



Constitutional Torts

Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable

Constitutional Torts

- 42 USC §1983
 - Against local and state action
- Bivens
 - Against federal action

42 USC §1983

- Historical context
 - Reconstruction
 - KKK
- Statement:

A plaintiff can establish a prima facie case under §1983 by showing the defendant was

 1. A person
 2. Who acted under color of state law
 3. To deprive the plaintiff of a right protected by the U.S. Constitution or a federal statute

42 USC §1983 - Elements

- Person
 - Includes filing suit against state and local officials in their personal capacity
 - Does not include a state government or an arm of the state (e.g., state agency)
 - Does not include state government officials sued in their official capacity
 - Can include a local government such as a city, because a city is not an arm of the state
 - But to sue a municipality, you must show that the municipality is responsible for the constitutional violation as a primary matter (such as by official policy).
 - Respondeat superior will not work

42 USC §1983 - Elements

- Acting under color of state law
 - This means the defendant “exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” West v. Atkins, 487 U.S. 42, 49 (1988)
 - A state or local official is acting under color of state law when they are on the job
 - And even when they are off the job if they are flashing a badge or somehow using their authority
 - NOTE: under color of state law does not mean authorized by state law! (Cf. respondeat superior)

42 USC §1983 - Elements

- Depriving a person of a right
 - Includes all rights guaranteed by the U.S. Constitution
 - What are those? Ask your Con Law teacher.
 - Includes rights guaranteed by a federal statute, unless Congress provided otherwise
 - What are these? They are all over the map. Many of them have to do with civil rights legislation and would include statutes protecting voting rights, prohibiting discrimination, etc.
 - Case: Scott v. Harris

Scott v. Harris

- Appreciate the breadth of situations in which §1983 actions can be used.
 - Such as, in this case, the suspect injured in the police chase he instigated.
- See how tort-type concepts can be imported into the constitutional analysis for a §1983 claim.
 - “[W]e think it is quite clear that Deputy Scott did not violate the Fourth Amendment. ... The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others ... Scott’s attempt to terminate the chase by forcing respondent off the road was reasonable ...”
- Appreciate the ability of a court, ruling as a matter of law, to decide a case on the facts without giving the factual determinations to a jury.

Bivens Actions

- A Bivens action is a claim against federal officials, sued in their individual capacities, for a violation of a person’s constitutional rights.
- It comes from Justice Brennan’s opinion in *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

Bivens Actions

- *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.
- So *Bivens* trumps the idea of sovereign immunity.

Bivens Actions

To state a claim under *Bivens*, a plaintiff must allege that she or he

1. was deprived of a constitutional right
2. by a federal agent
3. acting under color of federal authority.
4. And there is no viable alternative federal or state remedy or process that would provide adequate protection for the plaintiff's rights.

Bivens Actions

- An additional burden on plaintiffs is that courts will look for special factors that would counsel hesitation before allowing the kind of claim at issue to go forward.

Bivens Actions

- SCOTUS has signaled a lack of willingness to entertain Bivens actions other than those falling clearly within the precedent of prior cases in which the allowability of a Bivens action has been recognized.