiff with bodily injury. 474 U.S. at 349-60. The facts in *Davidson* resemble those in Smith v. Wade, 461 U.S. 30 (1983), a case in which an award of punitive damages against prison officials was upheld on a finding of recklessness.

Justice Blackmun also rejects the Court's "rigid" holding that negligence can never constitute a deprivation of liberty. *Id.* at 353. He would apply the *Daniels* doctrine to create a de minimus exception to the fourteenth amendment due process clause by looking at each case to determine whether there had been an "abuse of governmental power." *Id.* If the negligence in a particular case amounted to an abuse of governmental power, Blackmun would find a deprivation of liberty. *Id.* Basically, Blackmun would give federal courts discretion to determine which cases should be considered proper occasions for federal intervention.

Blackmun's approach has the virtue of bringing federalism concerns to the fore in determining which cases should be within district court jurisdiction. He is mistaken, however, to focus on the egregiousness of the conduct in the cases. On economic grounds, it may be more accurate to view all accidents as intentional. The government chooses a level of care and knows that this level of care will produce a certain number of accidents. The focus should be on whether the decision not to pay damages is an abuse of governmental power, not on the accident-producing conduct itself.

[85] *See* Daniels v. Williams, 720 F.2d 792, 798 (4th Cir. 1983), *aff'd on other grounds*, 474 U.S. 327 (1986); Davidson v. O'Lone, 752 F.2d 817, 830 (3d Cir. 1984) (en banc), *aff'd on other grounds sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986).

[86] *Daniels*, 474 U.S. at 332-34; *Davidson*, 474 U.S. at 347-48.

> [The Constitution] deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already administered by the States[.]"[87]

Daniels only temporarily avoids the immunities issue because due process requires adequate state remedies in cases of intentional, but random and unauthorized, deprivations.[88] Whether a state remedy is adequate if the defendants are immune may yet come before the Court, although judging from the past, the Court may find another technical due process doctrine to avoid confronting the issue.[89]

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[87] *Daniels*, 474 U.S. at 332 (citations omitted).

[88] There is also uncertainty over whether, after *Daniels*, all state tortious conduct that is more than negligent—that is, grossly negligent, reckless, or intentional—constitutes a deprivation. *See* Davidson v. Cannon, 474 U.S. 344, 349 (1986) (Brennan, J., dissenting) (arguing that the *Daniels* bar to negligence actions under § 1983 is inapplicable where prison official fails to protect prisoner from attack, because the official's failure to protect constituted recklessness); *id.* at 353 (Blackmun, J., dissenting) (criticizing the majority in *Davidson* for elevating the *Daniels* bar on negligence in § 1983 actions to the level of "inflexible constitutional dogma"). According to one court, even if conduct is more than negligent, *Daniels* also requires an "abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." Hogan v. City of Houston, 819 F.2d 604, 604 (5th Cir. 1987) (citation omitted). The courts have not, with any precision, attempted to define "abuse of power."

[89] The Court has already avoided this issue in cases of prisoners suing their keepers for tortious injuries. In Whitley v. Albers, 475 U.S. 312 (1986), the Court faced a claim that a prisoner's constitutional rights were violated when he was shot during a prison disturbance. The prisoner, Albers, argued that the shooting was unnecessary and therefore violated his eighth amendment and fourteenth amendment due process rights. *Id.* at 326-27. The Court held that while the shooting may have been unnecessary, it did not violate the eighth amendment because it was not done with "obduracy and wantonness." *Id.* at 319. The Court also held that the "Due Process Clause affords [prisoners] no greater protection than does the Cruel and Unusual Punishment Clause [of the eighth amendment]." *Id.* at 327. *See also* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) (holding that the due process rights of a person injured while being apprehended by the police are at least as great as that person's eighth amendment rights). The Court in *Whitley* could have distinguished Albers's claim from those raised in *Daniels*, *Davidson*, and *Parratt* on the grounds that Albers had raised a substantive due process claim. Instead, the Court linked Albers's claim with those raised in procedural due process. *Id.* By raising the question left open in *Daniels* whether recklessness or gross negligence constituted a deprivation prior to its substantive due process analysis, the Court implied it would not limit the application of *Daniels* to only procedural due process

Lurking behind the technicalities of due process doctrine, a number of factors apparently motivate the Court's decisions in the official tort area. First, the Court thinks that the Constitution should be read to deal with the "large concerns of the governors and the governed."[90] More simply, the federal courts should provide remedies for official torts only when there has been an abuse of government power because federalism objections are not as strong when such "large concerns" are implicated.[91] Second, state autonomy over tort law should be preserved to protect federalism values and to prevent the federal courts from being flooded with "trivial" litigation.[92] The adequate state remedies question, then, can be restated in the Court's terms as a two-pronged inquiry: first, is the failure to provide a remedy an abuse of

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cases. The *Daniels* negligence bar, interpreted in light of *Whitley*, may now mean that prisoners make out a cause of action under § 1983 only when the alleged deprivation violates the eighth amendment standards for deliberate indifference.

Another device the Court has consistently employed to skirt the difficult issues of immunity and state sovereignty is to choose small tort claims by prisoners as the vehicle for broad pronouncements on state tort law and the protections of the due process clause. One may agree with Justice Rehnquist that a deputy sheriff's error in leaving a pillow on a prison staircase should not give rise to a federal claim without embracing all the consequences the *Daniels* decision may have in other contexts. It may have been easier to persuade the more liberal members of the Court with the facts of *Daniels* and *Parratt* than with the facts of more egregious cases that had been denied review. *See, e.g.*, Jackson v. Joliet, 465 U.S. 1049 (1984) (White, J., dissenting from denial of certiorari). In *Jackson*, police officers directed traffic around a burning car without attempting to find out whether there were people inside the car. The suit was brought by the representatives of people who were still in the car and died. The court of appeals held that the plaintiffs had not stated a claim upon which relief could be granted and the Supreme Court denied review. *Id.*

Davidson v. Cannon, 474 U.S. 344 (1986), is the only § 1983 prisoner case which the court could have perceived as more than a small tort claim. Although the type of injury alleged—injury to a prisoner by another prisoner—is presumably common in a prison setting, Justice Blackmun argued in his dissent that the issue at stake was whether the state could ignore its duty to protect prisoners. *Id.* at 350 (Blackmun, J., dissenting) ("[By incarcerating Davidson,] the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed."). The reluctance of the majority in *Davidson* to examine the issue raised by Justice Blackmun and the subsequent ease with which the majority applied the *Daniels* bar to Davidson's case suggests that the Court may be unwilling to face these issues even in cases to which they grant review. *See* Anderson v. Gutschenritter, 836 F.2d 346 (1988) (finding that prison officials' callous indifference in failing to protect plaintiff prisoner from other inmates could have violated plaintiff's due process rights, and reversing trial court's granting of a directed verdict against plaintiff).

[90] See *Daniels*, 474 U.S. at 332.

[91] *Id.* at 331-32.

[92] *Id.* at 332.

government power,[93] and second, would state tort law be federalized if the federal courts, under federal law, required states to provide remedies to official tort victims? These two questions, and not technical implications of procedural norms, should direct the inquiry into the constitutionality of state immunities that permit states to deny compensation to their tort victims.

To summarize, procedural due process is not a promising avenue for solving the problem of government official torts. First, due process addresses the procedures by which the deprivation occurred, but because the victims of official torts are complaining about the lack of compensation for their injuries, they are unlikely to receive the remedy they are seeking. Second, procedural due process analysis tends to focus attention on the particular deprivation, which may seem unimportant as a matter of federal-state relations, instead of on the larger issue of whether state governments should be required to compensate their tort victims.

In the next section, I argue that the takings clause should be read to require states to compensate their tort victims. The answers to the Court's two due process concerns are addressed by takings clause analysis. The takings clause points toward a compensation requirement to the extent that immunities that allow government and government officials to avoid liability in situations in which private parties would be liable constitute abuses of government power. A compensation requirement under the takings clause could be erected without running the risk that federal constitutional norms would wrest control of state tort law from the states. Furthermore, the values underlying the takings clause militate in favor of a compensation requirement.

II. Overriding State Immunities with the Takings Clause

In this section I address how the takings clause can be read to require states to compensate their tort victims. The discussion proceeds on two levels. First, in subsection A, I show how the state tort victim can establish the elements of a takings claim. Second, in subsection B, I examine the two main issues in the Supreme Court's official tort jurisprudence and conclude that (a) the refusal to compensate tort victims is an abuse of government power and (b) a federal requirement that states compensate their tort victims would not make the federal Constitution "a font of tort law."

As noted in Section I, the traditional avenue of attack on state immunities in the federal courts has been procedural due process. In the typical case, the victim of a state tort will allege a deprivation of property or liberty without due process of law. Resting the claim on the due process clause forces the court to focus on three issues: whether there has been a *deprivation*, of an *interest* protected by the due process clause, and whether the

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[93] *See* Whitman, *supra* note 41, at 274 (questioning whether state decision to deny remedy for official tort is an abuse of government power).

deprivation was accomplished without *due process* of law.[94] The well developed body of law concerning which private interests qualify as liberty and property under the due process clause provides the starting point for the analysis of private interests protected by the takings clause. Although the Supreme Court has protected a wider range of private interests under due process than under the takings clause,[95] I argue in this section that the takings clause should protect all of the interests currently protected under the due process clause, and possibly more.

A. *Establishing the Elements of the Takings Claim*

To make out a claim under the takings clause, a plaintiff must show that the plaintiff's: 1) *property* 2) was *taken* 3) *for public use* 4) *without just compensation*.[96]

1. Defining Property[97]

Facially, the takings clause does not protect as wide a range of interests as the due process clause. Due process protections extend to deprivations of "life, liberty, or property,"[98] while the takings clause requires compensation for takings of "property" only.[99] But the word "property" in the takings clause encompasses most, or all of the interests that the due process clause protects. While I do not attempt a general definition of "property" in this article, a brief excursion is necessary to outline my argument that most, if not all, of the interests protected by the due process clause should be protected by the takings clause.

(a) *Traditional and New Property*. There is no question that the takings clause protects against uncompensated takings of tangible real property and tangible personal property.[100] The most obvious instances involve land and

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[94] *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (applying the three-part due process test).

[95] *See* Note, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541, 543-45 (1984) (noting that takings clause analysis, unlike due process clause analysis, has applied only to common law property).

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

[97] For a discussion of the relationship between takings law and tortious government conduct, see R. EPSTEIN, *supra* note 21, at 35-56. For a discussion of the interests that should be protected by the takings clause see *infra* notes 100-37 and accompanying text.

[98] U.S. CONST. amend. XIV, § 1.

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

[100] See Note, *supra* note 95, at 544-45; *see also* L. TRIBE, CONSTITUTIONAL CHOICES 169-74 (1985) (arguing that the Supreme Court has used intuitive notions of private property to establish traditional property rights under the takings clause).

chattels.[101] If the government builds a road over land that is privately owned, it has taken private property. Likewise, if the government seizes a private automobile to use for mail delivery, it has taken private property.

With regard to government torts, property is obviously involved in some of the cases. For instance, there is no doubt that the hobby kit in *Parratt v. Taylor* was property.[102] Other cases are more elusive. Personal injury cases, like *Daniels*[103] and *Davidson*[104] have been thought to implicate only liberty interests, which receive protection under the due process clause, but not the takings clause.[105]

The short doctrinal alternative to this position is that all causes of action are property.[106] A cause of action is something of value which in some circumstances may be sold; it is property for the purposes of the takings and due process clauses, first, because the holder of a cause of action has a legitimate expectation that the claim will be recognized by state law, and second, because all property is defined by the cause of action that is available to assert the property right.

This new concept of property, as those interests for which there is a cause of action, has gained popularity over the last few decades. In his landmark article, *The New Property*,[107] Professor Reich argues that government benefits—such as professional licenses, welfare benefits, and retirement insurance—should be recognized as property interests and protected by the due process and takings clauses.[108] The importance of private property, according to Reich, is that it provides a boundary against government interference with personal integrity and privacy.[109] To the extent that the

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[101] Colonial precursors to the federal constitution's takings clause protected against takings of goods and chattel only and not land. Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 752 (1985).

[102] Parratt v. Taylor, 451 U.S. 527, 536 (1981).

[103] Daniels v. Williams, 474 U.S. 327 (1986).

[104] Davidson v. Cannon, 474 U.S. 344 (1986).

[105] Further examples of government tort cases involving nontraditional property interests include Paul v. Davis, 424 U.S. 693 (1976) (defamation) and Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment of school children).

[106] *See* Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1344-45 (1988) (holding that cause of action is property); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982) (holding that dismissal of employment discrimination charge due to state commission's failure to hold a timely conference deprived appellant of a property interest protected by the due process clause); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (considering as property the right of beneficiaries of a trust fund to bring action against trustee).

[107] Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[108] *Id.*

[109] Reich's argument is premised mainly on his identification of the purpose of property law as containment "of governmental power over individuals." *Id.* at 771; *see also* Tushnet, *supra* note 16, at 985-86 (arguing that property ownership promotes "the ordered dimension of liberty" and ensures domestic tranquility).

"new property" performs the same function as the old, it too should be protected through procedural norms and compensation requirements from government encroachment.[110]

The Supreme Court has at least partially accepted Reich's reconstitution of the domain of constitutional protection of property.[111] The Court has extended due process protection to various sorts of government benefits, but only to the extent that the law creating the interest limits government discretion to recognize the right.[112] If state law (or any less formal under-

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[110] Reich's approach has been criticized as too narrow because both the recipients' needs and protection of individual liberty make protection of welfare rights important. *See* Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 26-27 (1985). Under current Supreme Court doctrine, there is no constitutionally recognized right to basic human necessities. For an argument that due process and equal protection should be read to require government provision of basic human necessities, see Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987).

[111] Many problems with the Supreme Court's current approach to property and liberty interests will not be discussed here. For a critique of the Supreme Court's reliance on state law in determining the existence of property interests, see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977). Monaghan argues that the significance of the interest, not the statutory language of the state-law entitlement, should be the key to determining whether due process protections should be invoked. *Id.* at 439-42.

[112] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 600-03 (1972) (acknowledging that a property interest in continued state employment exists where state created expectation that firing would be only for cause). This is described as a positivist definition of property because the existence of property depends on some aspect of positive law, i.e. law enacted by government.

Under the Court's due process regime, a hearing is only required if the plaintiff can establish the existence of an entitlement: no entitlement, no hearing. Professor Rubin criticizes the Court's all-or-nothing approach to the hearing requirement on the ground that it is insensitive to reasons for holding hearings. He favors an approach that allows courts to determine, independent of the formal question of the existence of property, whether a hearing would be a good idea:

> To be sure, translating questions about the scope of administrative discretion into discussions of the terms "liberty" and "property" as the Court has done, achieves a certain linguistic economy. It takes a necessary concept with no direct textual reference, and attaches it to a phrase in the text with no other obvious function. But while that seems convenient, it does not work; the phrase and the concept are really unrelated, and one distorts the other . . . . The phrase "life, liberty, or property" . . . provides us with no content for analyzing particular actions . . . .
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> Although the conceptual framework of the post-*Roth* cases is unworkable, the issues that the Court has confronted in these cases are real . . . . When magic solutions based on invocations of the terms "liberty" and "property" are abandoned, it becomes clear that the answer depends on one's views about a variety of issues: the proper role of constitutional courts, the proper balance

standing with the state[113]) does not limit the state's discretion to withdraw the benefit, then the interest is not recognized as property regardless of the importance of the private interest in continuation of the benefit.[114]

The Court has not adopted the concept of "new property" for takings clause purposes.[115] This dichotomy in the definition of property may lie in the Court's failure to recognize that the "new property's" positivist definition of property[116] is no different from the way traditional property comes into existence. As the Court itself has repeatedly noted, the Constitution does not itself create property interests; property interests arise from other sources, most notably from state law.[117] State law, in turn, grants property rights by granting the owner rights, such as the right to exclude others and the right to use the property for lawful purposes. These rights are granted through state tort, property, and contract law. When these rights are compromised, the owner can bring a cause of action to vindicate them. Because

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between state and federal power, the degree to which administrative agencies treat individuals unfairly, the causes of such unfairness, the significance of such unfairness, and the ability of courts to provide a cure for it.

Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1152-53 (1982).

[113] *See Perry*, 408 U.S. at 600-03 (holding that state college's informal tenure policy created constitutionally protected property interest).

[114] Reich would have the existence of property interests determined solely by reference to their importance in protecting liberty; even if government retained the power to withdraw a benefit at-will, it might be required to pay compensation:

> The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community.

Reich, *supra* note 107, at 785. The existence of property is thus insensitive to the importance of the private interest at stake. Because under current law the state's discretion, and not the liberty-protecting potential of the interest, determines whether a property right is recognized, this analysis will achieve the goal of protecting liberty in a somewhat "random" fashion. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 13 (1983). Interests important to individual liberty might not be protected because state discretion is insufficiently limited to create an interest. A more complete protection of liberty could be achieved by recognizing that all causes of action are property. Constitutional protection would thereby be extended to all legal mechanisms for protecting personal freedom, dignity, and autonomy. *See infra* notes 118-22 and accompanying text.

[115] *See* Note, *supra* note 95, at 544-45.

[116] *See supra* note 112.

[117] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

there is no constitutional or common law definition of property, the Court should recognize that the "new property" is just as deserving of takings clause protection as traditional property.

Causes of action are property under an analysis similar to that which led the Court to recognize the "new property" in the due process context.[118] A cause of action against a private party is the right to press a claim against that party and have it judged by substantive standards known as the elements of the cause of action. A party who can establish the elements of a cause of action has a property interest in using the state's adjudicatory mechanism to vindicate the rights protected by the substantive law.[119] Indeed, the existence of causes of action against parties who interfere with the enjoyment of property is the basis of the claim to property itself.[120] The legal standards under which the claim is judged set the limits to rights of possession and use of real and personal property. Having a cause of action against the government means setting legal limits on the government's ability to remove benefits or to interfere with personal integrity. The contours of causes of action are set by legal standards sufficiently clear to allow claims of entitlement under the "new property" doctrine.[121]

(b) *Liberty and Property in Causes of Action*. If one accepts that causes of action are property under the takings clause, liberty interests, insofar as they are protected by tort causes of action, should also be protected.[122] *Paul v.*

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[118] Property rights and private causes of action protect against domination of individuals by setting limits to permissible interference and coercion. Thus, under Reich's analysis, causes of action to vindicate rights against private parties should also be protected by the Constitution.

[119] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("the hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except for cause.") (citations omitted); Martinez v. California, 444 U.S. 277, 281-82 (1980) ("Arguably, [a state tort claim] is a species of 'property' protected by the Due Process Clause."); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (beneficiary's cause of action against trustee is property); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-04 (1984) (holding that trade secrets protected by common law are property protected by the fifth amendment's takings clause).

[120] The example of adverse possession illustrates this point most clearly. In adverse possession, the adverse possessor becomes the owner when the statute of limitations runs on the former owner's cause of action for trespass. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 757-64 (1984).

[121] Alternatively, a cause of action might be thought of as an entitlement to employ the state's adjudicatory machinery which can only be denied for cause, cause being the failure to establish the elements of the cause of action or to comply with reasonable procedural requirements. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[122] The federal component to the definition of "liberty" is more expansive than the federal component to the definition of property. For example, a state could not justify

Davis[123] provides a good example of this point. In *Paul*, the plaintiff claimed that he had been defamed by a government official. State substantive law protected the plaintiff's reputation by establishing the elements of a cause of action for defamation. Under the "new property" doctrine, then, the plaintiff would have a property interest in the cause of action to protect his reputation. This analysis applies to traditional liberty interests, such as freedom from physical restraint,[124] and contemporary liberty doctrine, such as the right to be free from stigmatizing defamation.[125] Whether a liberty interest exists is thus determined by deciding whether similar activity by a private party would create a cause of action in tort. Tort causes of action prescribe limits to both private and government infringement of private interests and thus are analogous to actions to vindicate rights in traditional property and in "new property." By protecting private interests in causes of action, "property" under the takings clause encompasses both "property" and "liberty" under the due process clause.[126]

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arbitrary imprisonment of individuals by eliminating the tort of false imprisonment without running afoul of constitutional protections. There is also a federal element to the definition of property, but it is not articulated in the cases. *See* Monaghan, *supra* note 111, at 440 (arguing that the sufficiency of a claim of entitlement must be determined by reference to federal law); Rubin, *supra* note 112, at 1078 ("[T]he existence of such a legitimate claim is a federal question to be determined by an independent reading of the statute."). The difference between the two is that liberty interests can sometimes be determined solely by reference to federal law, while property interests must be identified, at least in part, with state law.

[123] 424 U.S. 693 (1976).

[124] *See* Ingraham v. Wright, 430 U.S. 651, 673-74 (1977) (applying analysis to protection from corporal punishment).

[125] *Cf.* Paul v. Davis, 424 U.S. 693, 701-10 (1976) (holding that, although defamation by itself did not constitute a deprivation of a liberty interest, defamation which resulted in loss of other liberty or property interests did). For a critique of *Paul*, see Monaghan, *supra* note 111, at 423-29.

[126] This apparent congruence between liberty and property for takings clause purposes is faithful to the textual differentiation between liberty and property in the due process clause. Some federally recognized liberty interests are not protected by state tort law. In these cases, the distinction between liberty and property remains important. However, in many cases the distinction between liberty and property is unimportant and not specifically demarcated. Under the new property analysis, many interests may be characterized as either liberty or property because their existence is determined under identical analyses, i.e. by looking to whether state law creates an entitlement to the interest. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7-16 (1979) (applying *Roth* analysis to determine whether liberty interest attaches to parole); Meachum v. Fano, 427 U.S. 215, 223-25 (1976) (applying same analysis to determine whether liberty interest exists regarding transfer from medium to maximum security prison). However, in other situations, liberty is defined without reference to state law. *See* Ingraham v. Wright, 430 U.S. 651, 672-74 (1977) (liberty interest exists in freedom from physical restraint and corporal punishment regardless

(c) *Immunities and the Existence of Property.* One could argue that immunities, both sovereign and official, are state substantive provisions that limit ownership of property. In other words, no one "owns" property to the extent that it might be damaged by immune officials or an immune state, and therefore there is no cause of action.[127] This objection is answerable. Immunities should not be treated as substantive limitations on the existence of property interests for reasons that lie at the heart of the takings clause. Rejection of my argument here entails rejection of the takings clause as a viable limitation on state power to impose the costs of government inequitably.

It would be fundamentally at odds with the principles underlying the takings clause to allow states to condition entitlements on the right to destroy the entitlement. While states have substantial freedom to decide whether to create substantive rights such as ownership rights, takings clause principles must limit the states' ability to build into all entitlements the power to trump substantive law. Without this limitation, states could avoid the proscriptions of the takings clause altogether simply by passing statutes making themselves immune from all tort and contract actions.[128] If states

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of relevant state law). Interests in cases like *Greenholtz* and *Meachum* are called "liberty" because they look more like federally defined liberty interests. In principle, however, there is no difference between state-created property and liberty interests. For example, it is not self-evident that employment, protected under the *Roth* analysis, should be characterized as property rather than liberty.

For takings purposes, state-created property and liberty interests are protected under the "new property" doctrine. Federally created liberty interests are not protected unless state law also grants a cause of action for protection of that interest. Thus, property and liberty in the due process clause are not coterminous under the "new property" analysis.

[127] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (acknowledging that immunities arguably limit the scope of plaintiffs' property rights); Martinez v. California, 444 U.S. 277, 282 n.5 (1980) ("It is arguable . . . that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest.").

An example clarifies the arguments that immunities limit the scope of property. Consider individual ownership of a car. An individual is said to own an automobile because the individual has the right to exclude others from using the automobile, and a right to collect compensation from a person who negligently damages it. It could be argued that if state officials or the state is immune from suit, the individual's ownership rights are limited by the immunity—in other words, the individual does not have a property right in the automobile as against an immune tortfeasor.

[128] Admittedly, the state is restrained from redefining common law rights in this way by the possibility that the change from the common law would amount to a taking against the owners at the time the change in common law was made. However, unless the courts recognize that state invasions of common law rights are takings, there is no objection in principle to the state changing the common law in its favor.

were allowed to build immunities into the definition of property, then *no* takings claim could ever succeed without the state's consent. The state could decide, for instance, that all property, as a matter of common law, is subject to an easement for roadways. The owner of the property would have no recourse via the takings clause because the owner did not actually own the right to exclude users of the easement and thus no property interest was taken. Reading limitations on the enjoyment of property in favor of the state into the question whether property exists in the first place would thus allow states to subvert the operation of the takings clause.[129]

Immunities may be more properly described as procedural—not substantive—limitations on a litigant's property rights. Consequently, immunities should not bar a takings claim. This classification is not obvious, owing in large part to the murkiness of the line the Court draws between procedural and substantive limitations. At the extreme of the procedural end lie defenses such as statutes of limitations and statutes of repose. At the extreme of the substantive end are claims such as contributory negligence, which limit the scope of the property right. Immunities fall somewhere in the middle.[130] Immunities, though, should be thought of as procedural lim-

[129] To some extent, states are able to prevent some interests from becoming property by shaping substantive law so that it does not create a legitimate expectation of an entitlement. *See supra* note 50. However, the state cannot completely avoid creating property interests by formally declaring in its substantive law that individuals have no entitlement. The Court has recognized that the state may, through actions and policies less formal than actual law, create expectations that should be recognized as property interests. *See* Perry v. Sindermann, 408 U.S. 593, 600-03 (1972). This injects a federal element to the definition of property—albeit a narrow one—which is designed to avoid the injustice that could result if states could defeat property claims with technicalities of state law that have not been honored in practice. *See* Monaghan, *supra* note 111, at 440 (arguing that claim of entitlement must be evaluated under federal law).

Because the Supreme Court refuses to recognize that all property interests, not just the "new property," are established by state law, it has not analyzed traditional property claims under the legitimate expectations approach. For example, in Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988), the Court held that private property owners did not own tidal lands despite the fact that they "had long been the record title holders [and had] long paid taxes on these lands[.]" *Id.* at 799. The Court held that whether these facts would transfer ownership from the state to the claimants was a matter of state law. *Id.* Mississippi claimed ownership of the land under the public trust doctrine. *Id.* at 793. The Court agreed with Mississippi and held that ownership of the tidal land was transferred to the state from the federal government when Mississippi had been admitted to the Union. *Id.* at 793-95. Viewed under the legitimate expectations analysis of *Perry*, the ownership claims of the private land owners would have been much stronger.

[130] Justice Stevens, in his concurrence in *Daniels* and *Davidson*, lumped together immunities, statutes of limitations, and defenses of contributory negligence as permissible defenses to § 1983 actions so long as they are not fundamentally unfair. *Daniels*, 474 U.S. 327, 342-43 (1986) (Stevens, J., concurring in the judgment).

itations because they are not connected to the plaintiff's ownership of the property or the plaintiff's conduct in the world but instead are linked to factors that arise only in the context of a suit against the government official.[131] Following this reasoning, immunities, like statutes of limitations, limit the enforcement of the property right, not the property right's actual scope.

The only way to save the takings clause from extinction while simultaneously allowing the immunities to function as limitations on the property interests is to maintain what I believe is the untenable distinction between traditional property and the "new property," and then allow immunities to limit only claims of entitlement to the "new property." This would preserve the operation of the takings clause against state destruction of traditional property. The problem with this tactic is that there is no logically coherent way to distinguish between traditional and new property. All property interests are created by the combination of state law and the expectations created by state law and practice.[132]

The creation of property interests, as noted above,[133] depends largely on the legitimate expectations of the parties, most often on the expectation that they will be compensated for torts committed by the government. While these expectations may not be unilateral on the claimant's behalf,[134] it is not necessary that the claimant's expectations comport exactly with state law. Expectations may be reasonable even if they conflict with state law in two situations: informal state practice contrary to the strict requirements of state law may create property interests,[135] and state procedural law which would

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[131] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In *Logan*, state law required that a hearing on the plaintiff's employment discrimination claim be held within 120 days or the claim would be extinguished. The Illinois Supreme Court held that the 120 day rule was a substantive limitation on the right to bring a private employment discrimination claim and that the passing of 120 days without a hearing extinguished the claim. The United States Supreme Court reversed on the ground that the elements of the cause of action for employment discrimination created an entitlement and that the 120 day rule was a procedural limitation that was inadequate under due process. *See id.* at 431-38. The state's characterization of the 120 day rule as substantive was irrelevant to its classification for federal due process purposes. *Id.*

[132] Perry v. Sindermann, 408 U.S. 593, 600-03 (1972) (holding that the absence of specific provisions concerning discharge of teacher for cause did not foreclose the possibility that the teacher had a property interest in continued employment).

[133] *See supra* note 117 and accompanying text.

[134] To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[135] *See Perry*, 408 U.S. at 600-03 (holding that state college's informal tenure system created a property interest protected by the fourteenth amendment).

preclude assertion of the entitlement has been held not to bar the existence of a property right.[136]

There is an obviously normative element to the analysis of reasonable expectations. Claims of entitlement should be analyzed in light of the taking clause's fairness concern that the costs of government be socialized and not unfairly borne by a few individuals. Reasonable expectations analysis is not a factual matter that can be proved or disproved by a survey, even though the expectations of the "owners" are of primary importance. Immunities should not be held to limit property interests. People expect the state to compensate its tort victims and that individuals should not be forced to bear the cost of government.

This does not mean that the state cannot ever diminish the value of private property without paying compensation. To the contrary, states have substantial power to advance the public interest by regulating the use of private property, even if such regulation diminishes the value of the property.[137] The line between permissible regulation and takings is not a bright one, and there is no logical way to make the distinction. But the demand for logic would doom all law, and if the burdens placed on the victim of the government tort should, as a matter of fairness, be borne by the entire community and not by the individual, then the immunities should not bar the operation of the takings clause. Furthermore, the question of whether regulations granting immunities go too far is a question of whether there has been a taking, not whether property exists.

2. Defining a Taking

A taking of property occurs when the state interferes with property rights either by occupying or damaging the property or by regulating the use of the property to an extent that is beyond what federal law permits without compensation.[138] Cases arising under the first half of this definition are usually easy ones, such as when the state requires property owners to make an easement across their properties to increase use of nearby public prop-

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[136] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-38 (1982) (holding that 120 day period for agency to hold hearing under state antidiscrimination law deprived petitioner of property right without due process when failure to hold hearing was agency's fault); *see also* Goss v. Lopez, 419 U.S. 565, 573-74 (1975) (holding that entitlement to public education cannot be revoked without fair procedures required by due process).

[137] Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law . . . and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977).

[138] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

erty.[139] The second half of this definition is circular, and the real difficulties in takings law begin when the courts attempt to decide whether regulation has passed beyond the boundaries of federal law and is therefore a taking.[140] Tortious interference by the state with any legally protected interest should be considered a taking. Immunities should not be allowed to stand in the way of compensation.

To understand why all uncompensated torts committed by the state and state officials who are immune from suit are takings, it is important to clarify what the state has done in committing the tort. A state official has committed an act that would be tortious if done by a private party, and the conduct has injured someone's person or property.[141] The state then responded to the claim for damages from the private individual by granting immunity to itself (sovereign immunity) and its official. In takings terms, the tort may be characterized as the taking—either of traditional property damaged or destroyed or of the legitimate expectation that the state will respect legally protected interests[142]—and the defendant's assertion of the immunity or its

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[139] "Had [the state] simply required [property owners] to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach . . . we have no doubt there would have been a taking." Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987). Likewise, accidental destruction of traditional property has long been considered a taking of property requiring compensation. *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176-81 (1872) (holding that state unconstitutionally took plaintiff's property without compensation when it built a dam that caused flooding and destruction of plaintiff's property); *see also* R. EPSTEIN, *supra* note 21, at 38 ("The eminent domain clause must apply whether government takes or destroys property").

[140] For example, zoning regulation and landmark designation, which preclude development of property to its full physical and economic potential, often present difficult takings issues. *See Penn Cent. Transp. Co.*, 438 U.S. at 123-28 (holding that designation of building as a landmark, although it restricted exploitation of the property, did not constitute a taking). But the inquiry into what constitutes a taking is often motivated by a concern for the values underlying the takings clause. These values derive from the concern that the costs of government not be shifted unfairly from the many onto the few:

> [The just compensation clause] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different than which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893); *accord* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1256 (1987) (Rehnquist, J., dissenting); Armstrong v. United States, 364 U.S. 40, 49 (1960).

[141] I am assuming that the act was committed in the course of state activity so that the conduct would be considered state action.

[142] This distinction is unimportant for takings clause purposes. If, however, this analysis were applied to the "deprivation" part of a due process claim, how one

acceptance by the court as a refusal to compensate.[143]

Focusing on the tort makes the taking look like a random and unauthorized act, and not an act of the state. In due process cases, the Court has shown an unwillingness to subject the random and unauthorized torts of individual officials to constitutional scrutiny.[144] Likewise, the Court may be unwilling to subject random and unauthorized torts of individual officers to takings clause scrutiny. If negligence is not a deprivation of a protected interest under the due process clause, the Court could argue, a negligent act is not a taking for just compensation purposes.[145] But such an argument mischaracterizes the notion of a taking. The state grant of the immunity defense to itself and its officials should be viewed as a component of the taking. A taking occurs not merely because a tort is committed, but because it is committed with impunity.

The immunities are not random occurrences; they are granted to advance government policies. There is a substantial body of literature that explains sovereign and official immunity in policy terms.[146] Sovereign immunity protects state policymaking from the harmful effects of judicial second guessing; official immunity ensures that individual officials' formulation and execution of policies that might cause injuries to private parties will not be chilled by the threat of litigation and damage awards. These policies are advanced at the expense of individual victims of government torts. The special treatment

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characterizes the tort would be important because the tortfeasor's state of mind when damaging or destroying property may differ from the tortfeasor's state of mind when the tortfeasor denies the legitimate expectation that the state will respect legally protected interests.

[143] The victim's federal takings claim does not arise until after both the taking and the refusal to compensate. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985) (dismissing plaintiff's takings claim on ripeness grounds because the state government had not reached a final decision regarding application of the regulations in question, and because plaintiff did not seek compensation through state-prescribed procedures).

[144] *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (prison official's negligence in leaving pillow on staircase); Davidson v. Cannon, 474 U.S. 344 (1986) (prison official's negligence in failing to protect inmate from other inmates).

[145] One could argue that a random and unauthorized tort of a state official is not an "abuse of government power" and the Constitution therefore should not be read to address such torts. *Cf.* Daniels v. Williams, 474 U.S. 327 (1986) (holding that prison official's negligence in leaving a pillow on a staircase which resulted in plaintiff's injury did not constitute a constitutional deprivation). If the focus is on the denial of compensation rather than on the tortious conduct, then randomness should not be a problem.

[146] *See, e.g.*, P. SCHUCK, *supra* note 11; Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 806-08 (1982) (explaining importance of protecting officials from the threat of lawsuits).

that government takes for itself by exempting itself and its employees from tort liability is a deliberate policy choice of the government and should be subject to scrutiny under the takings clause when property is damaged or destroyed.

There are two different theories under which destruction of nontraditional property constitutes a taking. First, because individuals have property interests in nontraditional property, tortious government activity takes that property when it damages it or destroys it.[147] Second, official tort plaintiffs have property interests in their causes of action. Such causes of action entitle the plaintiff to a hearing on the merits of the claim and to a remedy if the elements of the claim are made out. These property interests are taken when the government or government official asserts the immunity and the immunity is accepted by the courts.

Because the second takings theory involves intangible property and (obviously) nonphysical destruction of that property, the Supreme Court would probably apply the analysis it uses in regulatory takings cases to determine whether the immunities constitute a taking.[148] The Court applies a regulatory takings analysis to determine whether regulation of property restricts the owners rights so much that, in effect, the property has been taken by the government. The Court does not have a clearly defined test for determining whether regulation effects a taking, but it does rely on a consideration of three factors: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' "[149] In addition to these factors, the Court sometimes considers the more abstract question whether fairness requires that the political community as a whole bear the costs of the regulation and that the costs not be placed on individual property holders.[150]

The first two factors are ill-suited to the government tort problem because they are designed to answer the takings question involving regulation of economic or business property, not personal property. But nothing in the takings clause indicates that the just compensation requirement applies only

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[147] *Cf.* Perry v. Sindermann, 408 U.S. 593 (1972), where the Court held that, because plaintiff's reputation would have been damaged had the regents of the state college failed to renew his employment contract, and because the state arguably had established a de facto tenure policy, plaintiff could sue for a deprivation of property under the due process clause.

[148] *See* Hodel v. Irving, 107 S. Ct. 2076, 2081-84 (1987) (applying regulatory takings analysis to federal statute prohibiting passing, at death, of certain property owned by Native Americans).

[149] Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[150] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

to business property. Personal interests should be protected as well. The factors have been fine-tuned somewhat to determine whether personal property has been taken.[151]

These factors indicate that the relatively small economic impact of many official torts would weigh against a finding of a taking. In the official tort area, however, the nature of the injury, and not the individualized economic effect of that injury, should lead to the conclusion that official torts are takings because official torts as a class can have a substantial economic effect. In cases in which government action has had a small effect on the individual victim, the Court has considered the potential economic impact on the class of interests affected in its determination of whether a taking has occurred.[152] Even without substantial economic effect, government torts should be considered takings because takings norms apply equally to valuable and less valuable property interests.[153]

The second factor considered by the Court, the extent to which regulation disturbs investment-backed expectations, is also important to determining whether a taking has occurred. But the fact that certain property is not held for investment purposes should not weigh against a finding that the property has been taken. Although a narrow, straightforward application of this test might indicate that noninvestment property deserves less takings protection than investment property, noninvestment property deserves takings protection as much as, if not more than, business property.[154] Protecting investment-backed expectations should be viewed as analogous to the due process test for determining whether a property interest exists. Under both the investment-backed test and due process, the Court looks to whether there is some basis for determining that government assurances, in the form of pretaking regulation, have given the private party a reasonable expectation that the personal or investment use of the property will be allowed.

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[151] *See* Bowen v. Gilliard, 107 S. Ct. 3008, 3020-21 (1987) (replacing interference with economic "investment-backed expectations" factor with interference with "vested protectable interest" as test for determining whether a taking has occurred).

[152] *See* Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987) (considering impact of federal statute on land owners in general as well as on plaintiffs).

[153] *See Penn Cent. Transp. Co.*, 438 U.S. at 131 (1978) (rejecting appellant's argument that a city law effects a taking solely when property value has been significantly diminished); *see also* L. TRIBE, *supra* note 100, at 178-79 (criticizing Court's ad hoc and anachronistic approach in determining whether property has been taken within the meaning of the fifth amendment).

[154] See Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 179 (1983). Judson argues that the Constitution protects noneconomic interests as well as economic interests, and that personal property safeguards the liberty of private individuals so that they may pursue happiness and participate in the political system. *Id.* at 216-18.

Moreover, the Court has recognized that some property not held for investment nevertheless should be protected under the investment-backed expectations factor if the private party has a reasonable expectation that the property interest will not be disturbed by regulation. In the recent case of *Bowen v. Gilliard*,[155] the plaintiff claimed that her property interest in welfare and child support benefits had been taken without just compensation. In the course of denying that property had been taken, the Court substituted, as the second factor in the takings test, the inquiry whether the child had a "vested protectable interest" in continued support payments.[156] In doing so, the Court recognized that, in nonbusiness settings, this factor should look to whether and to what degree property interests—and not merely unilateral expectations—are disrupted by government regulation.[157]

When an official commits a tort, the victim's legitimate expectations, created and protected by tort law, are disturbed. Private parties have "vested protectable interests" in their personal property and in causes of action to vindicate damage to their reputations and other personal interests that can be injured by official torts. The immunities destroy these vested interests without compensation. This factor weighs in favor of finding a taking.

The objection might be made that no "vested protectable interests" are implicated by official torts because the immunities themselves, as part of state law, should be understood to destroy any legitimate expectation that compensation will be granted. Private parties, the argument goes, do not have security under state law from government invasion of personal interests such as personal property and reputation. But, as previously discussed, property interests are not limited by the immunities,[158] and neither should the vested interests protected under the takings clause. Moreover, this argument—that state law itself restricts the application of the takings clause to official torts, by essentially incorporating official immunities into the definition of property for takings clause purposes—cannot coexist with takings clause principles. Sovereign and official immunities must be overruled by the takings clause.[159] The takings clause requires states to compensate private parties for property taken, and states cannot avoid the operation of the takings clause by redefining property to include the possibility of government destruction.[160] If one conceives of property rights as sticks in a

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[155] 107 S. Ct. 3008 (1987).

[156] *Id.* at 3020.

[157] *Id.* at 3020-21.

[158] *See supra* notes 100-37 and accompanying text.

[159] *Cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386 n.9 (1987) ("[I]t is the Constitution that dictates the remedy for interference with property rights that amounts to a taking.").

[160] Property interests are formed by expectations created by understandings with the state, either through law or some other, less formal, understanding. *See supra* notes 106-17 and accompanying text. Procedural limitations on enforcement of prop-

legal bundle of rights, when the state redefines property it removes some of these sticks.[161] The takings clause does not prevent states from removing sticks altogether. Rather, it establishes that if too many are removed, or if those removed are too important, a taking has occurred, and the owner must be compensated.

The final factor considered in regulatory takings cases—the character of the government action—also points toward finding a taking in the case of government torts. In tort cases involving destruction of traditional property, the government action completely destroys property interests. In cases of property damage not resulting in complete destruction, property damage has been equated with destruction for takings purposes.[162] Personal interests, like the interest in one's reputation, should be treated similarly. When government tortiously injures these personal interests and then refuses to compensate, it is turning its enormous power on private parties who are completely defenseless because the government has exempted itself from the mandates of its own legal system.[163] This use of unbridled force against

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erty interests do not limit those interests because they are not part of private parties' understanding of the contours of their rights. Similarly, people expect that they own their personal property and that they have a sphere of personal sanctity. It would be surprising if people expected that their personal property and security were always at risk from invasion by government without possibility of compensation. That these expectations are not fully consistent with law is not a fatal objection, because the expectations that give rise to property interests can be created with less formal understandings. *See* Perry v. Sindermann, 408 U.S. 593, 601-03 (1972) (holding that state college's informal tenure process created a property interest for due process purposes). This is analogous to the reliance doctrine in contract law: promises are made enforceable due to the reasonable expectations of the promisee even though under traditional consideration requirements no enforceable contract was made.

[161] *See* Hodel v. Irving, 107 S. Ct. 2076, 2083-84 (1987) (applying analogy of rights as a bundle of sticks, and concluding that regulation that abrogates property owners' right to transfer property through testamentary disposition without providing compensation is an unconstitutional taking).

[162] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386-87 (1987) (affirming the holding in Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872), that property damage that does not result in total destruction of the property still constitutes a taking).

[163] One could argue that the character of the government action, at least in negligence cases, is not an abuse of government power and therefore not a matter for federal concern under Daniels v. Williams, 474 U.S. 327 (1986). It is important here to analyze the refusal to compensate, and not the tortious conduct itself, to determine whether a taking occurred. *See infra* notes 190-99 and accompanying text for a discussion of whether the refusal to compensate should be considered an abuse of government power.

individuals motivates the prohibition against takings without compensation.[164]

The Supreme Court has also indicated that assessing the character of the government action incorporates the general fairness inquiry of whether the government action unfairly burdens a small class of individuals for the benefit of the community.[165] Official torts should be viewed as a situation in which the interests of a few are unfairly sacrificed to the general good because the policies behind sovereign and official immunities are attuned to greater government efficiency. Insofar as sovereign immunity makes government cheaper to operate by allowing government to expend fewer resources for safeguards against tortious injuries to private parties, the immunity obviously disadvantages victims for the community's sake.[166] But even the official immunities act similarly, because they are based on a policy of preventing the "fear of personal monetary liability and harassing litigation

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[164] *See* First English Evangelical Lutheran Church v. Los Angeles, 107 S. Ct. 2378, 2389 (1987) ("[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them."); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 889 (Fed. Cir. 1983) (stating that the purpose and function of the takings clause is to secure citizens against governmental expropriation, and to guarantee just compensation for the property taken); *see also supra* note 140.

[165] See Bowen v. Gilliard, 107 S. Ct. 3008, 3021 (1987) (holding that federal statute does not force " 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' ") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[166] I do not mean to imply that whenever an individual's property is regulated and its value substantially reduced, a court should find a taking. There are many well established situations in which government regulation may reduce the value of property without incurring takings liability. If a use of private property is a nuisance, the value of the property may be significantly reduced by regulation to abate the nuisance. Further, in a government tort situation, if the private party cannot establish the elements of the tort, or if the government has a defense, such as the negligence of the plaintiff, then no liability should attach. When government regulates the use of private property through zoning laws and the like, the factors outlined above will guide the inquiry. But ultimately, all property in our society is subject to a fair amount of regulation for the public good; and usually unless all reasonable profitable use of property is prohibited, courts will conclude that no taking has occurred. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 135-38 (1978) (holding that no taking had occurred where plaintiffs could still use the property in a manner similar to how it had always been used). Likewise, even if all profitable use had been prohibited, the regulation may be justified by the police power to protect the public health and welfare of society, and no compensation may be required. *Id.* at 125. The ad hoc takings analysis allows the courts to consider all of the relevant factors, such as the fairness of placing the burden of a policy on individuals, the threat that uncompensated takings pose to political freedom and personal liberty, and the threat to government efficiency if a regulation is deemed a taking.

[from] unduly inhibit[ing] officials in the discharge of their duties."[167] The benefits of freeing officials from this fear inure to the entire community, while the burdens fall on the unlucky tort victims. If both the government and the officials are immune, the unfortunate victims of official torts bear costs that should be borne by the community as a whole.[168]

The fairness inquiry underlying takings law is uncertain and there is no well developed theory to distinguish between permissible reductions in value and regulation that "goes too far" amounting to a taking.[169] To some extent, the fairness issue is an intuitive assessment, with issues regarding the existence of implicit in-kind compensation[170] and the expectation that property

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[167] Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[168] This fairness inquiry is closely analogous to economic arguments that parties should not be allowed to externalize their costs. If government can place the costs of its operation on third parties, government may not be as careful as it would be if it were forced to pay damages for the harm it causes. Therefore, government services might be overproduced relative to private services subject to tort law. In some situations, however, the good from exempting government from tort law may outweigh the harm. Frank Michelman refines this point and argues that in certain situations, the state's decision not to compensate should be upheld because the decision is based on an ex ante efficiency judgment that rational property owners would agree to. Michelman, *supra* note 17, at 1219-22 (applying the Rawlsian theory of justice as fairness to questions of compensation for tort victims, and concluding that the crucial question in determining whether to compensate is which general principles maximize claimants' opportunities over a fixed time span). Michelman points out that stringent compensation requirements could put cost-effective projects at risk and that property owners will agree to forgo short-run compensation in anticipation of the long-term benefits of the project. This is a powerful argument in support of immunizing a certain amount of regulation like zoning from takings attack. However, the argument ignores the counterargument that society as a whole can foresee long-term benefits as well as the individual can, and could therefore pay compensation and complete the project. If justified compensation demands were greater than the benefits of a project, so that the state would rather scrap the project than pay compensation, the project would not be cost-effective in the first place. Because costs would exceed the benefits, only the noncompensation decision would allow the project to go forward, allowing the government to redistribute the costs to the disadvantage of a few individuals. Ultimately, the inquiry returns to the basic question whether fairness should require society, rather than the individual, to bear the cost of the tortious conduct.

[169] *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973) (suggesting that, due to the paucity of theoretical elements available for deciding takings claims, each takings claim must be decided on its own individual facts).

[170] The existence of implicit in-kind compensation has been recognized as a factor weighing against finding a taking. *See* R. EPSTEIN, *supra* note 21, at 195-215 (arguing that to measure the impact of the taking, one must consider not only whether there was a taking, but if the restrictions imposed by the legislation upon the rights of others serve as compensation for the property taken).

was subject to regulation all along[171] justifying one's conclusion whether a taking has occurred. It would be difficult to justify noncompensation for official torts if the existence of implicit in-kind compensation and the existence of extensive regulation were the only factors, because official tort victims do not receive implicit compensation[172] and because official tort victims are not forewarned by extensive regulation that their property might be damaged or destroyed without compensation.

Unlike victims of regulation, however, tort victims are also more likely to have suffered injuries that affect their personhood and personal dignity.[173] Physical injuries inflicted by state officials, unlike devaluation of property through regulation, implicate the essence of personal sanctity. Indeed, government interference with personal rights and small scale property interests may be greater threats to personal dignity than interference with investment property because interference with investment type property is not as likely to threaten a person's identity or ability to exist as an independent entity.[174]

3. Defining Public Use

The takings clause requires compensation when "private property [is]

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[171] Parties who buy property knowing it is subject to extensive regulation are said to have "assumed the risk" of further regulation that might diminish the value of the property. *See id.* at 154-58 (arguing that notice by the state should mitigate damages, but not provide an absolute defense, in a takings claim against the state).

[172] The only compensation that official tort victims receive is the benefit of cheaper government, because government can operate under a lower standard of care and save money that would otherwise be spent on damages awards. This is not adequate implicit compensation because it will exist every time government regulation is challenged as a taking. Implicit compensation exists only where some benefit unrelated to the saving of government money exists, such as improvement of the environment.

[173] *See* Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Professor Radin's analysis calls for greater protection of property interests that are closely linked with personhood and lesser protection of more fungible interests such as investment property. *Id.* Although Professor Radin recognizes that accidents will affect such property, compensation requirements should, as much as possible, attempt to help a person recapture these interests. Professor Baker similarly discusses personhood and property, but his concern is that protection of personhood interests would prove detrimental to government's ability to function effectively. *See* Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 746 (1986) (arguing that the personhood function of property requires protection of specifically defined, unique objects or spaces, and implying that this would result in a more extensive legal support system). Baker thinks that property related to the exercise of other liberties deserves the most protection. *Id.* at 775-85.

[174] I recognize that the distinction between personhood property and other property is unclear. For example, it is difficult to ascertain whether a five unit apartment

taken for public use . . . ."[175] One could argue that destroyed property is put to no public use and therefore compensation is not required. This argument is strange because it converts a provision that appears to protect individuals from government into a license for government to ignore individual interests altogether. The public use requirement exists mainly as a limitation on the appropriate uses of the eminent domain power.[176] The public use requirement may thus be used as a defense to a proposed taking; government should not be able to avoid the compensation requirement by arguing that there is no public use.

In any event, the government's refusal to compensate parties for destroyed property should be deemed a public use. Such destruction has long been considered a taking reached by the takings clause.[177] As discussed

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building in which the landlord lives is personhood or investment property. Likewise, the division between the effects of interference with the two sorts of property is not likely to be perfect. There will also be instances in which people will have their personal dignity bound up in the future of an investment project. When government regulation destroys the viability of the project, for example, by zoning a proposed industrial park for residential use, property owners might perceive the regulation as a serious intrusion on their personhood. It is also conceivable that injuries will be compensated in situations where personal dignity is not threatened and when the injured party's financial resources are only minimally affected.

These criticisms inspire us to consider the inequalities that often occur due to government regulation and the individualist manner in which we approach questions regarding property ownership. No regime will be perfect, but as a practical matter, concentrating on compensation for personal injuries and other property damage in tort situations is one way to ensure that some important interests are protected. Another reason for preferring a constitutionally imposed compensation requirement for torts instead of inverse condemnation and other regulatory takings is that the group of tort victims is unlikely to be able to organize into an interest group that can gain protection through the political process. Property developers, by contrast, should be better able to protect their interests through the political process. In any event, this ad hoc takings analysis allows the federal courts to take into account all relevant factors, and the differences in nature between personal and investment property are important.

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

[176] Government may take property only if it intends to put that property to a public use. *Id.* This standard is not very difficult to meet. It is similar to the general due process requirement that regulation must be rationally related to a legitimate state interest. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) ("[T]he Court . . . will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' ") (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

[177] *See* Pumpelly v. Green Bay Co., 180 U.S. (13 Wall.) 166, 177-78 (1872) (dam built by state which resulted in flooding and destruction of plaintiff's property held to be a taking).

above, the government chooses its level of care knowing that injuries will occur in the course of its programs. Government takes the costs of liability into account when planning programs.[178] By immunizing its officials, the government protects its coffers, thereby advancing the government interest in official decisionmaking unfettered by fears of liability. In fact, it is hard to imagine a private purpose for a government decision to deny tort claims against government or its officials.[179]

4. Defining Just Compensation

The takings clause requires that just compensation be paid for property taken or destroyed by the government.[180] Numerous cases address the adequacy of compensation; the controversies by and large concern methods of valuation.[181] One could argue that "just compensation" means no compensation in tort situations. Living in society entails the risk of suffering certain noncompensable injuries and compensation for all injuries inflicted by government is too unrealistic. But even if one accepts this argument in some situations, the fairness principles underlying the takings clause make it appropriate to measure the range of noncompensable injuries by the limits of the generally applicable tort law.[182] Thus, although the state should not be required to compensate for all injuries, it should compensate for injuries that involve recognized torts.[183]

Damage awards in many federal claims follow traditional tort doctrine. The Court has consistently held that traditional tort measures apply in § 1983 actions.[184] In a recent § 1983 case, the Court refused to award damages for "the abstract 'importance' of a constitutional right" separate from any more traditionally recognized item of damage.[185] Tort damages should be applied

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[178] *See supra* note 84.

[179] Protecting the public purse from tort claims is obviously a public purpose, and protecting government officials from damages, while advancing the officials' private economic interests, also advances the policies underlying official immunities. *See supra* note 146 and accompanying text.

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

[181] *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24 (1985) (holding that fair market value, and not replacement cost, is the measure of compensation for condemned public facility).

[182] *See supra* notes 165-72 and accompanying text.

[183] Epstein argues that strict liability should apply against the government for destruction of private property. R. EPSTEIN, *supra* note 21, at 39-41. This argument is part of his larger theory that strict liability is morally preferable to a negligence standard. *See id.* at 40; Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

[184] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 257-59 (1978).

[185] *See* Memphis Community School Dist. v. Stachura, 477 U.S. 299, 309-10 (1986); *see also Carey*, 435 U.S. at 247 (rejecting damages for the abstract value of

in takings cases. In takings situations, the aim of the constitutional provision is to protect property interests from government. Because tort damages are the device through which property interests are protected generally, it follows that courts should apply traditional tort measures of damages to takings.

This does not mean that there is no room for federal supervision over state court damages decisions. Federal courts could deem state damage awards insufficient to satisfy the "just compensation" standard. This reasoning could apply even in purely private litigation over tortious damage to property. In a private tort case, the due process clause requires that victims have an opportunity to redress the injury.[186] This requirement includes a remedy

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due process rights). The Supreme Court in *Stachura* refused to limit *Carey* to due process cases and award damages for the value of first amendment rights. *Stachura*, 477 U.S. at 309-10.

One problem with the rule denying "abstract" damages is that the threat of a civil rights action creates no deterrent effect in situations where unlawful conduct is unlikely to cause damages. The threat of an injunction, which could serve as the basis for an award in punitive damages cases, is very slight after the Court's decision in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), in which the Supreme Court held that most victims of state torts do not have standing to seek an injunction against future tortious conduct. The refusal to grant damages for constitutional violations removes the incentive for victims of many due process violations to sue the official who violated their rights. For example, a government employee with an employment property interest who is fired without a hearing may be deemed to not have suffered any damages if a hearing would have resulted in the firing anyway.

One way to skirt the Supreme Court's refusal to award special damages in such cases is to allow the federal courts to order state officials to hold hearings that comport with due process and provide backpay for the period during which the plaintiff was unemployed prior to the hearing. This order would require notice, an opportunity to be heard, and an impartial adjudicator. *But see* Vail v. Board of Educ., 706 F.2d 1435, 1454 (7th Cir. 1983) (Posner, J., dissenting) (arguing that due process requires only that the body wishing to fire the government employee hear his side of the case after which it will certainly fire him anyway), *aff'd per curiam*, 466 U.S. 377 (1984) (equally divided court). The injunction would serve three purposes: first, it would vindicate the due process interest in a fair hearing; second, it would keep the federal court out of the state law decision-making process by allowing the state tribunal to decide whether the planned action, such as firing or suspension from school, is appropriate; third, it would give parties with no actual damages under a tort compensation scheme an incentive to vindicate their federal rights—the prospect of the hearing, backpay, and the attorneys' fees award predicated on the injunction would make the litigation worthwhile.

[186] *See* Parratt v. Taylor, 451 U.S. 527, 540 (1981) ("the fundamental requirement of due process is the opportunity to be heard"). Federal law governs, or at least oversees, many of the procedural aspects of purely private litigation. *See, e.g.*, Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314-18 (1950) (establishing federal standards for notice).

that, if awarded, would be adequate to compensate for the loss.[187] The takings clause's "just compensation" requirement merely makes more direct the argument for federal supervision of damages awards. Thus, federal courts could find a takings clause violation when state courts fail to provide adequate remedies in government tort cases.

B. *Federal Supervision of State Official Conduct*

Doctrinally, uncompensated government torts can be characterized as takings of private property. But, as previously noted, the Supreme Court has made two normative arguments against granting state tort victims a federal cause of action in federal court: in due process cases, the Court refuses to read the Constitution to address trivial problems;[188] and the Court will not apply the Constitution to displace state tort law with federal standards of conduct.[189] In this subsection, I address these two concerns, and provide a method for ameliorating or eliminating these concerns altogether.

1. Trivialization of the Constitution and Abuses of Power

At least since *Paul v. Davis*,[190] the Court has viewed isolated incidents of state tortious conduct as insufficiently important to invoke federal protection.[191] The Court has explained that the Constitution should be concerned only with *abuses of government power* by state officials, and not with conduct by state officials that is wrongful only because it is tortious under state law.[192]

Government official torts would not look trivial or unimportant if the Court focused on the state's refusal to compensate rather than on the

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[187] "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate." *Parratt*, 451 U.S. at 544. *Parratt* does require, however, that the state remedy must provide the possibility of complete compensation. *Id.* ("The remedies provided [by the state] could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.").

[188] *See* Daniels v. Williams, 474 U.S. 327, 332 (1986) (suggesting that finding a due process deprivation arising out of official's lack of care would trivialize the fourteenth amendment).

[189] *See id.* (holding that the fourteenth amendment is not a font of tort law to be superimposed on state tort systems).

[190] 424 U.S. 693 (1976).

[191] *See, e.g., Daniels*, 474 U.S. at 327; Davidson v. Cannon, 474 U.S. 344 (1986).

[192] Most recently, this view has appeared in the *Daniels* holding that injuries are not deprivations within the meaning of the fourteenth amendment because they are not instances of arbitrary government action or an affirmative abuse of power. *Daniels*, 474 U.S. at 331-33.

official's tortious conduct.[193] The refusal to compensate is not an isolated incident of inadvertent official conduct. It is a state policy expressed either in legislation, the common law, or even the state constitution.[194] Shifting focus from the tort itself to the refusal to compensate is appropriate because, in many cases, the taking occurs as the result of that refusal, combined with the tortious conduct.[195]

The Supreme Court should consider state government's refusal to compensate for official torts an abuse of government power for several reasons. The failure to compensate violates the notions of fairness underlying takings analysis.[196] It is unfair to force a few private parties to bear the burden of tortious damages where they are not at fault and where the benefits inure to the entire community. The whole purpose of the takings clause is to limit government's ability to unfairly shift the costs of its operation onto a few private parties. This purpose can be realized only by the socialization of the cost of torts that attend the normal operation of government.

Furthermore, not requiring states to compensate their tort victims allows the states to make general rules for proper conduct and then exempt themselves from the operation of those rules. This is an abuse of government power in a democratic society premised on limited government and government accountability.[197] Government wields enormous power, and account-

[193] In some cases, of course, the tortious conduct itself should also be viewed as an abuse of government power. For example, the Court should have considered the defamation in Paul v. Davis, 424 U.S. 693 (1976), an abuse of power because the officials in that case used the power of their offices improperly. However, in many cases, such as a simple car accident with a state employee on state business, the conduct will not appear to be an abuse of power.

[194] *See* Whitman, *supra* note 41, at 273-74 (arguing that the Court in *Daniels* and *Davidson* overlooked the fundamental question of the state's intentional decision to deny compensation to the plaintiffs). Whitman argues that the Court's official tort jurisprudence has suffered because the Court has not examined how the state system causes and reacts to government torts. *Id.* at 225-26. Whitman notes that in *Parratt*, the Court managed to employ a structural analysis by looking both at the conduct and at the compensation response of the state. *Id.* at 265-68. She laments that the "pull of the individual tort model has proved too strong, leading the Court to retreat from the structural analysis employed in *Parratt*." *Id.* at 226.

[195] *See supra* notes 144-46 and accompanying text.

[196] *See supra* notes 165-72 and accompanying text.

[197] *See* Murray & Murray, Jr., *The Unconstitutionality of Sovereign Immunity in Ohio–Last Stand for the Illegitimate King*, 18 TOLEDO L. REV. 77, 112 (1986) (citing Poindexter v. Greenhow, 114 U.S. 270, 291 (1884), for the proposition that sovereign immunity is incompatible with a democratic government). The Constitution, and government in the United States generally, is premised on the principle that government authority is founded upon the sovereignty of the people and that the law, especially the Constitution, binds government as well as the people. Sovereign immunity, and any special privilege allowing government to exempt itself from the operation of law, is inconsistent with this theory of government. *See infra* note 242 and accompanying text.

ability for injuries can serve as a significant restraint in two separate ways. First, subjecting government to tort law restrains the government's ability to exploit its necessary role as judge of its own conduct. Most litigation between government and private parties will take place in the government's own courts. Holding the government to the same rules and standards for conduct that it formulates for its citizens will thereby reduce the potential for arbitrary government action. Second, government will not be as likely to perpetuate unjust or unwise liability rules if government itself is also subject to those rules. It is illogical for government to formulate rules that presumably strike the proper policy balance for private parties, parties that may be as large and complex as state government, and then exempt itself from the operation of the rules for policy reasons. If government itself cannot live with the constraints that the liability rules place on it, then perhaps the rules should be altered. If government can exempt itself from liability rules, there will be less pressure to change rules that may be unduly oppressive and unwise.

From the point of view of the government tort victim, the refusal to compensate constitutes an abuse of power. When injuries occur through no fault of their own, people expect that the tortfeasor will pay compensation. Accordingly, if a motorist, for instance, turns out to be uninsured, or if the tortfeasor's insurance company tries to avoid liability by imposing difficult claim requirements or by delaying, victims sense that they have been cheated by the system. When the government is the tortfeasor, the likelihood that the victim will feel cheated by the judicial system increases. First, the victim will view government as an incredibly powerful organization, with a large capacity to do damage and a staggering potential for bureaucratic delay and avoidance. Moreover, victims may consider the government's refusal to pay as a betrayal of the ideal of government by law.[198] Victims will perceive that the government has put itself above the law and the reasons may appear more mean-spirited than the policy justifications given for the immunity. Victims will feel wronged because their government has failed to respect their personal integrity.[199]

The Supreme Court has very recently recognized that because defenses unique to government defendants effectively discriminate against parties with federal claims against state officials, they may be inconsistent with § 1983. *See* Felder v. Casey, 56 U.S.L.W. 4689, 4693 (U.S. June 22, 1988). In that case, the Court held that a state notice of claim statute, which required parties with claims against the state to notify the state of the claim within six months of when the claim arose, did not apply to a § 1983 action brought in state court. This case was decided too close to the time that this article went to press to allow for extensive analysis.

[198] *See supra* note 197.

[199] When rights are not respected, "the dignity of the individual is diminished and people are less able to achieve their goals. People feel insecure and they lose self-respect. . . . When denial of rights occurs systematically over time, the result is

With all these considerations in mind, it is difficult to view protection of victims of torts inflicted by government officials as anything approaching "trivial." At stake are policies ranging from the desirability of protecting individuals from governmental misconduct to the fundamental belief that people in a free country should have faith in their government and in the propriety of official conduct. Extending takings clause protection to government torts would therefore not lead to trivialization of the Constitution.

2. Federalization of State Tort Law

The Supreme Court's second normative argument is that if the fourteenth amendment is read to grant a cause of action in favor of official tort victims, the amendment will become a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[200] In some areas, most notably the law of defamation, whole areas of state law have become constitutionalized.[201] The question here is whether all of tort law in official tort cases would become federalized if the Court required states to compensate their tort victims.

The fear that the fourteenth amendment might displace state tort law is groundless.[202] The only federal issue in most cases would be whether the

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alienation, isolation, anger, and fear. In extreme cases, the result is totalitarianism or chaos." Ziegler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 679-80 (1987) (footnotes omitted).

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

[201] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (deciding scope of publisher's constitutional privilege against liability for defamation of a private citizen).

[202] The Supreme Court may be concerned less with federalization of state tort law than with the federal court caseload. Some perceive that the federal courts are overworked and that a primary cause of overload is frivolous § 1983 cases brought to redress tortious injuries. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 186-87 (1985) (suggesting that the fear that motivated federal jurisdiction over § 1983—that southern states would convict blacks for crimes they did not commit—is no longer applicable to modern southern courts). A recent study suggests that § 1983 cases have not contributed to the increased caseload more than other areas of federal jurisdiction. *See* Eisenberg & Schwab, *supra* note 23, at 693-95.

Another doctrinal area in which district court caseload concerns may be a motivating factor is the recent development of eleventh amendment jurisprudence. In Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), the Court held that the eleventh amendment prevents the federal courts from issuing injunctions against state agencies to force the agencies to follow state law. This may force cases into state court. *Cf.* Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980) (holding that the eleventh amendment has no application in state court and that state court may award damages against the state in claim based on federal law). The potential intrusion on state sovereignty seems greater in *Thiboutot* than in *Pennhurst*. In *Thiboutot*, federal law

state may treat victims of government inflicted torts differently from victims of private torts. This issue neither implicates the whole of state tort law nor does it present the possibility that federal law will displace state standards of liability generally.

Daniels v. Williams[203] provides a helpful example as to how state tort law would exist alongside the federal takings regime. In *Daniels*, a prison employee negligently left a pillow on a prison stairway and a prisoner was injured when he slipped on the pillow. Suppose that in a similar situation—a pillow left on the stairway by a hotel employee—the hotel owner and the individual employee would be liable for the injuries. Assume also that under state tort law there is a defense of contributory negligence. In deciding whether the prisoner stated a federal claim, the federal court could not disregard the state tort rules such as the liability rule or the contributory negligence defense because those rules delineate the protected interest at stake. If, under state law, the prisoner were guilty of contributory negligence, there would be no takings problem if the state did not provide compensation. However, if the state's refusal to compensate were based on an immunity enjoyed by the prison system or its employee, then the takings clause would be violated by the failure to compensate. The federal court would not overrule the state's choice of contributory negligence versus comparative negligence or any other state tort law doctrine.

Of course, if official tort cases were routinely heard in federal court, there is some chance that once the federal courts assume jurisdiction over cases, federal standards of conduct will inevitably develop.[204] If federal courts hear only cases involving official misconduct, federal courts could distinguish state tort rules based on the official nature of the § 1983 cases, resulting in a federal common law of state official liability. Thus the federal courts, to preserve the proper boundaries of federal-state power, would have to be careful not to replace state tort law with federal norms. While this sort of development theoretically could pose a substantial threat to state authority over official torts, experience with fairly extensive federal involvement in state tort administration in diversity cases shows that the injection of federal norms can be checked.[205]

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negated the state's decision, but in *Pennhurst* the federal courts were only forcing state officials to follow the commands of their own government. This suggests that district court jurisdiction may sometimes be more important than principles of federalism.

[203] 474 U.S. 327 (1986).

[204] *See* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1523 (1987) (arguing that federal courts are likely to misconstrue state law).

[205] Replacement of state tort law with federal standards may happen to some extent in the government employee due process cases. Where local law limits the discretion of the employing agency to fire the employee, a state or local government

There are many areas in which federal courts adjudicate state law issues without any apparent injection of federal values. The most immediate federal involvement in state law is in diversity cases and in cases involving pendent state law claims. Federal courts hear and decide a variety of state law issues in these contexts and there is no indication that *Erie*'s promise of state positive law authority has not been realized.[206] These cases present less of a problem than official torts because they involve only federal jurisdiction, and not substantive issues. Yet, federal due process standards apply in all cases adjudicating state tort and contract law between private parties, and there is no evidence that federal substantive norms have encroached on state authority in these cases.[207]

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employee is entitled to a hearing before being discharged. The most common form of this protection is the "for cause" limitation on firing most civil service employees. The Supreme Court has not, however, limited the reach of this doctrine to cases in which employees have an explicit contractual or statutory right to tenure. *See* Perry v. Sindermann, 408 U.S. 593 (1972). In *Perry*, the Court held that informal understandings, generated for example by a longstanding practice of discharge only for cause, are sufficient to create a constitutionally protected interest in employment which may be terminated only for cause and even then only after a hearing. *Id.* at 599-603. The Court in *Perry* referred to state law of implied contract as the source of the "legitimate expectation" of continued employment, *id.* at 601-02; but it is uncertain whether state contract law would actually recognize Perry's claim. Had the federal court disregarded state contract law and imposed its own implied contract norms in the name of procedural due process, it would make the federal court a font of common law, regulating state and local employment practices in ways contrary to the state's desire. The potential for this sort of federal activity should not doom from the outset the possibility of federal supervision of state compensation practices; rather it should merely point out that the federal courts must be sensitive to the role that state law plays in the area.

[206] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[207] In any litigation between private parties, if state law recognizes a cause of action, federal law establishes the minimum procedural opportunity the state must grant the parties to present their cases. The best example of this sort of federal supervision is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In *Mullane*, New York law granted beneficiaries of certain trusts a cause of action to challenge the accounting of the trustee. The state statute allowed notice of the settlement of the account to be by publication only, despite the fact that the trustee had the names and addresses of the beneficiaries. By settling the account, the trustee could cut off negligence and other claims against the trustee. The Supreme Court held that the cause of action was property and that notice by publication did not satisfy due process because it was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. Nothing in *Mullane* suggests that federal law tinkered with the elements of the claim against the trustee. Federal law can speak to the federal issues in a case without disturbing the state law aspects of the litigation. *Mullane* was reaffirmed recently in Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340 (1988).

In refuting the argument that federal norms would replace state liability rules, I do not mean to argue that there is no room for purely federal law regarding official conduct. Federal law governs whether a state official has violated a more specific clause of the Constitution, such as the fourth amendment's proscription of unreasonable searches and seizures. Further, while a determination whether a "taking of property" has occurred depends on whether state law has created a protected interest, substantive due process may protect interests from state deprivation that are not protected by state law. For example, assume state law allowed private parties and state officers to use deadly force against fleeing felons without considering whether the felons posed a danger to the community. An injured fleeing felon could not establish a takings claim, because no state liability rule protected the fleeing felon. But a federal court could find, under the relevant level of scrutiny, that the state rule violated substantive due process.

There is one last method of understanding the Supreme Court's fear that the Constitution would become a font of tort law. The Court might not be worried at all about federalization of state substantive law in the terms set forth above; instead, it may be concerned solely with striking a proper balance in the caseload distribution between the state and federal courts. The Court may simply think that the state tort law issues that would necessarily arise in official tort cases should not be litigated in the federal courts.[208]

This objection, however, can be easily met. It might be appropriate to leave primary enforcement of the states' obligation under the takings clause to compensate tort victims to the states themselves. In the next section, I describe a system of exhaustion of state remedies in official tort cases which will leave for federal courts only those cases in which the state refuses to waive its immunity, or cases in which there is reason to believe that the victim has not received a fair hearing. Specifically, I argue that no taking arises until after the state courts refuse to grant compensation. Thus, federal supervision would be necessary only after state tribunals have had an opportunity to redress the state injuries, and state tort law would not be litigated in federal court.

III. ENFORCING THE TAKINGS CLAUSE AGAINST STATES AND STATE OFFICIALS

Having laid out the groundwork for a federal cause of action for government torts, I now turn to the topic of enforcing the requirement that states compensate their tort victims. In this section I focus on the distribution of

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[208] As a normative matter, though, the federal courts would be much more receptive to official tort claims if they would treat the refusal to compensate, rather than the tort itself, as the cause for federal concern. *See supra* notes 193-95 and accompanying text.

jurisdiction over official tort cases between state and federal courts. I assume that federal law—that is, the takings clause—requires states to pay damages to their tort victims whenever similar conduct would give rise to damages liability in litigation between private parties.

Enforcement of federal law at the state level necessarily implicates federalism concerns. Having discussed the effects of federalism analysis on the recognition of substantive rights,[209] I now discuss how federalism affects the procedural rules necessary to implement the takings analysis at the state and federal level.

Although cases sometimes recognize that federalism entails federal supervision of state compliance with the Constitution,[210] federalism concerns are often raised to close the federal courts to constitutional claims against state officials.[211] This article works from the contrary position that federalism provides for enforcement of federal law against the states, and not federal deference to state decisions. Yet, even under this less deferential interpretation of federalism doctrine, the proposals outlined in this section provide for only minimal federal intervention into state processes. State tort law under the takings analysis would remain relatively free from federal supervision.

A. *Jurisdiction Over Official Tort Cases*

There are three possible jurisdictions over official tort cases. The cases could be heard in state court[212] (with federal review in the United States Supreme Court); in federal court without first going to state court; or in state court first, with review commencing in the federal district court after state remedies have been exhausted. In takings cases, the exhaustion model is the best alternative because it preserves the appropriate balance between federal and state power. Also, the takings clause requires some resort to state

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[209] *See supra* notes 200-08 and accompanying text.

[210] *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972).

[211] *See* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425-26 (1987) (characterizing the doctrines of sovereignty and federalism as an aegis protecting government from liability arising out of its own lawlessness). This holds true in eleventh amendment cases, *see, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99-103 (1984) (holding that the eleventh amendment jurisprudence is driven by federalism concerns), in abstention cases, *see, e.g.*, Younger v. Harris, 401 U.S. 37, 43-45 (holding that principles of "Our Federalism" preclude exercise of federal injunction against ongoing state criminal prosecution), and cases involving preclusion rules, *see, e.g.*, Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 80-85 (1984) (holding that federal court must apply state preclusion rules to determine preclusive effect of state court judgment).

[212] "State court" here refers to whatever tribunal the state designates. If the state established an administrative body for official tort cases, any such administrative remedy would be subject to federal due process standards.

remedies because takings claims are not ripe until state procedures for seeking compensation have proven fruitless.[213]

Under the exhaustion model, the state courts determine whether the defendant is liable for the plaintiff's injuries under state law, then the federal courts apply federal takings norms to the state decision. Victims of official torts should first sue in state court. If plaintiffs lose their cases in state court, they should then be allowed to sue in federal court. Federal claims would be meritorious only if plaintiffs were denied relief by the state court because of some privilege or immunity that the defendant had by virtue of the defendant's status as a government official or agency.[214] If the federal court were convinced that the state tort victim lost the case in state court because of a generally applicable limitation to liability, the federal court should dismiss the case; the federal court, however, would ensure that the plaintiff's federal right to compensation is respected.[215]

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[213] In regulatory takings cases, the Supreme Court requires some resort to state tribunals before federal takings claims may be brought in federal court, but it is unclear what state remedies must be exhausted. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-94 (1985) (holding that regulatory takings claim not ripe until administrative remedies for zoning variance are exhausted); *id.* at 194-97 (holding that takings claim not ripe until state procedures for seeking just compensation are exhausted); *see also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (holding that takings claim not ripe for first reason in *Hamilton Bank*).

The Supreme Court has analogized official tort due process cases to takings cases, writing:

> [T]he State's action is not "complete" in the sense of causing a Constitutional injury "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss." . . . Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action [in an inverse condemnation case] is not "complete" until the State fails to provide adequate compensation for the taking.

Hamilton Bank, 473 U.S. at 195 (citation and footnote omitted).

[214] Once it were established that states must compensate their tort victims, states would presumably follow the law and prohibit immunities from barring recovery. However, federal review would still be desirable to ensure that the state followed the law, and also to ensure that the damages met the just compensation standard.

[215] Federal review of state adherence to the Constitution in criminal cases increases the level of adherence to the constitutional values at stake. *Cf.* Resnik, *Tiers*, 57 So. CAL. L. REV. 837, 869-70 (1984) (arguing that in a judicial model in which one court reviews the decisions of the other, the forum under review, if it works "consistently, rationally, and impartially," will enhance norm enforcement). Having a federal district court forum for federal claims generally increases uniformity and accuracy because federal judges tend to be more expert in federal law than state judges. L. YACKLE, POSTCONVICTION REMEDIES 95 (1981). Yackle also notes that federal judges tend to be more independent than state judges and thus are better able to act in favor of federal rights when it would be unpopular to do so. *Id.*

The exhaustion model is preferable to an unlimited right to sue in federal court for a number of reasons grounded in federalism concerns. By allowing the state courts to decide the state tort law aspects of the takings cases, the exhaustion model eliminates the Supreme Court's objection that federalizing the law of official torts will wrest control of state tort law from the states. Similarly, the federal courts will be less likely to make mistakes concerning state law. State courts would thereby be allowed to develop their own tort law norms. Finally, pressure on the federal docket is relieved, for when the plaintiff in state court is successful, no federal claim will be brought.[216]

An exhaustion requirement has distinct advantages over a system in which cases are directed to either the state or the federal system. Beyond gaining control over their general tort policy, states are encouraged by the exhaustion model to solve the official tort problem themselves. States know that if they incorporate federal norms into their law, their system will function relatively free from federal review;[217] they can do so in this situation by

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[216] An exhaustion requirement for takings cases is consistent with Patsy v. Board of Regents, 457 U.S. 496 (1982). In *Patsy*, the Court held that § 1983 plaintiffs are not required to exhaust state remedies before bringing suit in federal court. *Id.* This holding does not speak to whether a constitutional provision, such as the takings clause, may require exhaustion of state remedies before a violation can be established.

The principles underlying *Patsy* do not act as a bar to the exhaustion model in takings cases because the alternative to exhaustion in takings cases is probably no federal suit at all. If an immediate federal court suit were the alternative to an exhaustion model, it would share some of the problems inherent in federal defense removal in state criminal cases in which the defendant has a federal defense. Professor Yackle has explained that in criminal cases, the exhaustion model is appropriate because it ensures a federal forum without completely displacing state authority and because it avoids the centralization that would occur if federal defense removal were allowed. *See* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1019, 1034-40 (1985) ("[Habeas] ensures the availability of trial-level federal forum to litigants whose federal claims arise initially as defenses to state criminal prosecutions."). *Patsy* could reduce the chances of a litigant getting into a federal forum because, if the *Patsy* holding is applied rigidly to forbid exhaustion whenever there is a federal claim, the Court may be so reluctant to open the federal district court to an immediate action that it will refrain from recognizing the federal claim at all.

[217] Professor Althouse explains that states should be free from federal intervention only when they have an "effectively functioning" system for recognizing a federal right or at least are "attempting to find in their own law alternative solutions to the problems addressed by federal law." Althouse, *supra* note 204, at 1489. The analysis depends on the notion that states are an important part of our federal system, and therefore there is a federal interest in fostering responsibility and independence in state administration. *Id.* Federal review, after exhaustion of state remedies, is still necessary to ensure that federal rights are respected. *See id.* at 1504-08 (arguing that deference to the states should be overcome by the interest in the integrity of federal law).

abandoning official and sovereign immunities and allowing compensation for official tort victims under ordinary tort rules. Entrusting this responsibility to the states can thus have the positive effect of making the states more independent.[218]

Within the exhaustion model, it is possible to design a system in which the federal courts only rarely adjudicate issues of state tort law in official tort cases. Once the takings rules were established, there would be few occasions in which federal intervention would be necessary. If, however, the plaintiff makes out a federal takings case on the grounds that the defendant asserted an immunity in state court, the federal court could compel the defendant, through an injunction, to waive the immunity, and send the parties back to state court.[219] This process of going back and forth between the two court systems is obviously costly and cumbersome, but if the Court wants to avoid federal decisionmaking on state tort law, it can be done without abandoning the federal rights of the official tort victim.

Judging from the number of § 1983 official tort suits brought directly in the federal courts,[220] official tort victims seem to prefer bringing their suits originally in the federal district court, bypassing state court altogether. Bypassing state court is less expensive for the plaintiff forced to bring a first suit in state court then a second in federal court; it can also allow the plaintiff the advantage of fact finding and application of state tort norms in what might be a more sympathetic forum.[221] I do not mean my discussion of the

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[218] Althouse argues that federal review is necessary to preserve state autonomy over state law: if state courts make erroneous decisions of federal law, federal review can free the state courts from such an erroneous view, and thereby empower the states to pursue a different course under state law. *Id.* at 1510.

[219] This could also reduce federal-state friction in some due process cases. In a due process employment case where the plaintiff complains of being fired without a prior hearing, a federal court could issue an injunction requiring a hearing, along with reinstatement and back pay for the period during which the employee was out of work, leaving it to the state system to determine whether the firing was proper under the state law that granted the plaintiff a property interest in continued employment. Only if the state system refused, after the injunction, to provide a constitutionally adequate hearing, would a federal court be forced to hear the merits of the state law dispute. Reinstatement and backpay are necessary to give employees an incentive to bring the case to federal court and to give employers an incentive to grant the pretermination hearings that are constitutionally required.

[220] *See* 1986 DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 179.

[221] *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106 (1977) (noting that historically, litigants looking for expansive and vigorous application of constitutional rights have sought federal forums, while their opponents have sought state forums). Some scholars have noted that federal judges may tend to approach their jobs with a mindset toward protecting federal rights, while state judges may be more concerned with advancing state legal goals. *Id.* at 1124-27; *accord* L. YACKLE, *supra* note 215, at 99.

exhaustion model to denigrate the importance of allowing plaintiffs with federal claims to bring those claims directly to federal court. But given the Supreme Court's unanimous resolve[222] to direct official tort cases to state court, and the Court's ripeness doctrine in takings cases,[223] the exhaustion model can preserve federal review that is more effective than an appeal to the United States Supreme Court.[224]

The notion that an exhaustion model might further important federalism policies has been raised many times, mostly in the habeas corpus context.[225] Habeas is the most well-established regime in which state remedies are exhausted before a federal issue may be brought to federal district court. In habeas corpus, state criminal defendants must raise their federal defenses in state court.[226] After the defendant has exhausted all available state remedies, the defendant may bring a petition in federal district court and relitigate the defendant's federal claims.[227]

If one believes that criminal defendants with federal defenses should have a federal forum in which to present their defenses, one could imagine a system in which such defendants could remove their cases for trial to federal district court. The disruption of the state system that would occur under this system is a good reason for disallowing federal defense removal in criminal

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[222] *See* Hudson v. Palmer, 468 U.S. 517 (1984) (Court unanimously recognizing that adequate state remedies bar due process claim even when alleged tortious behavior is intentional).

[223] *See supra* note 213 and accompanying text.

[224] Professor Yackle has argued that direct review by the Supreme Court is an inadequate federal forum for litigants. This inadequacy is created, Yackle suggests, because the Court realistically cannot hear all the claims brought before it, and consequently must select cases on criteria other than the effects of its decision on the litigants. Yackle, *supra* note 216, at 1022 n.137. The Supreme Court itself has noted that Supreme Court review "is an inadequate substitute for the initial District Court determination . . . ." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

[225] *See* Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) ("The rule of exhaustion in federal habeas corpus actions is rooted in consideration of federal-state comity."); Yackle, *supra* note 216, at 1019-40 (suggesting an alternate view of habeas as a method for providing a federal forum for federal rights that are unpopular at the state level, and thereby regarding habeas as an exhaustion model of review); *id.* at 1050 ("Indeed, my alternative explanation for postconviction habeas essentially collapses into the exhaustion doctrine.").

[226] *See* Rose v. Lundy, 455 U.S. 509 (1982) (holding that habeas petitioners must exhaust all claims at the state level before a federal court will hear the petition).

[227] 28 U.S.C. § 2254(b) (1982). The system of federal habeas corpus review of state criminal convictions is extremely complicated. The generalizations in the text are subject to numerous qualifications which are beyond the scope of this article. For a general description and analysis of federal review of state criminal convictions, see L. YACKLE, *supra* note 215.

cases; but those reasons do not undercut the necessity of an opportunity to eventually litigate in a federal forum.[228]

The habeas corpus system is an exception to general rules which preclude relitigation in federal court of issues already decided in state court.[229] Relitigation is allowed in habeas corpus because it is believed to contribute positively to effective federal-state cooperation in criminal justice.[230] The relationship between the federal and state court systems might be enhanced by the creation of what has been termed a dialogue between the two systems.[231] The two systems, by focusing on each other's performance in the same case, will engage in dialogue about the proper interpretation and importance of the elements of their respective decisions.[232]

In government tort cases, federal court misinterpretations of state tort law and state misconceptions about federal constitutional norms can be corrected through the exhaustion model. Each system will become better at

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[228] Commonly noted reasons against federal defense removal in criminal cases are that the federal courts would be flooded with cases, and state authority over its criminal law would be eroded. Professor Yackle adds that a centralized system of criminal justice presents a greater danger of repression than the decentralized multistate system of state criminal prosecutions. *See* Yackle, *supra* note 216, at 1034-40. Yackle's analysis complements Rapaczynski's normative analysis in favor of decentralization of political processes in the commerce clause context. Rapaczynski notes that the existence of smaller political units facilitates political organization of groups that might be at a disadvantage on the national level. *See* Rapaczynski, *supra* note 8. *But see* Tushnet, *supra* note 16, at 991-93 (doubting that local governments are much more accessible than the national government).

[229] "Not every would-be litigant is entitled to relitigation. The subject matter jurisdiction of the habeas courts is limited explicitly to petitions from applicants who allege they are in 'custody' in violation of federal law." Yackle, *supra* note 216, at 998-99.

[230] Although there are important differences between the habeas corpus system and federal review of state tort claims for takings clause violations, there are also significant similarities. Most notably, both problems involve direct federal court supervision of the working of state government, usually the state courts. In both situations, the importance of an effective forum for airing the federal issues must be analyzed in light of the reasons for entrusting certain functions to the states. By contrast, many areas of federal jurisdiction do not necessarily involve direct supervision of state courts. Examples include federal crimes and federal labor law.

[231] *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048-50 (1977) (outlining the contours of a model of federal-state interaction based on a dialogue between federal and state courts).

[232] Federal and state courts could learn from each other by reading each other's opinions in different cases, but that would not be as direct a dialogue as forcing review of the same case. If both federal and state courts looked at the same case, each system would need to evaluate the other's position directly because there would be no basis for distinguishing on the facts between the federal and state cases. The federal court could thereby gain an appreciation of state tort principles and the state court could learn about federal constitutional norms.

performing its function in the federal system; the states will administer tort law with increased sensitivity to federal rights, and the federal courts will have the benefit of authoritative state tort decisions to monitor for compliance with federal takings norms.

B. *Problems with Relitigation of Official Tort Cases in Federal Court*

Using the exhaustion model in official tort cases would be a departure from current law, and there are questions about whether it is consistent with important features of the American legal system. In this subsection, I address eleventh amendment problems with federal court jurisdiction—at any stage—over actions against states and state officials. I also consider problems specific to the exhaustion model, namely structural limitations on federal court jurisdiction, preclusion, and abstention.

1. The Eleventh Amendment

The eleventh amendment[233] presents the most serious threat to any federal court suit against states and state officials,[234] for it has long been interpreted to require the federal courts to respect state sovereign immunity in federal court actions.[235] Of course, state courts would still be required to apply

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[233] The eleventh amendment 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.

U.S. CONST. amend. XI.

[234] For eleventh amendment purposes, it is important to distinguish between local government and state government. The amendment does not bar damages actions in federal court against local government units such as cities and counties; it does bar actions against states themselves and units of state government, such as administrative agencies. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690-95 & n.55 (1978) (holding that municipalities could be sued under § 1983 notwithstanding the eleventh amendment); Lincoln County v. Luning, 133 U.S. 529 (1890) (holding that the eleventh amendment bars suits against states, but not counties). Even under current applications of the eleventh amendment, then, the exhaustion model could be implemented in official tort cases involving local governments and officials.

[235] Although the eleventh amendment forbids federal courts from exercising jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State," U.S. CONST. amend. XI, the Supreme Court has long interpreted the amendment to signify the framers' intent to grant complete immunity to the states from suits brought even by their own citizens in federal court. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (reaffirming the holding in Hans v. Louisiana, 134 U.S. 1 (1890), that the eleventh amendment "barred a citizen from bringing suits against his own State in federal court . . . ."). This interpretation appears to have very little basis in history and even less in text. See *id.* at 258-90 & n.11 (Brennan, J., dissenting) (arguing that the history

federal takings standards, because the eleventh amendment does not apply to cases brought in state courts.[236] Also, even if federal district court jurisdiction were barred by the eleventh amendment, the Supreme Court could still hear appeals from state supreme court decisions.[237] The Supreme Court arguably could order states to hear takings cases against the states, to hear cases against state officials based on federal law, and to award damages sufficient to satisfy takings clause requirements; but it is questionable that such an order would pass eleventh amendment muster, especially if issued by a federal district court.

Allowing federal district court jurisdiction over suits for damages paid out of the state treasury, or suits for an injunction ordering the state court to award compensation to tort victims,[238] would require a reinterpretation of the eleventh amendment. There is, however, persuasive historical and textual evidence that the eleventh amendment should not bar federal question suits against states in federal courts.[239] If the Court were to adopt this

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of the eleventh amendment has been misconstrued, and that there is "no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court."); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (arguing that the adopters of the eleventh amendment did not specifically intend to forbid the exercise of federal question jurisdiction over private suits against the states); *see generally* L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 129-41 (1986). Recently, the Court has intimated that some suits against state officials in their official capacity are also barred by the eleventh amendment:

> [I]t is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense.

Kentucky v. Graham, 473 U.S. 159, 167-68 (1985). It is unclear whether the *Graham* holding will affect suits for damages against individual state official tortfeasors. *But cf.* Will v. Michigan Dep't of Civil Serv., 428 Mich. 540, 410 N.W.2d 749 (1987) (holding that state official and state not "persons" under § 1983, thus immunizing them from § 1983 action in state court), *cert. granted,* 108 S. Ct. 1466 (1988)

[236] Maine v. Thiboutot, 448 U.S. 1, 9 & n.7 (1980).

[237] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413-23 (1821) (holding that the Supreme Court has the jurisdiction to hear appeals of state supreme court decisions).

[238] *See* Quern v. Jordan, 440 U.S. 332 (1979) (holding that eleventh amendment barred federal district court from ordering state officials to send to class action plaintiffs notice that they had been denied public assistance, and that they could request a hearing on such denial).

[239] Justice Brennan, joined by Justices Marshall, Stevens, and Blackmun, recently endorsed a view of the eleventh amendment that challenges conventional wisdom.

position, the eleventh amendment would no longer provide an impediment to hearing government tort actions based on the takings clause in federal court.

Another way around the eleventh amendment bar involves considering the text and history of the takings clause itself. The Court has recently acknowledged that the takings clause requires a damages remedy and overrides sovereign immunity to the extent such immunities bar compensation for takings.[240] Because the Court repeatedly has held that the eleventh amend-

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See Welch v. State Dept. of Highways and Pub. Transp., 107 S. Ct. 2941, 2958-70 (1987) (Brennan, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247-304 (1985) (Brennan, J., dissenting). Justice Scalia also recently expressed doubt as to the correctness of the Court's eleventh amendment jurisprudence. *See Welch*, 107 S. Ct. at 2957-58 (suggesting that Hans v. Louisiana, 134 U.S. 1 (1890), was decided incorrectly).

In *Atascadero*, Justice Brennan argued that while the eleventh amendment obviously was intended to overrule Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (sustaining a state law contract claim brought in federal court against a state by a nonresident plaintiff), it was to do so simply by preventing diversity of citizenship from being used as the sole basis for the federal courts' jurisdiction in such suits. According to Justice Brennan's theory, then, claims brought under federal law against states would be permitted under Article III's grant of federal jurisdiction, notwithstanding the eleventh amendment; only state law claims based solely on diversity would be barred.

Not only is this view supported by historical evidence, *see generally* Fletcher, *supra* note 235, but, as Justice Brennan suggests, it is more faithful to the text of the amendment:

> Those who have argued that the Eleventh Amendment was intended to constitutionalize a broad principle of state sovereign immunity have always elided the question of why Congress would have chosen the language of the Amendment as enacted to state such a broad principle.

Atascadero State Hosp., 473 U.S. at 286 (Brennan, J., dissenting). Justice Brennan's interpretation of the eleventh amendment would also obviate some of the Court's more tortured readings of the amendment's text, such as Hans v. Louisiana, 134 U.S. 1 (1890), in which the Court interpreted the amendment's bar of suits against a state "by citizens of another state" to include citizens suing their own states.

For a general exploration of eleventh amendment doctrine in a historical context, see Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); Fletcher, *supra* note 235. For a discussion of the importance of federal forum availability for the vindication of federal rights, see LeClerq, *State Immunity and Federal Judicial Power—Retreat from National Supremacy*, 27 FLA. L. REV. 361 (1975); Thornton, *The Eleventh Amendment, an Endangered Species*, 55 IND. L.J. 293 (1988). Akhil Amar has recently echoed these themes, calling the Court's jurisprudence in the areas of state sovereign immunity and the eleventh amendment "nonsense." Amar, *supra* note 211, at 1473.

[240] See First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386 n.9 (1987) ("[T]he Constitution . . . dictates [a damages] remedy for interference with property rights amounting to a taking.").

ment bar is based on principles of sovereign immunity,[241] and because the takings clause has been held to limit such immunities, the eleventh amendment should not limit federal district court jurisdiction over takings claims. Even if the Court refuses to adopt such an analysis, this analysis serves as a reminder to the Court that it is illogical to maintain sovereign immunity in a government limited by a Constitution and notions of popular sovereignty.[242]

Finally, the federalism concerns that motivate recognition of state sovereign immunity should not shield the state system so that it can violate federal law. The states may have a legitimate claim to some autonomy over

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[241] *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 12-15 (1890) (arguing from Hamilton's position in Federalist 81 that state sovereignty is the basis of the eleventh amendment).

[242] Akhil Amar has argued persuasively that state sovereign immunity is inconsistent with popular sovereignty and constitutional government, Amar, *supra* note 211, at 1466-92. Amar argues that popular sovereignty and constitutional government mean that victims of unconstitutional conduct must have an avenue for relief, either from the offending official or from the government itself. *See id.* at 1491. Amar argues from historical evidence that the framers intended for states to have no immunity from constitutional claims. *Id.* at 1444-51. He also argues that features of the Constitution (and its ratifying process) place the people of the United States sovereign over the state governments and place federal law, especially federal constitutional law, supreme over state law. In addition to the Supremacy Clause, Amar cites the facts that the Constitution was ratified in conventions of the people, not by the state governments, *id.* at 1458-60, and that the Constitution allows for binding amendments even without unanimity, as evidence that the states are not sovereign under the Constitution. *Id.* at 1464.

Amar would confine the eleventh amendment to its most obvious application, overruling the Court's conclusion in *Chisolm v. Georgia* that states can be sued by citizens of other states raising common law claims in the federal courts. 2 U.S. (2 Dall.) 419 (1793). Amar argues that the Court's mistake in *Chisolm* was its failure to apply state common law, which would have barred the claim under common law rules of sovereign immunity. Amar points out that this error would not be made today because of the rule in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) requiring federal courts to apply state law in most common law cases in the federal courts. *See* Amar, *supra* note 211, at 1469-70.

Amar's approach is overly simplistic. Similar theoretical problems regarding the legitimacy of government action arise when the state claims immunity under its own laws. Determining in which instances the state is sufficiently different from private parties so that it can exempt itself from the operation of law is not easy. Indeed, all breach of contract cases against states can be transformed into constitutional claims under the Contract Clause, *e.g.* Hans v. Louisiana, 134 U.S. 1 (1890), and all tort cases, if compensation is refused, are colorable takings clause violations. Consequently, it would be difficult to see when the states' common law immunity would actually operate. The question returns to the problems discussed above regarding whether the states' immunities limit the interests protected by the Constitution.

state law, and preservation of a well functioning state system might point toward jurisdictional allocations that minimize the potential for federal intervention; but at bottom, the states have no legitimate interest in avoiding federal constitutional constraints.[243] The states are not sovereign. They are units in a system of cooperative sovereignty in which minimization of needless friction and interference is all that can be expected.

2. Structural Limitations on Relitigation in the Federal Courts

(a) *Rooker-Feldman*. Only rarely do disappointed state court litigants get a second chance to bring their claims to federal court.[244] The Supreme Court has ruled that federal district courts have no jurisdiction to review "final state-court judgments."[245] Even in situations where general grants of jurisdiction could be interpreted to grant district court jurisdiction to review state court decisions, the Supreme Court has constructed doctrines to bar such cases from the federal district courts.[246] This doctrine prohibiting federal district court review of final state court adjudications has become known as the *Rooker-Feldman* doctrine.

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[243] *See* Althouse, *supra* note 204, at 1504-08.

[244] The most notable example of relitigation, as discussed above, is habeas corpus. In criminal cases, a state defendant, after exhausting state remedies, is allowed to relitigate some federal issues in federal court by way of a petition for a writ of habeas corpus in the district court. *See* 28 U.S.C. § 2241 (1982).

[245] The lower federal courts are not constituted as courts of appeal above the state system; only the Supreme Court has such jurisdiction. District of Columbia Court of Appeal v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). *See supra* notes 225-232 & 244 and accompanying text.

[246] *Feldman*, 460 U.S. at 486. In *Feldman*, the plaintiff's district court suit challenged the District of Columbia local court's refusal to grant him a waiver from its requirement that applicants to the District bar attend a law school approved by the American Bar Association. The Court distinguished between challenges to the state court's rule, which could be brought in federal district court, and challenges to particular decisions regarding eligibility, which could not. *Id.* at 485; *e.g.*, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731 (1980) (allowing federal court challenge to rules regulating lawyers issued by state supreme court).

The *Rooker-Feldman* doctrine appeared again recently in the Second Circuit's decision in Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 107 S. Ct. 1519 (1987). The Supreme Court noted the Second Circuit's reliance on the *Rooker-Feldman* doctrine, *Pennzoil Co.*, 107 S. Ct. at 1524, but did not itself rely on it. Only Justice Marshall relied on the doctrine in his concurrence, and four other concurring opinions expressly disclaimed reliance on it. *See id.* at 1533 (Marshall, J., concurring in the judgment); *id.* at 1529-30 (Scalia, J., joined by O'Connor, J., concurring); *id.* at 1531 (Brennan, J., joined by Marshall, J., concurring in the judgment); *id.* at 1534-35 (Blackmun, J., concurring in the judgment); *id.* at 1536 n.3 (Stevens, J., joined by Marshall, J., concurring in the judgment).

The most obvious reason underlying the *Rooker-Feldman* doctrine would seem to be res judicata. If the state court judgment were truly final, in that it precluded further litigation, then rules of claim preclusion should bar a second suit arising out of the same transaction or occurrence. The Supreme Court, however, has extended its reasoning in the *Rooker-Feldman* doctrine beyond preclusion rules, which may vary from state to state;[247] instead, the Court has held that the district courts lack subject matter jurisdiction over actions that are in the nature of appeals from state court judgments.[248]

In the state tort context, *Rooker-Feldman* could eliminate any possible subsequent federal district court action unless the state court refused to hear the claim at all. One could argue that any constitutional challenge to the state's refusal to hear the claim would be like an appeal of the state court's judgment and therefore must be brought to the Supreme Court on appeal. If this argument were true, it would create a Catch-22 out of the Supreme Court's ripeness decisions in the takings area.[249] Under ripeness rules, a takings claim is not ripe until state remedies are exhausted; but once such remedies are exhausted, *Rooker-Feldman* could be interpreted to eliminate federal subject matter jurisdiction. Thus, the Court's ripeness doctrine would effectively and permanently deprive federal district courts of jurisdiction. To avoid this Catch-22, the Court should view the takings claim in federal court as a new claim for ripeness purposes. Exhaustion of state remedies would be prerequisite to bringing a takings claim in federal court. Because the takings claim would address the question of the state's failure to compensate, and not the merits of the underlying claim, it would not be precluded by either res judicata or *Rooker-Feldman* principles.

In any event, the *Rooker-Feldman* doctrine should not bar the Supreme Court from constructing an exhaustion system because it is inconsistent with federal preclusion principles. The *Rooker-Feldman* doctrine itself is inconsistent with federal preclusion principles and should be abandoned. If the state court judgment, under state preclusion rules, would not bar the subsequent federal action, then federal courts cannot apply the *Rooker-Feldman* doctrine to bar the case without violating the Supreme Court's rule that federal courts may not give greater preclusive effect to a state court judgment than would the courts of the rendering state.[250] The *Rooker-Feldman*

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[247] Federal courts must apply the rendering state's law to determine the preclusive effect of a state court judgment. *See* Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 80-85 (1984) (holding that petitioner's state court judgment has same claim preclusive effect in federal court that the judgment would have in the state courts); 28 U.S.C. § 1738 (1982) (federal Full Faith and Credit statute).

[248] *See Feldman*, 460 U.S. at 476 (holding that only United States Supreme Court can review state court judgments).

[249] *See supra* note 213.

[250] *Migra*, 465 U.S. at 85; *id.* at 88 (White, J., concurring). Justice Stevens argued in *Feldman* that the appropriate inquiry into the preclusive effect of state judgments

doctrine is of dubious pedigree; any valid interests that it advances, such as finality or proper relations between the federal and state court systems, are already addressed through preclusion rules. Applying *Rooker-Feldman* to bar cases that would not be barred under preclusion rules would violate state autonomy over the preclusive effect of state judgments.[251]

(b) *Preclusion Rules*. Because the exhaustion model allows a new action in federal court after an action has already been adjudicated in state court, it is necessary to ask whether preclusion rules would bar the federal action. Generally, principles of preclusion bar relitigation both of issues actually litigated in an earlier action,[252] and issues that could have been raised (but were not) in the earlier action.[253] To preserve state autonomy over preclusion law, the Supreme Court has ruled that the Full Faith and Credit Statute[254] requires that federal courts apply state law to determine whether a state judgment bars a subsequent federal action.[255]

When a federal court decides whether a state court tort judgment precludes a takings claim, the Full Faith and Credit Statute requires the court to consider whether the state preclusion law would allow a takings claim to be brought after the tort suit. A subsequent takings suit can be barred by the state judgment on the tort suit *only* if the state itself would not allow a subsequent suit.[256]

State preclusion law should not bar the federal half of the exhaustion model because it would conflict with the takings clause's ripeness doctrine. The takings claim is not ripe until the state refuses to compensate the tort victim. It is thus impossible to bring the takings claim in federal court until after the state tort claim is resolved. Assume that state law instructed the

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was whether Feldman had sought appellate review, or whether he had stated a second cause of action on constitutional grounds. *Feldman*, 460 U.S. at 489-90 (Stevens, J. dissenting). Preclusion is discussed in more detail *infra* at notes 252-63 and accompanying text.

[251] *See infra* note 261.

[252] This principle of preclusion is known as collateral estoppel or issue preclusion. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.16 (3d ed. 1985) (outline of issue preclusion principles).

[253] *See id.* at §§ 11.22-11.31 (generally describing the effects of issue preclusion on third parties).

[254] 28 U.S.C. § 1738 (1982).

[255] Since 1984, the Supreme Court twice has firmly rejected the argument that federal courts could give greater preclusive effect to a state court judgment than the state courts would. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379-86 (1985); *Migra*, 465 U.S. at 81. Both of these decisions were based on the Court's interpretation of the federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982). *Marrese*, 470 U.S. at 379-86; *Migra*, 465 U.S. at 80-85.

[256] *Cf. Marrese*, 470 U.S. at 382-83 (holding that, unless state preclusion law bars a federal antitrust claim, there is no need to apply the federal Full Faith and Credit statute).

plaintiff to bring the takings claim together with the state tort claim. The plaintiff, desiring a federal forum for the takings claim, might try to bring the takings claim in federal court, and attach the state tort claim under pendent jurisdiction. The federal court could not hear such a case, because the takings claim would not be ripe for adjudication. The plaintiff would be forced to bring the entire case to state court. The plaintiff's interest in a federal forum for the federal claims would be defeated by state preclusion rules.

When a putative federal plaintiff is forced to litigate state issues in state court, the state interest in autonomy over its preclusion rules does not mean that the plaintiff should be prevented from returning to federal court with the federal issues. In an analogous situation, federal plaintiffs forced by abstention to bring their state law claims in state court, are allowed to return to federal court with any remaining federal claims.[257] The Court has recently reaffirmed this entitlement to return to federal court, and acknowledged that a litigant's right to choose a federal forum for the litigant's federal claims may override state preclusion rules.[258] Furthermore, the Court in *Marrese v. American Academy of Orthopaedic Surgeons*[259] recognized a more general power of the federal courts to make exceptions to preclusion rules where state preclusion rules would bar a federal action that could not have been brought together with the state action.[260] While allowing two separate suits

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[257] *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (allowing plaintiffs to reserve federal claims for federal courts while adjudicating state constitutional claims in state courts). *England* arose in the context of *Pullman* abstention. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *Pullman* allocates responsibility between federal and state trial courts by requiring federal district courts to abstain from deciding federal constitutional issues when an uncertain issue of state law might make decision of the federal issue unnecessary. *Pullman* abstention directs the federal district court to stay its proceedings until the state courts have an opportunity to decide the state law questions. The federal court is free, after the state proceedings, to reopen the case and address the federal issues if necessary. *England* and *Migra* hold that the subsequent federal action is allowed regardless of state preclusion rules to the contrary. *Migra*, 465 U.S. at 85 n.7; *England*, 375 U.S. at 421.

At least one court has held that a plaintiff may, in some circumstances, voluntarily litigate state issues in state court and still return to federal court to litigate the federal issues. *See* Wicker v. Board of Educ., 826 F.2d 442, 445-47 (6th Cir. 1987). In *Wicker*, the plaintiff filed a federal claim in federal court and, before an abstention order was entered, filed in state court on state grounds only. *Id.* at 444. The Sixth Circuit noted that the federal courts are split on "whether an *England* reservation is valid if the plaintiff first files in state court." *Id.* at 447 n.4.

[258] See *Migra*, 465 U.S. at 85 n.7.

[259] 470 U.S. 373 (1985).

[260] In *Marrese*, the issue was whether a judgment from a state common law action for wrongful exclusion from a professional association would bar a subsequent

may not be the most economical way to run a court system, the Supreme Court has acknowledged that smooth operation of a federal system, in which state and federal courts have the freedom to occupy their spheres free of unnecessary interference, may warrant such additional costs in the area of judgment finality.[261]

Allowing a subsequent federal suit on the takings claim is also appropriate in light of the reason for initially having state court jurisdiction. Federal jurisdiction statutes can be interpreted to grant federal district court jurisdiction over the entire case—including the state tort claim—under pendent jurisdiction. The Court need not apply its ripeness doctrine to bar the immediate federal action, if that would bar the federal takings case completely. According to principles of federalism, it is desirable to allow the states to formulate their own tort law policy. Giving state courts jurisdiction over the state tort claim and federal courts jurisdiction over the takings claim is a compromise designed to resolve problems inherent in granting either the federal courts or the state courts jurisdiction over the entire case.[262]

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federal antitrust action. *Marrese*, 470 U.S. at 375-76. The issue was complicated by the fact that the federal antitrust action could not have been brought in state court together with the common law action, because the federal courts have exclusive jurisdiction over antitrust claims. *Id.* at 379-82.

[261] *See id.* at 385-86. Federal court creation of a preclusion exception where important federal interests are at stake would not be inconsistent with federalism norms. *See* Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 808-31 (1986). Burbank notes that in order to ensure adequate federal review of federal issues in state cases, federal courts could develop federal common law preclusion rules that allowed federal litigation of federal issues in federal court after state proceedings concluded. The federal common law would advance the congressionally recognized policy in favor of a federal forum, at least in civil rights cases. *Id.* at 831. He argues that this would be consistent with *Migra's* interpretation of the Full Faith and Credit Statute, 28 U.S.C. § 1738, because states would be required, by the supremacy clause, to incorporate the federal common law into their preclusion rules. Once the federal norms were incorporated into state preclusion law, the federal court would in effect apply the same law to the preclusion problem that the state would apply, thus satisfying the statute. *Id.* I am not so sure the Court would view it this way; the whole point of *Migra* seems to be to avoid federal preclusion rules. I am confident that the Court would shy away from Burbank's implication that federal courts are free to formulate general preclusion rules and apply them in all federal question cases. But I think Burbank correctly argues that in some narrow circumstances, exceptions to the *Migra* rule are allowed.

[262] This is the way the Supreme Court and Congress have solved a res judicata problem in Title VII cases. In some situations, Congress has directed Title VII claimants to try state administrative remedies before going to federal district court. Defendants argued, and some circuits held, that state preclusion rules may bar the subsequent federal Title VII action. *See* Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 768 F.2d 842, 851-54 (7th Cir. 1985) (holding that principles of administrative res

Even if state preclusion rules barred a subsequent takings suit, there may be good reason for federal courts to make an exception allowing a subsequent federal district court action. Despite the command of the Full Faith and Credit Statute, the Supreme Court indicated in *Marrese* that in certain circumstances the federal courts are free to ignore state preclusion rules, but only to the extent that a federal action can be brought when state law would preclude it.[263]

(c) *Abstention*. Several judge-made abstention doctrines limit the original jurisdiction of the district courts to keep out of federal district courts cases involving review of state court and agency decisions. The theory behind the abstention doctrines support the idea that in some instances it is appropriate to divide cases between federal and state court. For present purposes, perhaps the most important lesson from the abstention doctrines is that federal courts often allocate responsibility between federal and state courts to maximize the realization of competing federalism policies. Under the exhaustion model,[264] state proceedings would be completed before the case were brought to federal court, so abstention would not be an issue.

The most notorious form of abstention that preserves the orderly movement of cases through state courts to the United States Supreme Court is *Younger* abstention.[265] In *Younger v. Harris*,[266] the Court held that a state criminal defendant may not bring an injunctive action in federal district court on any federal issue that could be raised as a defense in the state criminal trial. This decision has forced state criminal defendants to litigate their federal defenses, at least in the first instance, in the state courts with possible direct review by the Supreme Court.

Younger abstention supports the idea that states should receive appropriate respect and deference by giving state courts a chance to decide an issue without eliminating the possibility of subsequent review by a federal trial

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judicata barred federal Title VII action), *vacated and remanded* 106 S. Ct. 3328 (1986), *aff'd in part and rev'd and remanded in part*, 820 F.2d 892 (7th Cir. 1987) (holding that state agency's decision did not preclude plaintiff from bringing Title VII action to federal court, but did preclude plaintiff's § 1983 action from reaching federal court). The Supreme Court has held that Title VII entitled plaintiffs to a trial de novo in federal court regardless of state preclusion rules. See University of Tennessee v. Elliott, 478 U.S. 788 (1986). State interests are vindicated by the opportunity to address discrimination in state agencies and federal interests are vindicated by the subsequent district court suit.

[263] "The issue whether there is an exception to § 1738 arises only if state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding." *Marrese*, 470 U.S. at 383.

[264] *See supra* notes 213-24 and accompanying text.

[265] "*Younger* abstention" refers to the doctrine arising out of *Younger v. Harris*, 401 U.S. 37 (1971).

[266] 401 U.S. 37 (1971).

court.[267] In criminal cases, review of most federal issues in federal district court is still available through habeas corpus.[268] Thus even though *Younger* restricts federal trial court jurisdiction, and does so in the name of federal-state relations, the restriction is within the context of available subsequent federal review akin to the type of review appropriate for takings claims.

Later expansions of the *Younger* doctrine have been unfriendly to the idea that a federal hearing ought ultimately to be available. The Supreme Court has applied *Younger* abstention to civil cases in which the only federal review available would be in the Supreme Court.[269] In such cases, federal

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[267] What ["Our Federalism"] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. Within five years after *Younger* was handed down, *Younger* abstention had transformed from an equity-based scheme of deference to one based almost entirely on notions of comity. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In *Huffman*, the appellants, Ohio state officials, instituted a public nuisance proceeding in state court to enjoin the appellee from showing obscene films. The trial court found for appellants. The appellee, instead of appealing in the state system, filed suit immediately in federal court under § 1983, claiming that the Ohio nuisance statute had been unconstitutionally applied, thereby denying him his first amendment rights. The federal district court found the Ohio statute unconstitutional and enjoined execution of the state's judgment insofar as it closed the theater to films that had not been adjudged obscene in prior adversarial hearings. *Id.* at 595-99.

The Supreme Court overturned the district court decision. Justice Rehnquist, writing for the majority, held that *Younger* principles applied in civil cases which were akin to criminal prosecutions, unless state proceedings are conducted with an intent to harass, or are conducted in bad faith, or the challenged statute is flagrantly and patently unconstitutional. *Id.* at 605-07, 611-13. The Court in *Huffman* recast the relationship between § 1983 and comity by holding that it had "consistently required that when federal courts are confronted with [requests to enjoin state proceedings], they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Id.* at 603. For a more detailed account of *Younger* abstention's transformation from an equity-based to a comity-based scheme, see Soifer, *The Younger Doctrine*, 55 TEX. L. REV. 1141 (1977).

[268] Some federal issues may not be reviewed in habeas. For example, in Stone v. Powell, 428 U.S. 465, 474-82 (1976), the Court held that claims arising out of the fourth amendment's exclusionary rule may not be reviewed in federal habeas corpus.

[269] *See, e.g.*, Pennzoil, Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987) (tortious inducement to breach contract); Ohio Civil Rights Comm'n v. Dayton Christian Schools, 107 S. Ct. 1519 (1986) (sex discrimination suit); Juidice v. Vail, 430 U.S. 327 (1977) (contempt proceeding); Huffman v. Pursue, 420 U.S. 592 (1975) (claim under public nuisance statute). These sorts of decisions led Professor Currie to observe that "*Younger* was not based upon the availability of habeas corpus." D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 722 (3d ed. 1982). *But see* Deakins v. Monaghan, 108 S. Ct. 523, 529 (1988) (federal court must remain open to claim that "cannot be redressed in the state proceeding" despite *Younger* abstention).

district court jurisdiction may be unavailable if state preclusion rules bar relitigation of the federal issues.[270] In applying abstention to foreclose the possibility of a federal trial forum, however, the Supreme Court does not sufficiently recognize the value of allowing litigants to bring federal issues to federal court. The Supreme Court is operating under the misconception that the choice of forum is less important than the policies advanced by *Younger* abstention.[271]

The *Pullman* abstention regime[272] also supports the propriety of federal review after a state case. The *Pullman* regime addresses the takings problem better than *Younger* abstention because *Pullman* involves civil actions where plaintiffs, if allowed, would probably bring their entire cases initially to the federal court and where some federal jurisprudential doctrine (here ripeness) forces them to bring the state issues in the case to state court. The *England* doctrine, reaffirmed in *Migra v. Warren City School Dist. Bd. of Educ.*, recognizes the plaintiff's entitlement to return to federal court to litigate the federal issues.[273]

There is a strong federal interest in resolution of federal questions by federal district courts.[274] This interest often conflicts with concerns federal courts have that their proceedings may disrupt the course of state proceedings.[275] One solution that has been implemented—by court decision or legislation—allows state proceedings to run their course and provides federal district court review of the state action. In the takings situation, this

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[270] *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 383 (1985) (holding that, unless state preclusion law bars a federal claim, plaintiff can bring federal claim into federal court).

[271] See Neuborne, *supra* note 221, at 1115-30. Professor Neuborne argues that the Court's belief in federal deference to state judicial forums is based on the misconception that as a greater number of constitutional cases shift to state court, the capacity of individuals to mount successful challenges to collective decisions will diminish. *See also* Yackle, *supra* note 216, at 1022-24 (providing overview of arguments comparing relative strengths and weaknesses of federal and state judges).

[272] *See supra* note 257.

[273] See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964) (Supreme Court review is "an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts."); *see also* Wicker v. Board of Educ., 826 F.2d 442 (6th Cir. 1987) (discussing whether party that files in both state and federal courts is entitled to bring federal issues to federal court under the *England* reservation).

[274] *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 171-83 (1961) (tracing the history of § 1983, and explaining it as a statute designed to create a federal forum for the vindication of federal rights that state courts failed to enforce).

[275] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 43-44 (1971) (stating that equity and comity concerns underlie the policy against federal court interference with state court procedures).

would allow the state to manage its own tort policy and still provide effective federal enforcement of takings norms.

IV. Conclusion

Conflicting visions of the appropriate amount of deference federal courts should pay to state policy pervade federal constitutional doctrine. The Supreme Court has addressed the problem of federal supervision of state tortious conduct without much sensitivity to the competing interests at stake. The Court has used the spectre of federal displacement of state tort policy to restrict federal court supervision of state law without realistically assessing whether this supervision could be accomplished without displacing state authority. The Supreme Court has been unable, or at least unwilling, to create a system that recognizes and accommodates the federal interest in allowing litigants to choose a federal forum for federal claims.

One purpose of this article has been to persuade the reader that the treatment of victims of state-inflicted torts is legitimately a matter for federal concern. State and local governments are in a position to inflict great injury to private parties. Often, states claim authority to refuse to compensate for the injuries they cause or at least to compensate only on their own terms and not fully. The federal courts need not and should not defer to state decisions based on sovereign and official immunity. Immunities for states and state officials are contrary to the spirit of democratic government and the rule of law. Federalism demands respect for state institutions not deference to state transgressions.