

2011

## Bivens, the Judgment Bar, and the Perils of Dynamic Textualism

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### Bluebook Citation

James E. Pfander & Neil Aggarwal, *Bivens, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417 (2011).

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ARTICLE

**BIVENS, THE JUDGMENT BAR, AND THE PERILS OF DYNAMIC TEXTUALISM**

JAMES E. PFANDER\* AND NEIL AGGARWAL\*\*

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, *by reason of the same subject matter*, against the employee of the government whose act or omission gave rise to the claim.<sup>1</sup>

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\* Owen L. Coon Professor of Law, Northwestern University School of Law. Thanks to Greg Sisk and the conference organizers for the invitation to present this paper to the *Bivens* conference at the University of St. Thomas School of Law, and to the Northwestern faculty fund for research support. Thanks for comments on an early draft to Laura Hines, Rick Levy, Alex Reinert, Peter Schuck, Steve Vladeck, and to the participants at the Kansas law faculty workshop at which I presented an early version of the paper.

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1. 28 U.S.C. § 2676 (2006) (emphasis added).

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INTRODUCTION

Something has gone terribly wrong with the interpretation of the judgment bar provision of the Federal Tort Claims Act (FTCA).<sup>2</sup> Enacted back in 1946, when the FTCA first became law, the judgment bar was designed to block a specific kind of duplicative litigation that could result from the government’s acceptance of *respondeat superior* liability in suits for ordinary negligence. The provision was enacted with suits against the drivers of government vehicles in mind: it would, for example, block negligence suits against the driver of a federal postal truck whose act or omission had given rise to an earlier negligence suit against the federal government.<sup>3</sup> The idea was straightforward: once a tort plaintiff has pursued a vicarious liability claim against the federal government to judgment, whether successfully or unsuccessfully, the judgment bar would block a later negligence suit against the federal employee for the same act or omission. (If the plaintiff settled with the government under the FTCA, the statutory release or settlement bar would likewise foreclose litigation against the employee.) The statute, in short, was meant to codify narrow versions of the judgment and release bars that had developed at common law (as part of the moderation of strict mutuality) and to ensure state court respect for the federal disposition.

Today, in what can only be regarded as the product of breathtakingly dynamic statutory interpretation, courts have interpreted the judgment bar to block a much broader range of claims than those made actionable under the FTCA. Perhaps most troubling, courts have applied the judgment bar to preclude constitutional tort claims brought under the authority of *Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*.<sup>4</sup> Such *Bivens* claims, as they have come to be known, seek to impose liability on the officer or employee in her personal capacity. The government itself bears

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2. On the origins of the Federal Tort Claims Act, see Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 1–9 (1946); LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 1.01 (2011); WILLIAM B. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* 1–10 (1957). The judgment bar has largely, but not entirely, escaped scholarly attention. See, e.g., Stefan Sciaraffa, Note, *Section 2676 of the FTCA: Why it Should not Bar Contemporaneously Filed Bivens Claims*, 24 AM. J. CRIM. L. 147 (1996) (discussing the FTCA judgment bar).

3. *Tort Claims: H.R. 5373 and H.R. 6463 Hearings Before the Comm. on the Judiciary*, 77th Cong. 9 (1942) [hereinafter *Tort Claims*] (statement of Francis M. Shea, Assistant Att’y Gen., U.S. Dept. of Justice).

4. 403 U.S. 388 (1971). Courts hold that the judgment bar can bar a *Bivens* action. E.g., *Manning v. United States*, 546 F.3d 430, 438 (7th Cir. 2008); *Farmer v. Perrill*, 275 F.3d 958, 964–65 (10th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994); *Serra v. Pichardo*, 786 F.2d 237, 241–42 (6th Cir. 1986).

no liability for *Bivens* claims; both the Supreme Court<sup>5</sup> and Congress<sup>6</sup> have consistently refused to impose vicarious or *respondeat superior* liability on the government for the constitutional torts of its employees. While one might suppose that the absence of vicarious liability under the FTCA would end the matter, the lower federal courts have nonetheless extended the judgment bar to *Bivens* claims.

In perhaps the most arresting example of this expansive application of the judgment bar rule, the Seventh Circuit held that the judgment bar applies retroactively to vitiate a *Bivens* judgment.<sup>7</sup> In *Manning v. United States*, the plaintiff obtained a substantial *Bivens* verdict against agents of the Federal Bureau of Investigation.<sup>8</sup> Manning also brought a separate FTCA claim against the federal government.<sup>9</sup> Not only did the judge, sitting without a jury, reject the FTCA claim, but he also ruled that his disposition retroactively invalidated Manning's earlier jury verdict on the *Bivens* claim.<sup>10</sup> Apparently without carefully evaluating the limits of the judgment bar and the threat to the constitutional right to trial by jury, the Seventh Circuit affirmed.<sup>11</sup> In the end, specific jury findings of official misconduct rising to the level of a constitutional violation were set aside by a judge's determination that the facts would not support a government tort claim under the FTCA.<sup>12</sup>

Understanding why this wrongheaded view of the judgment bar has taken hold in the federal courts—and the Seventh Circuit is by no means alone<sup>13</sup>—will take time and a patient reconstruction of the evolving interpretation of the statute. Before we begin the task of reconstruction, however, we offer an overview from a relatively high level of generality. In brief, the story goes like this: The FTCA's judgment bar was adopted in 1946 out of concern with the prospect of duplicative litigation against the government and its employees. Preclusion rules reflected in state common law and the 1942 Restatement of Judgments provided a measure of protection against duplicative litigation in the master-servant context. If an injured

5. *FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994).

6. James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 131 (2009).

7. *Manning*, 546 F.3d at 438.

8. *Id.* at 432.

9. *Id.*

10. *Id.*

11. *Id.* at 438.

12. *Id.*

13. For cases that apply the judgment bar to *Bivens* claims raised in the same suit, see, for example, *Serra v. Pichardo*, 786 F.2d 237, 241–42 (6th Cir. 1986); *Harris v. United States*, 422 F.3d 322, 333–34 (6th Cir. 2005); *Estate of Trentadue ex rel. Aguilar v. U.S. Dep't of Justice*, 397 F.3d 840, 859 (10th Cir. 2005). For the suggestion that the judgment bar applies even to FTCA claims dismissed for lack of jurisdiction, see for example, *Hoosier Bancorp of Ind., Inc. v. Rasmussen*, 90 F.3d 180, 184–85 (7th Cir. 1996); *Farmer v. Perrill*, 275 F.3d 958, 964–65 (10th Cir. 2001). For the retroactive application of the judgment bar, see *Manning*, 546 F.3d at 438; *Aguilar*, 397 F.3d at 859; *Engle v. Mecke*, 24 F.3d 133, 135–36 (10th Cir. 1994).

plaintiff first sued the servant on a theory of negligence and lost, based on a finding of non-negligence, the exoneration would block a second suit against the master.<sup>14</sup> While the master and servant were not in privity, common law courts nonetheless recognized that a judgment in the first action might fairly bar the second claim; after all, the liability of the master would depend on a showing of negligence that the plaintiff had failed to make.<sup>15</sup> For complex reasons of mutuality that we will explore in greater detail below, however, many state courts and the Restatement refused to treat the judgment in an action against the master as a bar to further litigation against the servant even where the issue of negligence had been resolved against the plaintiff.<sup>16</sup>

The FTCA was drafted to fill this gap by allowing the employee to assert a defense of non-mutual issue preclusion following an unsuccessful action against the government. With its creation of a rule of non-mutual issue preclusion, the judgment bar applied in the main to situations of *derivative* liability where the issue of negligence in the first proceeding was identical to the issue of negligence in the second proceeding.<sup>17</sup> Because it depended on the essential identity of the negligence issues that arose in the vicarious liability context, the judgment bar had no application when the initial judgment did not negate the liability of the defendant in the second action.<sup>18</sup> Imagine that the government successfully defended an FTCA claim on the ground that the employee had committed an *assault* rather than an act of simple negligence. Such an argument might succeed, for example, in the context of malpractice litigation, at least in states that characterized malpractice as an assault when the physician performed an operation that exceeded the scope of the patient's consent.<sup>19</sup> An assault characterization

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14. RESTATEMENT (FIRST) OF JUDGMENTS § 96(1)(a) (1942) (declaring that in an action by the injured party against the servant, where the master has a right to claim indemnity, a valid judgment against the injured party “terminates the cause of action against the [master]”).

15. See *Canin v. Kesse*, 28 A.2d 68, 70 (N.J. Dist. Ct. 1942) (“Strictly speaking, master and servant are not in privity, but, where the relationship is undisputed and the action is purely derivative and dependent upon the doctrine of respondeat superior, it constitutes an exception to the general rule.”); *Wolf v. Kenyon*, 273 N.Y.S. 170, 171–72 (N.Y. App. Div. 1934) (similar holding).

16. See RESTATEMENT (FIRST) OF JUDGMENTS § 96(2) (1942) (the entry of judgment in an earlier action by the injured party against the master has no effect in a subsequent claim against the servant).

17. See *Davis v. Perryman*, 286 S.W.2d 844, 847–48 (Ark. 1956) (applying judgment bar to block suit against servant for the “same mishap” where it was conceded in the first suit that the servant was at all times acting within the scope of employment); *Canin*, 28 A.2d at 69 (applying judgment bar to block suit against servant following an exoneration of the master “for the same negligent act”).

18. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 532 (1965); Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 559 n.170 (1947) (citing *Gould v. Evansville & Crawfordsville R.R. Co.*, 91 U.S. 526 (1875)) (holding that a dismissal for lack of subject matter jurisdiction “cannot be res judicata of the issues involved in the action”).

19. See *Moos v. United States*, 118 F. Supp. 275, 276–77 (D. Minn. 1954) (concluding that surgeon who operated on the wrong leg had committed an assault that fell outside the scope of the

would exonerate the *government*; the FTCA recognized vicarious liability for negligent acts committed in the scope of employment, but it expressly excluded assault claims from its coverage.<sup>20</sup> Needless to say, a judgment for the government based on the assault exception would not exonerate the *physician* from personal tort liability under state malpractice law. As a result, the victim was free to pursue the assault claim against the physician notwithstanding the codification of the judgment bar.

The judgment bar implemented this rule of non-mutual issue preclusion with language that has grown more ambiguous with the passage of time. By its terms, the statute makes a judgment in an action against the government “a complete bar to any action” brought against the employee “*by reason of the same subject matter.*”<sup>21</sup> The drafters borrowed the “same subject matter” reference from the Restatement where it had been used to describe a narrow subset of claims that rested on the same theory of liability.<sup>22</sup> The “same subject matter” formulation was meant to capture the logic underlying the judgment bar’s relaxation of mutuality; only when the prior decision addressed the identical legal question—the “same subject matter”—was it fair to treat the prior judgment as a bar to a subsequent claim against the employee.<sup>23</sup> On this view, a government judgment on the basis of a finding of non-negligence fairly bars a negligence claim against the employee arising from the same act or omission. A government judgment on some other basis, however, should not bar a suit against the employee on theories of tort liability that the prior judgment fails to negate. No issue preclusive effect attaches to such a judgment.

The model of government tort litigation has changed in the last generation. First, the *Bivens* decision in 1971 recognized an implied federal cause

FTCA); *cf.* *United States v. Hambleton*, 185 F.2d 564, 567 (9th Cir. 1950) (lengthy investigation amounted to an assault and therefore fell outside the scope of FTCA’s coverage); *Duenges v. United States*, 114 F. Supp. 751 (S.D.N.Y. 1953) (honorably discharged army veteran wrongly jailed for desertion amounted to false arrest and imprisonment and therefore fell outside the scope of the FTCA’s coverage).

20. 28 U.S.C. § 2680(h) (2006) excepted claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights from the ambit of the FTCA. However, claimants were still free to pursue other intentional tort claims against the Government. Such claims included: trespass, conversion, and intentional infliction of emotional distress. Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 *TORT TRIAL & INS. PRAC. L.J.* 1105, 1131–32 (2009) (collecting cases).

21. 28 U.S.C. § 2676 (2006) (emphasis added).

22. *See* RESTATEMENT (FIRST) OF JUDGMENTS §§ 70, 84 (1942).

23. Congressional testimony discussing the judgment bar indicates that Congress anticipated that the judgment bar would only bar subsequent claims that were functionally equivalent to claims that had been tried to judgment against the government under the FTCA. *Tort Claims*, *supra* note 3, at 31 (discussing the judgment bar and stating the “judgment in a tort action constitutes a bar to further action upon *the same claim*, not only against the Government (as would have been true [in the absence of the judgment bar]) but also against the delinquent employee . . . .”) (emphasis added).

of action for those alleging a violation of their Fourth Amendment rights.<sup>24</sup> Next, the 1974 amendments to the FTCA broadened the scope of the government's liability to include certain intentional torts committed by law enforcement officers.<sup>25</sup> In expanding the government's *respondeat superior* liability, Congress obviously broadened the application of the judgment bar to some extent. It tried to make clear, however, that it did not mean to displace the *Bivens* action; the new remedies under the FTCA were meant to supplement, rather than exclude, the right of individuals to pursue constitutional tort claims<sup>26</sup> as the Court concluded in *Carlson v. Green*.<sup>27</sup> Finally, in 1988, Congress expanded the scope of employee immunity from liability in the Westfall Act but deliberately left constitutional claims outside the FTCA. Despite Congress's persistent effort to preserve *Bivens*,<sup>28</sup> the FTCA's expanded remedies have been read, in combination with the judgment bar, to exclude *Bivens* liability in much the way Congress meant to avoid.<sup>29</sup>

A variety of factors have contributed to the changing interpretation of the judgment bar. First, the federal courts have displayed little interest in understanding the origins and early operation of the judgment bar, preferring to focus on the text of the statute and its application to modern litigation.<sup>30</sup> Second, modern courts confront a very different litigation landscape. At the time the judgment bar was adopted, the plaintiff could not routinely consolidate FTCA litigation against the government and state tort claims against an employee in a single proceeding.<sup>31</sup> The district court lacked sup-

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24. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

25. 28 U.S.C. § 2680(h) (1974).

26. See S. REP. NO. 93-588, at 3 (1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2791 (“[T]his provision should be viewed as a counterpart to the *Bivens* case and its progeny [sic] . . .”).

27. *Carlson v. Green*, 446 U.S. 14, 20 (1980).

28. Between the years of 1973 and 1983, the Department of Justice made several failed attempts to convince Congress to preempt the *Bivens* action by amending the FTCA to provide an exclusive remedy for constitutional violations. See, e.g., H.R. 10439, 93d Cong. §§ 2–4 (1974); S. 2117, 95th Cong. § 2 (1978); S. 829, 98th Cong. § 2 (1983); H.R. 595, 98th Cong. § 1 (1983).

29. See *supra* note 13 (collecting cases that apply the judgment bar to *Bivens* claims raised in the same suit).

30. See *infra* Part II.

31. Courts interpret the phrase “by reason of the same subject matter” as incorporating the modern transactional test into the judgment bar. Thus, modern courts interpret the judgment bar as precluding claims against government employees where those claims arise out of the same transaction as those that gave rise to an FTCA action. E.g., *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986); see also *Unus v. Kane*, 565 F.3d 103 (4th Cir. 2009) (holding that a judgment against the government under the FTCA precluded a *Bivens* claim against the tortious government employee); *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008) (finding that a claim against a government employee could not be sustained where plaintiff brought a simultaneous claim against the government); *Harris v. United States*, 422 F.3d 322, 333–34 (6th Cir. 2005) (holding that a court’s adjudication of an FTCA claim barred a plaintiff’s claim against a government employee); *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir. 2001) (stating that a claim under the FTCA precludes a victim from bringing a *Bivens* action against the employee responsible for the tort); *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994) (asserting that a decision to bring a claim

plemental jurisdiction over pendent party claims against the employee, and the state court could not hear FTCA claims.<sup>32</sup>

Today, in contrast, *Bivens* and FTCA claims both arise under federal law for jurisdictional purposes and often appear in a single proceeding joined under Rule 20<sup>33</sup> on the basis that they grow out of the same transaction or occurrence.<sup>34</sup> The existence of a transactional relationship has encouraged the courts to treat the *Bivens* claim as one brought “by reason of the same subject matter”<sup>35</sup> as any claim brought under the FTCA. Third, federal courts undoubtedly feel obliged to avoid the threat of double recoveries seemingly posed by the assertion of overlapping claims under *Bivens* and the FTCA (although other tools of coordination could prevent duplicative recovery).<sup>36</sup> Finally, the federal courts today display a degree of hostility towards *Bivens* claimants that dramatically contrasts with the solicitude for the rights of individual claimants that informed judicial decisions a half century ago.

In this three-part article, we explore the issue preclusive origins of the judgment bar and show why it does not come into play as a device to coordinate *Bivens* litigation with tort claims under the FTCA. Part I examines the factors that led to the adoption of the judgment bar and describes its operation in light of preclusion law and the scope of state and federal judicial authority over the claims in question. Part II examines the sharply dif-

under the FTCA precludes bringing an additional action against employee responsible for the tort); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987) (stating that a government employee is “no longer answerable” after judgment entered against government for FTCA claim).

32. See, e.g., *Benbow v. Wolf*, 217 F.2d 203, 205 (9th Cir. 1954) (dismissing suit against government employee because claimant and employee were not diverse); *United States v. Lushbough*, 200 F.2d 717, 721–22 (8th Cir. 1952) (stating in dicta that where there is no diversity of citizenship between claimant and employee, court cannot exercise jurisdiction over employee); *Donovan v. McKenna*, 80 F. Supp. 690, 690 (D. Mass. 1948) (“I find no language in the Act whereby the Government consented to be sued along with its employees.”). Cf. *Finley v. United States*, 490 U.S. 545 (1989) (refusing to allow pendent party jurisdiction in action brought against government under FTCA).

33. FED. R. CIV. P. 20 allows permissive joinder of multiple defendants in a single lawsuit if (1) a right to relief is asserted against each defendant that relates to or arises out of the same transaction or occurrence; and (2) any question of law or fact common to all defendants arises in the action. Claimants bring claims under the FTCA against the government and against federal agents under *Bivens* in the same action where those claims are related and arise out of the same transaction. See *infra* note 34.

34. Modern courts try FTCA and *Bivens* claims in the same action as a matter of course. See, e.g., *Harris*, 422 F.3d at 334; *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978); *Serra*, 786 F.2d at 241.

35. 28 U.S.C. § 2676 (2006).

36. E.g., *Hallock v. Bonner*, 387 F.3d 147, 156 (2d Cir. 2004) (stating that the principal purpose of the judgment bar is to prevent duplicative recoveries); *Clifton v. Miller*, No. 97-2342, 1998 WL 78992, at \*2 (7th Cir. Feb. 19, 1998) (declaring that the judgment bar prevents double recoveries); *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992) (“We thereby read [the judgment bar] to preclude dual recover[ies] . . . .”); *Ting v. United States*, 927 F.2d 1504, 1513 (9th Cir. 1991) (similar holding); *Henderson v. Blumink*, 511 F.2d 399, 404 (D.C. Cir. 1974) (similar holding).



ferent conception of the judgment bar that has taken hold in the lower federal courts and the various factors that help to explain the drift away from the original operation of the provision. Divorced from its context and an understanding of the factors that gave rise to its enactment, the text of the judgment bar produces dysfunctional results. Part III generalizes from the lessons of the judgment bar. Textualism promises judicial modesty and deference to Congress; but as the growing power of the judgment bar so vividly illustrates, textualism can enable the federal courts to achieve results very much at odds with the expectations of the Congress that adopted the relevant language. Unless tempered with an appropriately modest assessment of the expectations of the enacting Congress, textualism can facilitate a kind of judicial immodesty and willfulness quite at odds with the claims of its most eloquent supporters.

## I. THE 1946 JUDGMENT BAR AND THE COORDINATION OF VICARIOUS LIABILITY

Although Congress finally adopted the FTCA after a United States military plane crashed into the Empire State Building,<sup>37</sup> the statute had been in the works for a number of years.<sup>38</sup> To understand the Act's operation and the role of the judgment bar, we must first understand the broader legal context in which the FTCA was adopted and the fundamental goals of the legislation. This part first sketches the origins of the FTCA and then examines the understood operation of the judgment bar circa 1946.

### A. *The Adoption of the FTCA*

Scholars agree that the FTCA was adopted in part to provide compensation to victims of government wrongdoing and in part to free Congress from the burden of passing on petitions for private relief.<sup>39</sup> Both of these

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37. See Mark C. Niles, *Nothing But Mischief': The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1279 (2002).

38. *Dalehite v. United States*, 346 U.S. 15, 24 (1953) ("The Federal Tort Claims Act was passed by the Seventy-Ninth Congress in 1946 . . . after nearly thirty years of congressional consideration . . .").

39. Prior to 1946, persons injured by a government employee had to petition Congress to pass special, private legislation in order to obtain financial compensation from the government. Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 397-403 (2010). Such private bills are termed "private claims bills." *Id.* at 400. The process of passing a private claims bill was "slow, cumbersome, and frequently inequitable since identical claims could receive vastly different treatment by different Congresses." ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 9.2.3, at 635 n.38 (5th ed. 2007) (quoting BASIL J. MEZINES ET AL., ADMINISTRATIVE LAW 6A-6 to -7 (rev. ed. 1986)). Furthermore, Congress was overrun by such bills. For example, in the Sixty-Eighth Congress, 2200 private claims bills were introduced of which 250 became law; in the Seventieth Congress, 2268 private claims bills were introduced of which 336 became law; and in the Seventy-Sixth Congress, 1763 private claims bills were introduced of which 315 became law. *Tort Claims*, *supra* note 3, at 49-56 (discussing the burden that private claims bills imposed on Congress). Congress enacted the FTCA in order to relieve itself of the burden that such private claims bills imposed and to provide claimants with a just system

concerns arose from the way the federal government's sovereign immunity interacted with the common law doctrine of *respondet superior*. Under the doctrine of *respondet superior*, the master generally bears vicarious liability for the torts of the servant, at least those committed within the course and scope of the servant's employment.<sup>40</sup> In the case of torts committed by the employees of the federal government, however, the doctrine of sovereign immunity prevented the common law rule from coming into play.<sup>41</sup> Instead of suing the federal government for the torts of its servants, individuals would sue government officers and employees themselves. In the early years of the republic, federal officers (including military officials, customs officers, and tax collectors) found themselves defending personal liability claims brought by those who alleged a trespassory taking of property.<sup>42</sup> The government often supplied counsel to defend such litigation and would often indemnify the official in cases where damages were awarded.<sup>43</sup> (Government employees had to submit applications for indemnity to Congress in the form of petitions for private legislation.<sup>44</sup>) In effect, sovereign immunity served to place Congress in charge of making the principal-agent determinations that shaped the federal government's vicarious liability for the tortious acts of its employees. Congress would enact legislation to compensate victims when it concluded that the employee had acted as the government's agent in inflicting the injury.

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within which they could pursue their claims against the government. H.R. REP. NO. 71-2800, at 2 (1931) (explaining that the private claims process was unjust to claimants); Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 5-9 (1991) (explaining the dual purpose of the FTCA); Jeff L. Lewin, *The Tail Wags the Dog: Judicial Misinterpretation of the Punitive Damages Ban in the Federal Tort Claims Act*, 27 WM. & MARY L. REV. 245, 263-67 (1986) (same).

40. RESTATEMENT (FIRST) OF AGENCY §§ 215, 216 cmt. a (1933) (master is liable for the torts that his servant commits while acting within the scope of his employment); RESTATEMENT (SECOND) OF AGENCY § 219.1 (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").

41. See Figley, *supra* note 39, at 397-98.

42. See, e.g., *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 138 (1836) (to recover customs tax from collector); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 749 (1824) (injunction against trespassory taxation); *Meigs v. Mclung's Lessee*, 13 U.S. (9 Cranch) 11, 11 (1815) (ejectment); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 332 (1806) (damages for wrongful seizure of property to enforce illegal fine).

43. *Tort Claims*, *supra* note 3, at 9 (statement of Francis M. Shea, Assistant Att'y Gen., U.S. Dept. of Justice: "It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damages or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services. Most of these persons are not in a position to stand or defend large damage suits, and they are of course not generally in a position to secure the kind of insurance which one would if one were driving for himself.").

44. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1865 (2010).

By the 1940s, the scope of federal government activities had grown, producing a wide range of tort claims and a flood of petitions to Congress for relief.<sup>45</sup> Critics worried about the speed and fairness with which Congress disposed of these claims.<sup>46</sup> Congress eventually heard the critics and chose, through the FTCA, to transfer government tort litigation to the federal courts as part of the Legislative Reorganization Act of 1946.<sup>47</sup> The structure of the statute was fairly straightforward: Congress adopted state law as the measure of liability and simply declared that the federal government would be liable for the torts of its employees, acting within the scope of their office “in accordance with the law of the place where the act or omission occurred.”<sup>48</sup> Under the terms of the FTCA, federal courts were to determine both whether the underlying action was tortious and whether the action had occurred within the scope of office such that the government was subject to vicarious or *respondeat superior* liability. The primary focus of the FTCA was negligence; the 1946 version of the statute expressly exempted claims based on intentional torts, such as “assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, and deceit.”<sup>49</sup>

Congress added a variety of procedural wrinkles to the statute in later years. First, Congress required the injured individual to file a notice of claim with the relevant agency and permitted suit in federal court only after the agency denied the claim.<sup>50</sup> Second, Congress put in place the Judgment Fund, a standing appropriation from which judgments up to \$100,000 were to be paid.<sup>51</sup> (Congress has since removed the cap, thereby authorizing routine payment of any judgment rendered by a United States court against the

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45. See *Tort Claims*, *supra* note 3, at 9 (explaining the private claims bill process).

46. The process of passing a private claims bill was “slow, cumbersome, and frequently inequitable since identical claims could receive vastly different treatment by different Congresses.” ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* § 9.2.3 (5th ed. 2007) (citing BASIL J. MEZINES, JACOB A. STEIN & JULES GRUFF, *ADMINISTRATIVE LAW* 1-6A § 6A.02 (rev. ed. 1986)).

47. Federal Tort Claims Act (FTCA), Pub. L. No. 79-601, §§ 401–22, 60 Stat. 842 (1946) (codified at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401–02, 2411–12, 2671–80 (1982)); *Dalehite v. United States*, 346 U.S. 15, 23 (1953) (“The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of congressional consideration.”).

48. 28 U.S.C. § 1346(b)(1) (2006).

49. FTCA § 421(h), 60 Stat. at 846; 28 U.S.C. § 2680(h) (2006).

50. 28 U.S.C. § 2675(a) (2006); see also FTCA § 403, 60 Stat. at 843 (providing mechanism for administrative settlement of claims).

51. 31 U.S.C. § 1304 (2006). In the past, Congress would pass specific appropriations to fund particular judgments. The Judgment Fund, enacted in 1956, initially established a cap of \$100,000 on payable judgments, and larger claims were payable only through special appropriations. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. REV. 899, 966 n.241 (1997).

federal government.<sup>52</sup>) These terms provided the agency with notice of the claim and the power to resolve it through compromise or settlement before litigation. They also ensured routine payment of judgments from the general treasury (rather than from the agency's appropriation), thereby eliminating any Article III finality concerns and further relieving Congress of the burden of making payment decisions on a case-by-case basis.

### B. *Understanding the Judgment Bar*

The judgment bar—and the related settlement or release bar—provide important protections to federal government employees by foreclosing specific forms of duplicative litigation.<sup>53</sup> In brief, the judgment bar provides that a judgment in an action under the FTCA shall constitute a “complete bar” to any action by the claimant “by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.”<sup>54</sup> It thus bars a claimant from litigating a *respondeat superior* claim against the government (as master) and then pursuing the same claim against the employee (as servant). The release bar operates in much the same way, declaring that the claimant's acceptance of a settlement or compromise payment from the government shall release both the government and the “employee . . . whose act or omission gave rise to the claim, by reason of the same subject matter.”<sup>55</sup> One can best understand these provisions as relaxing the rules of mutuality in the context of the master's vicarious liability for the torts of the servant. Claims to which the judgment and release bars apply—those brought “by reason of the same subject matter”<sup>56</sup>—are claims based on common law theories of tort liability to which the FTCA's acceptance of *respondeat superior* liability extends.

One can see the concern with the preclusion of duplicative litigation in the context of vicarious liability in the remarks of a leading witness. In an oft-quoted passage from the 1942 hearings on the FTCA, the Assistant Attorney General, Francis M. Shea, explained the purpose of what later became the judgment and release bars.<sup>57</sup> He stated:

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52. Congress removed the cap in 1977. Pub. L. No. 95-36, 91 Stat. 177 (1977). The statute thus provides the necessary authorization or appropriation to pay any judgment against the government.

53. 28 U.S.C. § 2676 (2006) (judgment bar); 28 U.S.C. § 2672 (2006) (release bar).

54. 28 U.S.C. § 2676.

55. 28 U.S.C. § 2672.

56. 28 U.S.C. § 2676; 28 U.S.C. § 2672.

57. Mr. Shea was actually testifying regarding Section 201 of H.R. 6463, which stated “The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.” *Federal Tort Claims Act, H.R. 6463, 77th Cong.* § 201, at 790–91 (1942). That provision was included in the 1946 Act without alteration.

It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damage or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services. Most of these persons are not in a position to stand or defend large damage suits, and they are of course not generally in a position to secure the kind of insurance which one would if one were driving himself.

If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.<sup>58</sup>

For Shea, then, the point of the provisions was to protect the employee from a successive proceeding and the government from the burden of defending duplicative claims.<sup>59</sup> To see why the common law doctrines of claim and issue preclusion (the tools often used to regulate duplicative litigation) did not adequately address the government's concern, we first examine the judgment bar's common law foundations and then explore the particulars of its codification.

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58. *Tort Claims*, *supra* note 3, at 9 (statement of Francis M. Shea, Assistant Att'y Gen. of the United States).

59. Note, however, that the Judgment Bar does not afford an absolute immunity to the federal employee. It does not prohibit suit against the employee, but instead rather plainly assumes that the employee will remain a proper defendant in litigation brought by the victims of tortious activity. One can readily understand Congress's decision to preserve the possibility of litigation against the employee. Imagine a situation in which the post-office driver caused an accident while driving to or from work, or while on personal business during a lunch break. The government might well contend, in such a case, that it bore no vicarious liability because the employee was not acting within the scope of employment at the time of the accident. If the government were successful in asserting such a defense, then the plaintiff could not recover under the FTCA. But the plaintiff would nonetheless retain the right to pursue a claim against the driver and to recover damages on a showing of negligence. In some cases, moreover, the plaintiff might even prefer to sue a well-insured driver instead of the government. Thus, the author of an early article argued that two features of the FTCA—its cap on attorney's fees (20% of the recovery) and its prohibition of trial by jury—would make the prospect of suing a well-insured government employee relatively attractive. *See* WILLIAM B. WRIGHT, *THE FEDERAL TORT CLAIMS ACT 78-79* (1957).

### 1. *The Judgment Bar at Common Law*

We begin with a brief primer on the law of claim and issue preclusion and the doctrine of mutuality. Borrowing Shea's example of *respondeat superior* liability, we hypothesize a suit by a pedestrian (Peter) that seeks to impose vicarious liability on a delivery firm (USPS) on account of the negligence of a driver (Donna) who struck Peter while driving the company's truck.<sup>60</sup> If an action brought by Peter against USPS were to result in a verdict of non-negligence, the judgment would obviously preclude Peter from pursuing further litigation against USPS.<sup>61</sup> (That's claim preclusion.) Under a strict reading of the mutuality doctrine, however, the USPS exoneration would not block Peter from bringing a successive claim against Donna. After all, Donna and USPS are different parties for preclusion purposes;<sup>62</sup> if Peter did not join Donna as a party to the USPS litigation, he could not rely on his judgment against USPS as the basis for imposing liability on Donna (even though a judgment in his favor would necessarily entail a finding of Donna's negligence).<sup>63</sup> Peter's inability to bind Donna (a non-party) to the

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60. Recall that Mr. Shea's example involved a claimant successfully pursuing the government on a negligence theory under the FTCA and subsequently filing suit against the government's employee whose acts gave rise to first claim. *Tort Claims*, *supra* note 3, at 9 (statement of Francis M. Shea, Assistant Att'y Gen., U.S. Dept. of Justice).

61. See RESTATEMENT (FIRST) OF JUDGMENTS § 48 (1942) ("Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action.").

62. See *id.* § 83 (declaring a person, not a party, to be bound by a judgment when "in privity" with the parties). A finding of privity could be based on a variety of different relationships, including a relationship of control over the litigation and a relationship of successor in interest to an owner of real property. See *generally id.* § 84 (those who control litigation); § 85 (agency relationship); § 86 (members of a class); §§ 89, 92 (successors in interest and those having derivative claims). However, government employees are not in privity with the government. *Willner v. Budig*, 848 F.2d 1032, 1034 n.2 (10th Cir. 1988) ("Government employees in their individual capacities are not in privity with their government employer."); see also 18A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4458, at 567 n.20 (2d ed. 2002). This rule that government employees are not in privity with the government stems from the common law rule that master and servant are not privies. See, e.g., *Canin v. Kesse*, 28 A.2d 68, 70 (N.J. Dist. Ct. 1942) (quoting *Wolf v. Kenyon*, 242 A.D. 116, 117 (N.Y. App. Div. 1934)) ("Strictly speaking, master and servant are not in privity. . . ."); *Sherwood v. Huber & Huber Motor Exp. Co.*, 151 S.W.2d 1007, 1012 (Ky. App. 1941) (" . . . no such privity relationship exists between principal and agent or master and servant in tort actions growing out of the sole negligence of the servant."); *Mackey v. Frazier*, 106 S.E.2d 895, 899 (S.C. 1959) ("[W]e do not hold that a judgment in favor of Sloan Williams, who was the master, operates as *res judicata* in a subsequent action against his servant or agent for the reason that the parties are not the same and there is no such privity between them as is necessary for the application of that doctrine."); *Deorosan v. Haslett Warehouse Co.*, 332 P.2d 422, 435 (Cal. Ct. App. 1959) ("Agents and principals, including, of course, masters and servants, do not, as such, have any mutual or successive relationship to rights of property. They are not in privity with each other."); *Maryland Cas. Co. v. Morris*, 128 S.W.2d 86, 88 (Tex. App. 1939) ("no privity between a principal and his agent, or a master and his servant").

63. On the requirements of preclusion law, and the idea that preclusion applies only to parties and their privies, see RESTATEMENT (FIRST) OF JUDGMENTS §§ 73, 93, at 332–33, 459–60 (1942) (declaring judgments binding on parties but not on non-parties, at least in the absence of privity). The Supreme Court recently signaled its desire to preserve traditional conceptions of party-cen-

earlier judgment *against* USPS would mean, from a strict mutuality perspective, that Donna could not use an earlier *exoneration* of USPS as a defense to Peter's subsequent claim against her.<sup>64</sup>

At the time of the FTCA's adoption in 1946, many state courts continued to apply the strict doctrine of mutuality, thereby permitting successive suits by plaintiffs in the position of Peter.<sup>65</sup> Indeed, the Restatement of Judgments, which appeared just four years before the FTCA's adoption, confirmed the rules of mutuality.<sup>66</sup> The Restatement, however, also recognized a carefully tailored exception (what the Wright and Miller treatise *Federal Practice and Procedure* refers to as the "narrow exception"<sup>67</sup>) for situations involving vicarious liability. If Peter went to judgment first against Donna, then that judgment could have a preclusive effect in a later action against USPS. The Restatement (and many state courts) justified this departure from mutuality by pointing to the duty of indemnity.<sup>68</sup> At common law, the servant (Donna) would owe a duty to indemnify the master (USPS) for any vicarious liability imposed on the master on account of the servant's negligence.<sup>69</sup> (Today, of course, most employers look to liability insurance carriers for indemnity rather than to their employees.) To protect the master's right of indemnity, preclusion law would bar Peter's suit against USPS if Donna had first been exonerated in a suit brought by Peter.<sup>70</sup> The idea was to protect the master (or indemnitee) from the subse-

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tered preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 906–07 (2008) (rejecting the notion that an individual who did not become a party to earlier litigation could be subsequently barred from pursuing a claim in his own right on a theory of vicarious representation).

64. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 93 (1942) (declaring that a person not a party or not in privity is not entitled to claim the benefits of an earlier adjudication).

65. *See id.* (collecting cases); *see also Mackey*, 106 S.E.2d at 899 (“[W]e do not hold that a judgment in favor of Sloan Williams, who was the master, operates as *res judicata* in a subsequent action against his servant or agent for the reason that the parties are not the same and there is no such privity between them as is necessary for the application of that doctrine.”).

66. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 93 (1942) (declaring that a person not a party or a privy “is not bound by or entitled to claim the benefits of any adjudication”).

67. *See* WRIGHT, MILLER & COOPER, *supra* note 62, § 4463, at 681.

68. RESTATEMENT (FIRST) OF JUDGMENTS § 96 (1942) (defining the preclusive effect of judgments against tortfeasors where a duty of indemnity exists); *see also id.* § 96 cmts. a, d (specifying that the rule rests on concern with protecting rights of indemnity and not on a finding of privity between master and servant).

69. RESTATEMENT OF RESTITUTION § 96 (1937) (declaring that a person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability).

70. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 96(1)(a) (1942) (declaring that in an action by the injured party against the servant, where the master has a right to claim indemnity, a valid judgment against the injured party “terminates the cause of action against the [master]”). While the Restatement frames the rule in terms of the interests of indemnitees (employers) and indemnitors (employees), the commentary and illustrations make clear that the rule applies to the master-servant relationship. *See id.* § 96 cmt. b (declaring the rules applicable to “cases involving master and servant” where the master “is responsible only upon the ground of *respondeat superior*”); § 96 cmt. d (offering three illustrations of the principle drawn from master-servant litigation). We have translated the rule into master-servant terms for clarity of exposition.

quent imposition of liability that could not be shifted back to servant. The same idea explains why a successful action for damages against the servant often served as a cap on the amount of any vicarious liability that could later be imposed on the master.<sup>71</sup>

While Restatement § 96 recognized that a judgment exonerating the servant (Donna) would bar a subsequent suit against the master (USPS), the same result would not obtain if Peter first brought suit against the master.<sup>72</sup> According to the Restatement, the entry of judgment in an earlier action by the injured party against the master has no effect in a subsequent claim against the servant; it “binds neither the plaintiff nor the [servant].”<sup>73</sup> The Restatement explained that a person (like the servant) who was “not represented in [the first action] and who does not participate in it, is entitled to . . . litigate his rights and liabilities.”<sup>74</sup> In such a setting, the Restatement could discern “no reason for an exception to the ordinary rules of mutuality.”<sup>75</sup> Mutuality controlled because the servant, as the party primarily liable, was owed no duty of indemnity and faced no threat of unfairness through inconsistent results. As a result, the Restatement held that the injured party’s prior litigation with the master bound neither the servant nor the injured party. Both were free to re-litigate liability and the amount of damages.<sup>76</sup> In short, the Restatement’s rules of preclusion confirmed the government’s concern: a non-negligence finding in an action against the government under the FTCA would not, at common law, bar a later negligence claim against the employee.

A similar asymmetry was embedded in Restatement § 99,<sup>77</sup> which specified an affirmative rule of non-mutual preclusion that applied even in circumstances where the law imposed no obligation of indemnity. Speaking in terms of a “judgment bar” (and thus providing an obvious precursor to the provision in the FTCA), Restatement § 99 provided that a

*valid judgment* on the merits and not based on a personal defense, in favor of a person charged with the commission of a tort . . . bars a subsequent action by the plaintiff against another responsible for the conduct of such person if the action is based solely

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71. See *id.* § 96(1)(b) (providing that a judgment for the victim in a suit against the servant will bind the victim as to the amount of the recovery in a subsequent action against the master, but will not bind the master in any respect).

72. See *id.* § 96(2).

73. *Id.*

74. *Id.* § 96(2) cmt. j.

75. *Id.*

76. *Id.* (declaring that the judgment in a suit by an injured party against the master does not bind the injured party either as to result or as to amount in the event the jury awarded a small judgment); see also *id.* § 96(2) cmt. j, illus. 9 (illustrating the principle by clarifying that a judgment for the master on the issue of negligence would not bar a subsequent negligence suit against the servant).

77. *Id.* § 99.



upon the existence of a tort . . . by such person, whether or not the other person has a right of indemnity.<sup>78</sup>

The commentary explained that the provision, like § 96, addressed a situation “in which a *judgment for the defendant has the effect of barring a claim against a third person*” even though a judgment for the plaintiff would not bind such third party.<sup>79</sup> The Restatement explained that the plaintiff, having had his “day in court” and having been unsuccessful, would suffer no unfairness by being “deprived of an action against another.”<sup>80</sup>

In articulating an asymmetric rule of judgment bar preclusion,<sup>81</sup> the Restatement charted something of a middle course among the various approaches taken by the state courts. As noted above, some state courts continued to adhere to a strict form of mutuality and declined to treat any exoneration (whether of master or of servant) as a bar to subsequent suit.<sup>82</sup> Some courts, however, adopted the Restatement’s position, applying the judgment bar to protect the master after the servant’s exoneration but refusing to protect the servant.<sup>83</sup> Still others extended the logic of the judgment bar more fully (and further abandoned mutuality), allowing the servant to invoke the master’s exoneration as a bar to duplicative litigation.<sup>84</sup> As Jus-

78. *Id.* (emphasis supplied).

79. *Id.* § 99 cmt. a (emphasis supplied).

80. *Id.*

81. Like those in Restatement of Judgments section 96, the judgment bar provisions in section 99 appear consistent with the government’s perception that the rules of preclusion at common law failed to offer protection to federal employees. Section 99 protected the *master* from a subsequent suit following the exoneration of the *servant*. But it afforded no protection to the servant if a judgment of non-negligence were entered in a previous suit brought against the master. This asymmetric feature (protecting the master but not the servant from duplicative litigation) was specified in the provision’s application only to a subsequent action against “one responsible for the conduct” of the prior defendant. Plainly, the master bears “responsibility” for the torts of the servant but the servant bears no responsibility for the torts of the master. As phrased in the Restatement, then, the judgment bar afforded no protection for employees after an exoneration of the master. Recall that Francis Shea explained the need for a statutory judgment bar precisely to eliminate this asymmetry; the statute was meant to protect employees from a duplicative suit following a judgment in litigation against the government.

82. *See supra* note 65; *see also* RESTATEMENT OF JUDGMENTS § 93.

83. *Mackey v. Frazier*, 106 S.E.2d 895, 899 (S.C. 1959) (“[W]e do not hold that a judgment in favor of Sloan Williams, who was the master, operates as *res judicata* in a subsequent action against his servant or agent for the reason that the parties are not the same and there is no such privity between them as is necessary for the application of that doctrine.”). For the proposition that the release of the master does not release his servant, see *Hamm v. Thompson*, 353 P.2d 73, 76 (Colo. 1960) (release of employer does not constitute release of servant).

84. *See, e.g., Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127–28 (1912) (“An apparent exception to this rule of mutuality had been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff.”); *Bernhard v. Bank of Am. Nat’l Trust & Savs. Ass’n*, 122 P.2d 892, 895 (Cal. 1942) (“Thus, if a plaintiff sues a servant for injuries caused by the servant’s alleged negligence within the scope of his employment, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the master as *res judicata* if he is subsequently sued by the same plaintiff for the same injuries. Conversely, if the plaintiff first sues the master, a judgment against the plaintiff on the grounds that the servant

tice Roger Traynor explained in a leading account of the judgment bar, the key lay in a conclusion that a defendant was exonerated “in an earlier suit brought by the same plaintiff upon the same facts.”<sup>85</sup> Thus, if the plaintiff first sues the master, “a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the servant as *res judicata* if he is subsequently sued by the plaintiff.”<sup>86</sup> Traynor acknowledged, in such a case, that the party asserting the plea (Donna, in our example) was neither a party to the earlier proceeding (against USPS) nor in privity with that party (under the accepted definitions of privity).<sup>87</sup> Courts based their extension of the judgment bar on simple justice; having had an opportunity to prove liability, Peter would not be allowed to “reopen identical issues” by switching opponents.<sup>88</sup>

To ensure that the judgment bar did not swallow the rules of privity and mutuality,<sup>89</sup> courts were careful to limit its operation to cases of vicarious or derivative liability.<sup>90</sup> Thus, the courts allowed the judgment bar to

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was not negligent can be pleaded by the servant as *res judicata* if he is subsequently sued by the plaintiff.”); *Canin v. Kesse*, 28 A.2d 68, 70 (N.J. Dist. Ct. 1942) (“Strictly speaking, master and servant are not in privity, but, where the relationship is undisputed and the action is purely derivative and dependent entirely upon the doctrine of *respondeat superior*, it constitutes an exception to the general rule.”); *Wolf v. Kenyon*, 273 N.Y.S. 170, 173 (N.Y. App. Div. 1934) (similar holding); *Leary v. Virginia-Carolina Joint Stock Land Bank*, 2 S.E.2d 570, 573 (N.C. 1939) (“[W]here it is not claimed that the master actually participated in or directed the commission of the wrong, and is only sought to be held under the doctrine of *respondeat superior*, a judgment rendered as in this case, in favor of the servant, would bar a judgment against the master.” (quoting *Childress v. Lake Erie & W.R. Co.*, 105 N.E. 467, 469 (Ind. 1914) (“This general rule, however, does not apply when the relation of master and servant exists between two defendants and there is no claim that the master actually participated in or directed the commission of the wrong, but is sought to be held liable under the doctrine of *respondeat superior*.”))); *Giedrewicz v. Donovan*, 179 N.E. 246, 248 (Mass. 1931) (“[T]he better rule would seem to be that if it is clearly established in the trial of an action either against the employee or against the principal for damages caused by the employer’s negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff for the same negligent act of the same employee.”).

85. *Bernhard*, 122 P.2d at 895.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Res judicata*, as one court explained, did not apply in the vicarious liability context because the “parties were not the same.” For examples in which the courts referred to the doctrine as a Judgment bar, see *Wolf*, 273 N.Y.S. at 172 (under the doctrine, the “prior judgment is a bar” to subsequent litigation) (emphasis added); *Leary*, 2 S.E.2d at 573 (“Where it is not claimed that the master actually participated or directed the commission of the wrong, and is only sought to be held under the doctrine of *respondeat superior*, a judgment rendered as in this case, in favor of the servant, would bar a judgment against the master.” (emphasis added)); *Giedrewicz*, 179 N.E. at 248 (“The better rule would seem to be that if it is clearly established in the trial of an action either against the employee or against the principal for damages caused by the employer’s negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff for the same negligent act of the same employee.”) (emphasis added).

90. See, e.g., *Canin v. Kesse*, 28 A.2d 68, 70 (N.J. Dist. Ct. 1942) (“Strictly speaking, master and servant are not in privity, but, where the relationship is undisputed and the action is purely

operate in cases of master-servant liability and in cases involving the liability of principal-agent and indemnitor-indemnitee.<sup>91</sup> This emphasis on derivative liability limited the judgment bar to situations in which the claims against the two defendants could be fairly described as “identical.”<sup>92</sup> Such an identity of issues clearly obtained in the context of master-servant litigation; as one court explained in applying the judgment bar, the master’s liability “was purely of a derivative or secondary character on the theory of *respondeat superior*.”<sup>93</sup> This derivative quality would ensure that the exoneration of the master (USPS) on the basis of a finding of non-negligence would apply to the servant as well.<sup>94</sup>

Two corollaries followed from the requirement of derivative liability and identity of issues. First, if the theory of liability was not derivative but was joint and several, the judgment bar had no application.<sup>95</sup> In such cases, the liability of each defendant was based on the conduct of that defendant; a finding of liability or non-liability as to one defendant would not imply either the validity or invalidity of the claim against another defendant. The claims might bear a close resemblance to one another, but the absence of

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derivative and dependent upon the doctrine of respondeat superior, it constitutes an exception to the general rule.”); *Wolf*, 273 N.Y.S. at 173 (holding resembles that in *Canin*); *Davis v. Perryman*, 286 S.W.2d 844, 846 (Ark. 1956) (“[A] holding in favor of the plaintiff in the first action—whether against the master or the servant—is not *res judicata* on the questions of negligence and contributory negligence in a subsequent action, nor does the rule apply as long as the judgment obtained in the first action remains unsatisfied. It is only when the plaintiff has tried and lost that the rule applies; and then only where the only questions are negligence and/or contributory negligence.”); *Sherwood v. Huber & Huber Motor Exp. Co.*, 151 S.W.2d 1007, 1011 (Ky. Ct. App. 1941) (“[N]o such privity relationship exists between principal and agent or master and servant in tort actions growing out of the sole negligence of the servant. Therefore, in this case the instant defendants, not having been parties to the first action of plaintiff against their servant, either actually or through privity relationship to their servant, it follows that the judgment rendered against the latter is not *res adjudicata* as against them. But the reason for that conclusion is wanting where the alleged guilty servant was acquitted in the first action, since in that case the very foundation of derivative liability of the principal was adjudicated in his favor as well as that of his servant in the action against the latter alone, and to which action the injured plaintiff was a party.”); see generally *Bigelow v. Old Dominion*, 225 U.S. 111, 127 (1912) (describing a principle of “. . . general elementary law that the estoppel of a judgment must be mutual”).

91. *Bigelow*, 225 U.S. at 128; *Bernhard v. Bank of Am. Nat’l. Trust & Savs. Ass’n*, 122 P.2d 892, 895 (Cal. 1942).

92. *Bernhard*, 122 P.2d at 895; see also *Davis*, 286 S.W.2d at 845 (applying judgment bar to block suit against servant for the “same mishap” where it was conceded in the first suit that the servant was at all times acting within the scope of employment); *Canin*, 28 A.2d at 69 (applying judgment bar to block suit against servant following an exoneration of the master “for the same negligent act”); *Wolf*, 273 N.Y.S. at 172 (applying judgment bar after exoneration of the master “upon the same facts when sued by the same plaintiff”).

93. See *Canin*, 28 A.2d at 70; see also *Wolf*, 273 N.Y.S. at 173; *Lasher v. McAdam*, 211 N.Y.S. 395, 395 (N.Y. Sup. Ct. 1925) (barring suit against servant after jury rendered verdict in favor of master and where master’s liability was purely of a derivative character).

94. See *supra* note 84.

95. See *Bigelow*, 225 U.S. at 128 (holding that where the liability of two tortfeasors is joint and several, the exoneration of one is no bar to a suit against the other even if upon the same facts); *Wolf*, 273 N.Y.S. at 171 (explaining that a subsequent suit against the servant would not be barred if the master and servant were joint tort-feasors).

derivative liability meant that the courts would continue to apply the doctrine of mutuality and would not treat one party's exoneration as the basis for barring a later suit against a joint tortfeasor.<sup>96</sup>

A second corollary flowed from the requirements of derivative liability and an identical set of issues. If the exoneration in Peter's first proceeding against USPS was based on considerations other than a finding of Donna's non-liability, then Donna could not invoke the judgment bar to block a successive claim by Peter.<sup>97</sup> Exonerations that failed to trigger the judgment bar could occur in a number of situations in the first suit against USPS. For example, USPS might win exoneration on a finding that Donna's conduct, though tortious, did not occur in the course and scope of employment, thus rendering the doctrine of *respondeat superior* inapplicable. Similarly, the USPS exoneration may have been based on a finding that Donna's conduct was intentional or malicious, thereby precluding vicarious liability in some jurisdictions.<sup>98</sup> Either form of exoneration would not establish Donna's non-liability; both would leave Donna subject to suit for any injuries her tortious conduct may have caused. Restatement § 99 captured this limitation in part by declaring the judgment bar inapplicable when the first exoneration was based upon a defense personal to the master.<sup>99</sup> A judgment that rested upon such personal defenses would not necessarily negate any claim against the party secondarily responsible.

In some jurisdictions that had relaxed the mutuality rule, the judgment and release bars were also triggered in cases where the plaintiff (Peter) was *successful* in the first proceeding against the master (USPS) and secured a judgment of negligence. There were, however, differing views about how the doctrine applied in that setting. In some jurisdictions, the courts imposed a kind of election of remedies; if Peter obtained a judgment against

96. *Bigelow*, 225 U.S. at 128.

97. See FLEMING JAMES, JR., *CIVIL PROCEDURE* 532 (9th ed. 1965); Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947) (citing *Gould v. Evansville & C.R.R.*, 91 U.S. 526 (1875)) (explaining that a dismissal for lack of subject matter jurisdiction "cannot be res judicata of the issues involved in the action"); RESTATEMENT (FIRST) OF JUDGMENTS § 96 cmt. g (1942) ("Defense personal to indemnitor. The rule . . . by which normally when judgment is rendered against the claimant in favor of the indemnitor the indemnitee would be discharged from liability, does not operate to discharge the indemnitor from liability where the judgment was given for the indemnitor on grounds which were personal to him and which could not have been taken advantage of by the indemnitee in an action against him. Thus, where judgment is given in favor of the indemnitor because of a personal immunity, as where the indemnitor was the husband of the injured person, or where judgment was rendered in his favor because of a statute of limitations, which would not apply to an action against the indemnitee, the judgment does not bar the subsequent action against the indemnitee."); *id.* § 99 (holding similarly); see also *Israel v. Wood Dolson Co.*, 134 N.E.2d 97, 99 (N.Y. 1956) (stating the rule that in cases involving the master-servant relationship, if the first case was brought against either master or servant, and that case was dismissed on grounds personal to the defendant, the claimant is not barred from pursuing the other in a subsequent suit).

98. Of course, Peter might attempt to show that USPS engaged in independent misconduct in hiring a driver with a known tendency toward intentional misconduct.

99. See *supra* note 78 and accompanying text (language of Restatement provided in text).

USPS that alone was enough to foreclose suit against Donna.<sup>100</sup> In other states, by contrast, the judgment bar came into effect for the benefit of Donna only when the master *satisfied* Peter's judgment.<sup>101</sup> As the Ohio Supreme Court explained:

The plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied. . . . The plaintiff, in any event, can have but one satisfaction of his claim.<sup>102</sup>

This emphasis on the importance of satisfaction to the application of the judgment bar also influenced the operation of the release bar. Some states would treat any settlement by a plaintiff with the master (USPS) as a release of the claim against the servant (Donna).<sup>103</sup> As the Ohio Supreme Court explained, however, a partial settlement would not constitute full satisfaction and should not operate to bar suit against the servant.<sup>104</sup> Suit was thus allowed against the servant with the condition that the amount paid in settlement by the master would reduce any judgment against the servant.<sup>105</sup>

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100. See *McNamara v. Chapman*, 123 A. 229, 233 (N.H. 1923); *Betcher v. McChesney*, 100 A. 124, 125 (Pa. 1917) (“[T]he party may sue either master or servant, the one for actual negligence, the other for imputed negligence; but it by no means follows that, if he sue the one and obtain judgment, he can afterwards sue the other . . .”).

101. See, e.g., *Losito v. Kruse*, 24 N.E.2d 705, 705 (Ohio 1940) (“Where a liability arises against both a master and his servant in favor of a party injured by the sole negligence of the latter while acting for the master, such injured party may sue either the servant, primarily liable, or the master, secondarily liable, or both, in separate actions, as a judgment in his favor against one, until satisfied, is no bar to an action against the other, the injured party being entitled to full satisfaction from either the master or servant or from both.”); *Hart v. Guardian Trust Co.*, 75 N.E.2d 570, 583 (Ohio Ct. Com. Pl. 1945) (“For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied.”); *Huey v. Dykes*, 82 So. 481, 482 (Ala. 1919) (explaining that satisfaction of judgment by master or servant will bar subsequent action against the other); *O'Briant v. Pryor*, 195 S.W. 759, 760 (Mo. Ct. App. 1917) (“Where, for example, a master is liable for the tort of his servant, a satisfaction from one discharges both . . .”).

102. *Losito*, 24 N.E.2d at 707.

103. Many courts held that where the liability of the master was predicated solely upon the doctrine of *respondeat superior*, a valid release of either the master or the servant would release the other. E.g., *Chapin v. Chicago & E.I.R. Co.*, 18 Ill. App. 47, 50 (1885) (“When, for example, a master is liable for the tort of his servant, a satisfaction from one discharges both, though they can not be sued jointly. If it were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way, and repeat the proceeding as to all but one, and then sue him and recover the whole damage, as if nothing had been paid by the others.”); *Max v. Spaeth*, 349 S.W.2d 1, 3 (Mo. 1961) (“A valid release of a servant from liability for tort operates to release the master . . . likewise release of the master releases the servant . . .”); *McLaughlin v. Siegel*, 185 S.E. 873, 874 (Va. 1936) (satisfaction by master of judgment against both held to release servant as well).

104. *Losito*, 24 N.E.2d at 708 (“[A] partial settlement with the master does not amount to an adjudication of the whole claim, as does a suit carried to judgment, and, therefore, such settlement cannot be claimed as a bar in this case. The settlement can only be a pro tanto satisfaction of the claim.”).

105. *Id.*; *Miller v. Beck*, 79 N.W. 344, 345 (Iowa 1899).

The doctrine of subrogation, applicable in some jurisdictions, complicated the operation of the release bar. At common law, the liability of the servant was viewed as primary and that of the master as secondary or derivative. Although the plaintiff (Peter) might sue USPS and collect full satisfaction, courts often took the position that the loss should ultimately fall on the primarily negligent party (Donna). As a result, when USPS satisfied a judgment in favor of Peter, it was subrogated to Peter's rights and entitled to seek indemnity from Donna.<sup>106</sup> (To be sure, as employers purchased insurance, they would tend to look to the insurance company to defray tort liability rather than calling on their relatively impecunious employees to repay the loss.) This conception of the master's liability as secondary introduced an asymmetry into the operation of the release bar. Courts in subrogation jurisdictions held that a settlement with the servant would exonerate the master.<sup>107</sup> The purpose of this broader version of the release bar was to protect the master's right to seek reimbursement for any amounts paid to the victim. (The plaintiff's release of the servant would prevent the master from suing the servant as subrogee of the plaintiff's claim.) As a result, it was possible in some jurisdictions that a settlement with the master would not release the servant, but a settlement with the servant would release the master.

One final provision of the Restatement deserves notice as part of the backdrop to the codification of the judgment bar. As a general matter and as Francis Shea remarked, the government would often defend employees sued for negligent acts committed in the scope of their employment even though the government had no obligation to pay the damages on behalf of such employees.<sup>108</sup> Following the FTCA's adoption, the government's practice of controlling the defense of suits brought against employees posed a threat of non-party preclusion *against the government*. In keeping with the common law, Restatement § 84 provided that the master who assumes control of the servant's defense can be bound by an unfavorable judgment in that proceeding.<sup>109</sup> Section 84 states the rule as follows:

A person who is not a party but who controls an action . . . is bound by the adjudications . . . as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the *same subject matter* or transaction.<sup>110</sup>

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106. See generally *Clark v. Fry*, 8 Ohio St. 358 (1858); *Chicago City v. Robbins*, 67 U.S. 418 (1862).

107. *Losito*, 24 N.E.2d at 707.

108. *Tort Claims*, *supra* note 3, at 9 (statement of Francis M. Shea, Assistant Att'y Gen., U.S. Dept. of Justice).

109. See *RESTATEMENT (FIRST) OF JUDGMENTS* § 84 (1942).

110. *Id.*

While the government would face no direct liability on any judgment entered against the servant, it would (post-FTCA) clearly qualify as a party with a financial interest in the determination of a question of fact or law in that proceeding.<sup>111</sup> (Exoneration of the servant on a finding of non-negligence would protect the government from any claim of vicarious liability under the FTCA; as we have seen, under Restatement sections 96 and 99, such a judgment would bar a subsequent negligence claim against the government.)<sup>112</sup> Such a financial stake set the stage for the conclusion that an unfavorable judgment in litigation against an employee, if conducted under the government's control, could foreclose the government from re-litigating an earlier finding that the employee was negligent.

While the threat of preclusion was quite real, section 84's reference to the "same subject matter" limited the scope of preclusive effect of the first judgment—language that was later incorporated into the judgment bar itself. Commentary accompanying the provision clarified that a judgment against the servant could preclude the master on the issue of negligence.<sup>113</sup> Nevertheless, how broadly would the preclusive effect extend? The "same subject matter" language served to limit the preclusive effect of the earlier judgment; that judgment did not operate to foreclose the master from contesting liability altogether but only from re-litigating the specific issue of negligence that had been previously resolved. The use of the "same subject matter" formulation thus invited an analysis of the earlier judgment to determine what had been decided and what could fairly be given preclusive effect in the subsequent action.<sup>114</sup> As the next section explores in more

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111. The government only waived sovereign immunity for claims brought against it under the FTCA in federal court. Thus, the government could not be bound by a judgment in a personal capacity suit against an employee, even if it controlled the defense of that suit, until the claimant elected to bring suit against the government under the FTCA.

112. Recall that masters can invoke a judgment exonerating the servant, at least on the same subject matter, as a bar to vicarious liability litigation against the master. *See* RESTATEMENT (FIRST) OF JUDGMENTS §§ 96, 99 (1942). The goal of securing a preclusive exoneration would clearly satisfy the financial interest test of Restatement section 84. *Id.* § 84. In explaining the scope of this rule of preclusion by control, the Restatement's account specifically included situations in which the master bears derivative liability for the torts of a servant and thus appears to threaten the government with preclusion under the FTCA. *See id.* § 84 cmt. c ("The rule also applies to one who participates in an action because an issue in the action is the tortious quality of an act on which his liability or freedom from liability depends . . ."); *see also id.* § 84 cmt. c, illus. 9. (illustrating that if Peter sues Donna, and USPS assumes control, then "in a subsequent suit by [Peter] against [USPS] based on a claim that [Donna] was acting in the scope of employment, the prior judgment concludes [USPS] upon the question of [Donna]'s negligence.").

113. *Id.*

114. Restatement of Judgments section 70 confirms that the "same subject matter" test was meant to limit the scope of preclusive effect quite narrowly rather than to preclude all related claims. *Id.* § 70. Section 70 provides that legal determinations made in litigation between the parties are not conclusive "in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction . . ." *Id.* In explaining the construct, comment b defines the same subject matter quite narrowly to apply to successive breach of contract claims on a single contract, or successive suits for installments of interest under a contract or rental payments due under a lease. *Id.* § 70 cmt. b. At the time, these were regarded

detail, it appears that the drafters of the FTCA introduced the “same subject matter” language into the judgment bar to achieve a similarly narrow definition of the non-mutual preclusive effect of judgments in favor of the government.

## 2. *The Judgment Bar as Codified*

As the discussion of common law developments made clear, the judgment bar was framed against the backdrop of a rich body of preclusion law. To summarize briefly by returning to our illustrative case, the law provided that Peter as the victim of a servant’s negligence was free to sue the servant (Donna), the master (USPS), or both. (Of course, if Peter recovered judgments against both defendants, he could recover but a single satisfaction of the amount of his claim.) If Peter sued Donna, a finding of non-negligence would ordinarily bar a subsequent suit against USPS based on a claim of vicarious liability. (In such a case, the exoneration of Donna would negate the claim of negligence at the center of the vicarious liability proceeding.) In addition, if USPS controlled the action against Donna, then a judgment imposing liability on Donna for negligence would bind USPS in a subsequent vicarious liability action, at least with respect to the negligence determination itself. If Peter first brought suit against USPS, by contrast, the judgment might not have had much impact on subsequent litigation against Donna. According to the Restatement and the many state courts that adhered to mutuality, both Peter and Donna were free to re-litigate issues of liability, and neither one could rely on the prior adjudication against USPS. Still, in a few states (like California) that had gone further in abandoning mutuality, a judgment of non-negligence in an action against USPS could bar a subsequent negligence claim against Donna.

The judgment bar<sup>115</sup> seeks to codify this last element of the law of preclusion, treating a judgment in litigation with the government under the FTCA as a complete bar to any action against the employee “by reason of the same subject matter.”<sup>116</sup> While the judgment bar goes beyond the common law in some respects, the comments of Francis Shea and the language and structure of the statute confirm that it meant to track the common law in

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different causes of action because they arose from separate breaches of duty, but they were nonetheless subject to preclusion because the legal question at the heart of the two claims was otherwise identical.

115. 28 U.S.C. § 2676 (2006). The original Judgment Bar was substantially similar to the modern Judgment Bar. It provided: “The judgment in such action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.” Law of Aug. 2, 1946, ch. 753, § 410(b), 60 Stat. 844 (1946).

116. Recall that Mr. Shea testified that the purpose of the judgment and release bars was to prevent a claimant from pursuing the government to judgment on a negligence theory under the FTCA and subsequently filing suit against the government’s employee on the same theory. *Tort Claims*, *supra* note 3, at 9 (statement of Francis M. Shea, Assistant Att’y Gen., U.S. Dept. of Justice).



imposing a limited restriction on duplicative litigation (and a modest relaxation of the mutuality rule) following an initial suit against the government on a theory of *respondeat superior*.<sup>117</sup> For starters, the statute tracks the common law and Restatement of Judgments in treating the entry of a judgment as a bar to suit against a non-party to the litigation.<sup>118</sup> The statutory bar, however, comes into play only in a limited set of circumstances: where a judgment has been entered in an action “under the” FTCA and where the subsequent claim arose from the “same act or omission” that had previously resulted in a judgment.<sup>119</sup> These features of the statute narrow the universe of subsequent claims that might be barred, making it clear that any candidate claim for preclusion must have arisen from the same set of circumstances (the “act or omission”) that gave rise to the claim against the government.

With a transactional connection between the initial claim against the government and the subsequent claim against the employee ensured by other language in the statute, the limiting reference to actions brought “by reason of the same subject matter” must be doing something more than simply giving voice to a (redundant) requirement of transactional connec-

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117. A contemporaneous student note writer clearly understood the limited operation of the judgment bar. See Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy*, 63 Yale L.J. 570 (1954). Thus, the author explained that “This section alters the common law rule that a claimant may obtain judgment against all persons liable for the same tort.” *Id.* at 575 n.30 (citing PROSSER, TORTS 1106 (1941); RESTATEMENT (FIRST) OF JUDGMENTS § 93 cmt. b (1942)). The author explained the switch by noting that the government provided an assurance of satisfaction, thus justifying a departure from the common law. The author anticipated and rejected the possibility that the judgment bar might be interpreted to block suits against an employee, even though the exoneration of the government did not bear on the employee’s liability. Although one could argue that “the section would preclude an action against the employee whenever *any* prior suit against the Government reaches judgment,” the author rejected this result as “palpably unfair where judgment is rendered for the Government on the grounds that the employee acted outside the scope of his employment.” *Id.* In such case the claimant would be deprived of his remedy against the negligent employee “merely because he mistakenly attempted to avail himself of his statutory remedy.” *Id.*

118. See, e.g., *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127–28 (1912) (“An apparent exception to this rule of mutuality had been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff.”); *Bernhard v. Bank of Am. Nat’l Trust & Savs. Ass’n*, 122 P.2d 892, 895 (Cal. 1942) (“Thus, if a plaintiff sues a servant for injuries caused by the servant’s alleged negligence within the scope of his employment, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the master as *res judicata* if he is subsequently sued by the same plaintiff for the same injuries. Conversely, if the plaintiff first sues the master, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the master as *res judicata* if he is subsequently sued by the same plaintiff for the same injuries.”); *Canin v. Kesse*, 28 A.2d 68, 70 (N.J. Dist. Ct. 1942) (“Strictly speaking, master and servant are not in privity, but, where the relationship is undisputed and the action is purely derivative and dependent upon the doctrine of *respondeat superior*, it constitutes an exception to the general rule.”); *Wolf v. Kenyon*, 273 N.Y.S. 170, 174 (N.Y. App. Div. 1934) (holding similarly).

119. 28 U.S.C. § 2676.

tion.<sup>120</sup> Viewed against the backdrop of the Restatement and the common law development of the judgment bar, the purpose of the limiting reference seems quite clear. Rather than a flat bar on subsequent suits against an employee, the judgment bar meant to foreclose only those suits that were necessarily defeated by the findings embedded in the prior judgment.<sup>121</sup> When the government secured a judgment on the basis of non-negligence and the claimant brought a subsequent action for negligence against the employee, the second claim was barred as one brought by reason of the same subject matter. Both the relevant facts and the theory of liability were identical (as required in common law applications of the judgment bar).<sup>122</sup> When the judgment rested on other considerations (such as a finding that the conduct at issue did not occur within the scope of employment or that the conduct, though tortious, was not within the government's waiver of sovereign immunity), the judgment was to have no preclusive effect on a subsequent action against the employee.<sup>123</sup> When the prior judgment did not negate the employee's liability, the subsequent action was not brought "by reason of the same subject matter" that had led to the denial of government liability under the FTCA. In other words, the judgment bar codifies what Wright and Miller refer to as non-mutual issue preclusion.<sup>124</sup> (The mistake of mod-

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120. The judgment bar provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. Absent the phrase "by reason of the same subject matter," the judgment bar would bar any subsequent claim against the employee that arose out of the same act or omission that gave rise to the FTCA claim that was pursued against the government. *Id.* The inclusion of the phrase "by reason of the same subject matter" indicates that Congress intended to narrow the scope of the judgment bar. *Id.*

121. Congressional testimony discussing the judgment bar indicates that Congress anticipated that the judgment bar would only bar subsequent claims that were functionally equivalent to claims that had been tried to judgment against the government under the FTCA. *Tort Claims*, *supra* note 3, at 31 (discussing the judgment bar and stating "Judgment in a tort action constitutes a bar to further action upon *the same claim*, not only against the Government (as would have been true [in the absence of the judgment bar]), but also against the delinquent employee . . .") (emphasis added); *see also id.* at 32 ("Under the present bill, the judgment rendered will constitute a bar to further action *upon the same claim* not only against the Government but also against the employee.") (emphasis added).

122. Of course, if in a suit against the government under the FTCA, the plaintiff were to lose after a finding of non-negligence on the merits, such a judgment would bar a subsequent claim against the employee for intentional misconduct. Only when the judgment for the government fails to negate the employee's liability (such as a judgment for the government on the basis that the employee's intentional tort was excluded from the statute's coverage) would a subsequent claim against the employee arise from a different subject matter and escape the preclusive effect of the judgment bar.

123. The common law rules of preclusion provided that a non-merits based disposition would not bar a subsequent suit by the claimant against either the master or the servant. *See Israel v. Wood Dolson Co.*, 134 N.E.2d 97 (N.Y. 1956) (discussing rule that where exoneration is based on non-merits based disposition, no preclusive effect attaches).

124. *See* WRIGHT, MILLER & COOPER, *supra* note 62, at § 4464.

ern courts lies in their treatment of the FTCA as a form of non-mutual claim preclusion.)<sup>125</sup>

Other superficially puzzling features of the judgment bar make sense when viewed against the backdrop of the common law model of non-mutual issue preclusion that it was meant to implement. First, some might wonder why the judgment bar operates asymmetrically, barring subsequent suits against federal employees after litigation with the government but failing to address the preclusive implications of initial litigation with an employee. The common law background makes clear that the statutory judgment bar was not meant to set out a detailed code but only to add a single rule of preclusion to a series of common law rules that were otherwise left undisturbed. As we have seen, the common law ensured that a judgment exonerating the servant would bar a subsequent action against the master as to the same subject matter.<sup>126</sup> Moreover, the common law treated a successful action against the servant as binding on the government, at least when the government controlled the litigation.<sup>127</sup> If we accept those results as given, then the judgment bar, far from imposing an asymmetric result, operates to furnish a symmetry that had eluded the Restatement.

The statute's (arguably asymmetric) failure to address the preclusive effect of a judgment against an employee may also reflect Congress's determination that the preclusive effect of a state judgment (in private tort litigation against a federal employee) was properly governed by the law of the state that rendered the judgment.<sup>128</sup> In fashioning the judgment bar, Con-

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125. The essential difference between non-mutual issue preclusion and non-mutual claim preclusion is that non-mutual claim preclusion allows a party to bar a litigant from bringing claims that were never raised (but that could have been raised) in a previous suit, whereas the effect of non-mutual issue preclusion is limited to issues that were actually litigated in a previous suit. *Id.* § 4464.1. The only cogent argument in favor of non-mutual claim preclusion is that the party to be precluded should have joined his new adversary in the original litigation. *Id.* This argument in favor of the application of non-mutual claim preclusion carries no weight with regards to the FTCA as it stood in 1946 because a litigant could not always join a government employee in the same suit as the government. See *infra* note 180 and accompanying text.

126. See RESTATEMENT (FIRST) OF JUDGMENTS § 96(1)(a) (1942) (discussing exoneration of servant exonerating master).

127. As Francis Shea's comments indicate, the government made a consistent practice of controlling the defense of federal employees in personal capacity suits. For the proposition that a successful action against the government was binding on the government where the government controlled the litigation, see *supra* notes 108–11.

128. Federal courts apply state preclusion law to determine the preclusive effect of a prior state court adjudication on a subsequent FTCA case despite the FTCA's requirement that all actions under the FTCA be tried by the court and not a jury. 28 U.S.C. § 2402 (2006); In re Byard, 47 B.R. 700, 703 (Bankr. Tenn. 1985) ("For example, in cases under the Federal Tort Claims Act . . . federal courts have generally looked to state law principles of *res judicata* and collateral estoppel in determining the preclusive effect of a prior state court decision in a subsequent federal case."); see also *Bowen v. United States*, 570 F.2d 1311, 1323 (7th Cir. 1978) (applying Indiana preclusion law to estop claimant from re-litigating contributory negligence finding of federal FAA administrative law judge in subsequent FTCA suit); *Falk v. United States*, 375 F.2d 561, 564 (6th Cir. 1967) (applying Ohio preclusion law to hold that claimant was not barred from pursuing similar claim under FTCA after state court judgment because FTCA claim involved different

gress plainly envisioned two rounds of litigation: an initial proceeding against the federal government in federal court<sup>129</sup> and a second proceeding against the employee in state court.<sup>130</sup> Because the FTCA made state law the measure of the federal government's liability, Congress had every reason to expect that (in the absence of codification) state law would control the preclusive effect of the federal judgment on the later proceeding against the employee.<sup>131</sup> To ensure against the sort of duplicative litigation it feared, Congress had to specify a statutory judgment bar rule for application in the subsequent state court proceeding. Otherwise, if the initial FTCA judgment was entered in a state that continued to adhere to full mutuality or to the Restatement's approach, state preclusion law would afford little protection to the employee.<sup>132</sup> When, by contrast, the first action was brought against the employee in state court on a state law claim, Congress may not have identified a strong federal interest that would warrant the specification of a federal preclusion rule.<sup>133</sup> Having declined to federalize the negligence

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claimants and different theory of liability); *Filice v. United States*, 271 F.2d 782, 783 (9th Cir. 1959) (applying California preclusion law to bar claimant from re-litigating identical suit against the United States under the FTCA where previous suit arose under the FTCA); *Maryland v. Capital Airlines, Inc.*, 267 F. Supp. 298, 302–05 (D. Md. 1967) (applying Maryland preclusion law to estop the United States from defending against a negligence suit under the FTCA where different claimants successfully litigated similar negligence suit in the District of Columbia under the FTCA); *D'Ambra v. United States*, 396 F. Supp. 1180, 1181–82 (D.R.I. 1973) (applying Rhode Island preclusion law to estop the United States from defending against negligence suit where same court found United States liable in previous FTCA suit involving different claimant); *Bagge v. United States*, 242 F. Supp. 809, 810–11 (D. Cal. 1965) (holding that the claimant is estopped from re-litigating negligence claim in indemnity action against the United States where California jury already conclusively determined that claimant was negligent and that the United States was not the sole proximate cause of the underlying plaintiff's injuries).

129. Congress assumed that all litigation against the federal government would proceed in federal court; indeed, it conferred exclusive jurisdiction on the district courts and thus foreclosed state court adjudication of such claims.

130. Congress assumed that any subsequent (or prior) action against a government employee would proceed in state court (at least in the absence of diversity). After all, the existing rules of supplemental jurisdiction did not allow the plaintiff (Peter) to add a pendent claim (against Donna) to its claim against the government under the FTCA. While the government could remove the state court action against a federal employee, the plaintiff could not bring such a suit in federal court in the first instance.

131. Under rules of inter-jurisdictional preclusion today, state courts owe an obligation rooted in federal common law to respect judgments of the federal court. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507–08 (2001). But at the time of the FTCA adoption, under the regime of *Dupasseur v. Rochereau*, 88 U.S. 130 (1874), state courts were expected to assess the preclusive effect of federal judgments, rendered by federal courts sitting in diversity, by reference to the law of the state in which the district court sat.

132. *See Filice*, 271 F.2d at 783 (defining the preclusive effect of a federal judgment in an action brought under the FTCA by reference to the law of the state, California, in which the events occurred); *D'Ambra*, 396 F. Supp. at 1181–82 (applying Rhode Island preclusion law in subsequent FTCA suit where original suit was brought under FTCA).

133. Recall that the FTCA was passed with goals in mind: to reduce the burdens that private claims bills were inflicting upon Congress, and to ensure that claimants had a just and efficient mechanism for seeking compensation for torts committed by government employees. *See supra* note 33. Congress was aware that because government employees are often under-insured or judg-

claim against the employee, Congress could have reasonably decided to leave the preclusive effect of a state court judgment to state law as well.<sup>134</sup>

In a second puzzling feature, the statutory bar applies to any judgment entered in litigation with the government, including both judgments for the government and judgments for the plaintiff. This application to judgments of all kinds represents a departure from common law; Restatement section 99, for example, treated a judgment as a bar to further litigation only when it *exonerated* the defendant from liability.<sup>135</sup> Other aspects of the common law scheme, however, ascribed some preclusive effect to judgments in favor of the plaintiff; thus, when a plaintiff recovered a judgment against a servant under Restatement section 96, the principle of indemnity barred the plaintiff from obtaining a more substantial judgment against the master (at least with respect to the same subject matter).<sup>136</sup> Modest success in initial litigation could thus impinge on the plaintiff's right to pursue a larger judgment against another defendant. The statutory judgment bar essentially duplicated this result by declaring that a successful action against the government would bar subsequent litigation against the employee. The statute clearly assumed that the government would pay the judgment, thus guaranteeing the plaintiff full satisfaction of the claim.<sup>137</sup> So long as the judgment involved the "same subject matter" as the suit against the employee, the statute could fairly bar recovery on the theory that the plaintiff had obtained full satisfaction of the claim.

One final omission from the statute bears mention. The release bar addresses the consequences of a settlement with the federal government, declaring that such settlements preclude a subsequent suit against the employee whose conduct gave rise to the claim.<sup>138</sup> The statute, however, does not specify the preclusive consequences of settlement with an employee for future litigation with the federal government. At the time of the FTCA's adoption as noted above, some states were treating such settlements as preclusive in order to protect the master's right as subrogee/indemnitor to

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ment proof, government employees would rarely satisfy judgments rendered against them. *Tort Claims*, *supra* note 3, at 9, 31. Thus, perhaps Congress elected to give the judgment bar a unidirectional application so as to ensure that claimants could pursue the government in the event that a government employee could not satisfy a judgment rendered against it in the first instance.

134. Under the Full Faith and Credit Clause, federal courts must give effect to the judgments of state courts and state law ordinarily provides the measure of the preclusive effect of such judgments. *See Sentek Int'l, Inc. v. Lockheed Corp.*, 531 U.S. 497 (2001).

135. RESTATEMENT (FIRST) OF JUDGMENTS § 99 (1942).

136. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 51 (1982) (collecting authority); RESTATEMENT (FIRST) OF JUDGMENTS § 96(1)(b) (1942) (providing that a judgment for the victim in a suit against the servant will bind the victim as to the amount of the recovery in a subsequent action against the master).

137. Mr. Shea's testimony indicates that Congress assumed that the government would satisfy any judgment rendered against it under the FTCA. *Tort Claims*, *supra* note 3, at 9.

138. 28 U.S.C. § 2672 (2006).

seek indemnity from the employee.<sup>139</sup> Congress, however, did not address either the subrogation/indemnity rights of the federal government or the implications of any such right on the preclusive effect of a settlement with an employee. Reflecting on these omissions, the Supreme Court ruled in 1954 that it would decline to recognize an implied right for the federal government to seek indemnity (as subrogee) from the employee whose negligence resulted in the imposition of liability under the FTCA.<sup>140</sup> Without a right of subrogation/indemnity to protect, there was little reason for Congress to treat a settlement with the employee as preclusive (especially when there was a possibility that the judgment might go unsatisfied). Once again, the preclusive consequences were left to state law.<sup>141</sup>

### 3. *The Judgment Bar in Operation*

During the fifteen years that followed the FTCA's adoption, the rules of preclusion in general and the judgment bar in particular operated, as sketched above, to coordinate litigation of negligence claims against the federal government and its employees. To begin with, the judgment bar left common law claim preclusion in place to coordinate routine problems of duplicative litigation. Thus, when a plaintiff first secured a judgment against the government for \$15,000 and then sought an additional sum from the government as compensation for injuries that had later manifested themselves, the court had no reason to cite the judgment bar and its relaxation of mutuality because both lawsuits named the government.<sup>142</sup> Accordingly, the court simply held that the state law of preclusion, which was thought to govern the preclusive effect of the first FTCA judgment against the federal government, treated all claims as merged in the first judgment and, thus, barred the second action.<sup>143</sup>

A variety of sources confirm the presumptive viability of suit against the employee in the wake of a judgment for the government. Thus, in *Johnston v. Earle*,<sup>144</sup> the plaintiff first sued the government to challenge an action by agents of the IRS in forfeiting his tractor to pay a tax

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139. See *supra* notes 103–08 (discussing release bar).

140. See *United States v. Gilman*, 347 U.S. 507 (1954) (refusing to allow the government to collect indemnity from employees absent legislative approval).

141. On the failure of the FTCA to preserve a duty of indemnity running from the federal employee to the government, see *Collins v. United States*, 564 F.3d 833, 835–36 (7th Cir. 2009).

142. See *Filice v. United States*, 271 F.2d 782, 783–84 (9th Cir. 1959) (concluding that res judicata principles in California bar the plaintiff, who recovered a judgment against the United States for \$15,000, from bringing a second suit against the United States claiming that the damages were inadequate).

143. *Id.* at 783; see also *Jones v. United States*, 228 F.2d 52 (D.C. Cir. 1955) (following dismissal of initial claim to challenge government's failure to provide accurate geological information, court holds that res judicata bars a second such claim without referring to the judgment bar).

144. 162 F. Supp. 149 (D. Or. 1958).

delinquency.<sup>145</sup> The court dismissed the action under the FTCA's forfeiture exemption.<sup>146</sup> Next, the plaintiff sued the agents themselves.<sup>147</sup> In a series of procedural moves that anticipate its posture in *Bivens*, the government successfully moved to dismiss on the ground that the claim against the agents did not arise under federal law.<sup>148</sup> When the plaintiff re-filed in state court, the government removed and argued that the judgment bar or the doctrine of claim preclusion barred the action.<sup>149</sup> The district court sensibly concluded that the prior adjudication of the claim against the government under the FTCA had no preclusive effect on the action against the employees. The earlier disposition, according to the court, was based on a finding that the government's waiver of sovereign immunity did not extend to the claims in question; such a disposition "was not a judgment in bar or on the merits."<sup>150</sup> In other words, the court found that the judgment would have no preclusive effect either under the judgment bar itself or under the common law doctrine of claim preclusion (that governed the preclusive effect of a merits disposition to which the judgment bar did not apply).

Other authorities agreed that a judgment for the government would bar subsequent litigation against the employee only when it negated the employee's liability.<sup>151</sup> Well-advised attorneys thus had an obvious incentive to anticipate the possible non-scope or other rulings in favor of the government by bringing actions against employees, if only to address the time-bar problems that might result from excessive delay. To deal with the problems of coordination presented, the federal courts developed a set of interesting techniques. Everyone agreed, apparently, that the plaintiff could not pursue claims against both the government and the employee in a single proceeding. Rules of joinder and supplemental jurisdiction did not permit such an expansive assertion of jurisdiction.<sup>152</sup> As it did in *Johnston*, however, the

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145. *Id.* at 151.

146. *Id.*; see 28 U.S.C. § 2680(c) (2006).

147. *Johnston*, 162 F. Supp. at 151.

148. *Id.*

149. *Id.* at 153.

150. See *id.*

151. See, e.g., *Gov't Emps. Ins. Co. v. Ziarno*, 170 F. Supp. 197, 200 (N.D.N.Y. 1959) (confirming viability of suit against government employee following an exoneration of the government on grounds that employee was acting outside the scope of his employment). Similarly, a leading treatise on the early operation of the FTCA assumed the viability of a successive claim against the employee following a non-scope defense by the government; indeed, the author advised lawyers to take account of the possibility that the statute of limitations might bar the second action. See WRIGHT, *supra* note 59, at 78–79 (explaining why government's tenacity and attorney fee limits might lead plaintiffs to pursue claims against a well-insured employee, rather than the government) (citing *United States v. Eleazer*, 177 F.2d 914 (4th Cir. 1949) (holding on appeal that the employee was outside the scope of employment, thus requiring reversal of the judgment against the United States, and posing a timeliness threat to subsequent litigation against the employee)).

152. See *Donovan v. McKenna*, 80 F. Supp. 690 (D. Mass. 1948) (refusing to permit plaintiff to join government as additional defendant in action to recover damages for federal employee's negligent operation of motor vehicle; although FTCA effected waiver of immunity, it did not

government persisted in removing state law claims against employees under the federal officer removal statute, 28 U.S.C. § 1442.<sup>153</sup> That meant, as a practical matter, that some proceedings against the employee and the government might go forward in a single district court. In *Moon v. Price*, the district court managed these coordinated proceedings in a way sensibly designed to protect the plaintiff's right to pursue claims against both parties.<sup>154</sup> The court first empanelled a jury to hear the negligence claim against the employee and approved the entry of a verdict of \$2500.<sup>155</sup> Then, the court relied on this finding in disposing of the negligence claim against the government, finding negligence and awarding \$2500 in damages.<sup>156</sup> This process of coordination protected the plaintiff's right to trial by jury on the claim against the employee without posing a threat of double recovery. On appeal, the Fifth Circuit declared that the plaintiff could obtain but a single satisfaction of the claim.<sup>157</sup> The court, however, expressly rejected the government's contention (later accepted in *Manning v. United States*)<sup>158</sup> that a later judgment under the FTCA would, in combination with the judgment bar, retroactively invalidate the earlier judgment against the employee.<sup>159</sup>

As we have seen, the judgment bar did not foreclose suit against employees but simply accorded preclusive effect to judgments entered in suits against the federal government. Unsurprisingly, then, litigants in the wake of the FTCA's adoption were free to file suits against both the government and its employees. While there were obvious advantages to bringing suit against the (deep-pocketed) government, at least one early commentator on the FTCA urged litigants to consider suit against employees as well.<sup>160</sup>

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expressly allow joint litigation with its employees); WRIGHT, *supra* note 59, at 89 (collecting authority for the inability of plaintiffs to join employee and government as a foregone conclusion).

153. There is some indication that this practice was common prior to 1971. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 391 n.4 (1971) ("[I]t is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment . . .").

154. 213 F.2d 794 (5th Cir. 1954).

155. *Id.* at 796–97.

156. *Id.* at 796 (quoting Georgia precedents in determining the preclusive effect of the judgment against the employee and noting that the judgment against the employee preceded that against the government). Notably, a decision to accord preclusive effect to the negligence finding would comport with Restatement of Judgments section 84 to the extent that the government exercised control over the defense of the negligence claim against the employee. See *RESTATEMENT (FIRST) OF JUDGMENTS* § 84 (1942).

157. See *Moon*, 213 F.2d at 796–97. The government claimed, as it has in some recent *Bivens* cases, that the subsequent entry of judgment in an FTCA claim may retroactively invalidate a prior judgment obtained against the employee. The *Moon* court rejected this argument for retroactive invalidation, cogently observing that the point of the coordination provisions was to prevent a double recovery. Because of the looming threat of a finding of no-liability under the FTCA, well-advised plaintiffs must bring suit against the employee as well.

158. *Manning v. United States*, 546 F.3d 430, 437 (7th Cir. 2008).

159. *Moon*, 213 F.2d at 796–97.

160. WRIGHT, *supra* note 59, at 78.



Thus, William Wright's treatise on the FTCA pointed out that the government litigated issues (such as scope of employment) quite vigorously, increasing the cost of obtaining and defending a favorable judgment.<sup>161</sup> Wright also noted that the FTCA imposes a cap on the amount of attorney's fees available to a successful plaintiff.<sup>162</sup> He thus suggested that plaintiffs might reasonably prefer to pursue suit against an employee, at least one with an applicable insurance policy, rather than against the government.<sup>163</sup>

Whether they were influenced by Wright's advice and the government's practice of vigorously contesting scope of employment issues,<sup>164</sup> many plaintiffs brought suit against both the government and the employees whose negligence had caused them injury. While the federal courts could not exercise original jurisdiction over both the state and federal claims (as they can today), they understood the need for such duplicative litigation, at least when the government mounted defenses that threatened to make the FTCA remedy unavailable and require the victim to look to the employee instead.<sup>165</sup> By the 1950s, the federal courts concluded that the judgment bar did not foreclose overlapping litigation even though it limited the plaintiff to a single satisfaction of his claim.

#### 4. *The Drivers Act: Confirming the Narrow Scope of the Judgment Bar*

The reality of continuing litigation against federal employees for vehicular negligence set the stage for Congress's decision to add the Drivers Act to the Federal Tort Claims Act in 1961.<sup>166</sup> Aimed at immunizing federal employees from claims arising from the negligent operation of a motor vehicle within the scope of their employment, the Drivers Act provided the following:

The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding *by reason of the*

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161. *Id.*

162. *Id.* at 140.

163. *Id.* at 78.

164. *See* United States v. Lushbough, 200 F.2d 717, 720–21 (8th Cir. 1952) (arguing that employee was outside scope of employment, thus precluding liability in suit against the United States); Satterwhite v. Bocelato, 130 F. Supp. 825, 828–29 (E.D.N.C. 1955) (arguing unsuccessfully that government driver was acting outside the scope at the time of the accident).

165. In 1990, Congress passed 28 U.S.C. § 1367, which allowed claimants to join additional parties to a case where federal questions predominate although a federal court could not otherwise assert jurisdiction over those parties so long as those claims were adequately related to the claims over which the court had original jurisdiction.

166. 28 U.S.C. § 2679 (2006). Reports indicate that the government viewed the immunity as tantamount to purchasing insurance for federal employees.

*same subject matter* against the employee or his estate whose act or omission gave rise to the claim.<sup>167</sup>

The Drivers Act did not absolutely immunize federal employees and drivers from suit but simply made the FTCA's negligence remedy against the government exclusive of any negligence suit against the employee.<sup>168</sup> Like the judgment bar, the Drivers Act achieved this limitation on the scope of FTCA exclusivity by declaring it applicable only to suits against the employee "by reason of the same subject matter."<sup>169</sup> Using a variety of theories, the lower federal courts were quick to agree that the regime of exclusivity applied only to suits for negligence as to which Congress had accepted *respondeat superior* liability under the FTCA. As to suits for intentional (or other) tortious conduct outside the scope of the FTCA, by contrast, federal courts consistently ruled that actions against the employee could proceed.<sup>170</sup>

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167. 28 U.S.C. § 2679(b) (1961) (emphasis added).

168. See, e.g., *Henderson v. Bluemink*, 511 F.2d 399, 403 n.27 (D.C. Cir. 1974) ("28 U.S.C. § 2679 protects federal employees from suits for damages arising out of their negligent operation of motor vehicles during the scope of their government employment."); *United States v. Hawaii*, 832 F.2d 1116, 1119 (9th Cir. 1987) ("The purpose of the [Federal Drivers Act] is to relieve a federal employee from the need to insure against personal liability arising out of the negligent operation of a motor vehicle in the course of federal employment."); *Houston v. U.S. Postal Serv.*, 823 F.2d 896, 899 (5th Cir. 1987) ("The amendment, known as the Federal Drivers Act (FDA), deprived plaintiffs whose injuries arose from the negligent operation of a government vehicle of any claim against the driver in his individual capacity."); *Thomason v. Sanchez*, 398 F. Supp. 500, 504 (D.N.J. 1975) ("By enactment of the Federal Drivers Act, Congress sought to protect the individual federal employee from personal tort liability. This was accomplished by designating suit against the United States under the FTCA the exclusive remedy for damages sustained as a result of the negligent operation of a motor vehicle by a federal employee acting within the scope of his employment.").

169. 28 U.S.C. § 2676 (2006).

170. *Willson v. Cagle*, 694 F. Supp. 713, 717 (N.D. Cal. 1988) ("The government's reading of section 2679(b), pressed to its logical conclusion, would create a third category of injuries for which no remedy was available: those intentionally caused by government employees while operating motor vehicles within the scope of their employment. We do not believe that Congress intended to leave victims bereft of remedy in this situation. Accordingly, we do not accept the government's position. Section 2679(b) will instead be given a narrower reading, to preclude only those tort actions against individual government employees sounding in negligence."); *Adams v. Jackel*, 220 F. Supp. 764, 766 (E.D.N.Y. 1963) (holding that a state action against a federal driver will not be dismissed unless a federal court determines the case to be one "in which a remedy is 'available' under the *respondeat superior* principle . . . and the exceptions of 28 U.S.C. § 2680 do not operate."). Courts that were asked to interpret other statutes, that were nearly identical to the Drivers Act, came to similar conclusions. E.g., *Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983) (holding that federal employees are not immune from claims excepted under the FTCA); *Mendez v. Belton*, 739 F.2d 15, 19 (1st Cir. 1984); *Smith v. Dicara*, 329 F. Supp. 439, 443 (E.D.N.Y. 1971) ("We cannot conclude that in enacting § 4116, Congress intended to immunize both the Government and the individual employee from the latter's defamatory conduct, leaving the injured plaintiff without remedy, which would be the anomalous result under the Government's theory, unsupported by the cases, the relevant statutes, or the legislative history."). *But see Gush v. Bunker*, 344 F. Supp. 247, 248 (W.D. Tenn. 1972) (holding that Drivers Act applies to INS officers accused of fraudulently falsifying immigration papers, and that section 2680(h) can act to deny claimant a remedy altogether); *Powers v. Shultz*, 821 F.2d 295, 297 (5th Cir. 1987) (holding that remedy is not available against doctor in his personal capacity under 10 U.S.C.

Of course, the statute's limited exclusivity did not prevent the government from maintaining that the regime of preemptive effect extended much more broadly. The federal courts, however, generally refused to embrace the government's contention that immunity barred any transactionally-related claim against the employee. Instead, as the district court explained in *Willson v. Cagle*:

The paradigmatic case that prompted Congress to adopt the Federal Drivers Act was that of a postman who had an accident while performing his appointed rounds. Clearly Congress desired that the postman not be held individually liable in these circumstances. The result would have been quite different, however, if while engaged in his rounds the postman spotted an enemy and intentionally ran him down. There is no indication that Congress intended to give government employees carte blanche to intentionally commit mayhem with public vehicles while engaged in the performance of their public duties. The government's argument, if accepted, would lead precisely to this result. The result is made more unconscionable by the fact that the victim in the above hypothetical would not even have recourse against the government, as in general the government is not responsible for intentional torts of its employees.<sup>171</sup>

As *Willson* illustrates, and many other cases confirm,<sup>172</sup> federal drivers were not immunized from suit for intentional misconduct or other claims to which the FTCA's waiver of government immunity did not apply.

Like the judgment bar, the Drivers Act accomplished its goal of narrowing the scope of its exclusivity by including the phrase "by reason of the same subject matter."<sup>173</sup> As we have seen, that phrase does not apply to any claim against an employee that happens to arise from the same transaction or occurrence that led to the victim's injury. Instead, the phrase refers to claims cognizable under the FTCA on a theory of vicarious liability. Just as the judgment bar meant to exclude duplicative actions only where the prior decision negated the employee's liability for negligence so too did the Driv-

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§ 1089 although claimant had no remedy under the FTCA because of the foreign country exception found in 2680(k).

171. *Willson*, 694 F. Supp. at 716–17; see also *Dagnan v. Gouger*, No. Civ-1-88-452, 1989 WL 81655, at \*3–4 (E.D. Tenn. July 19, 1989) (explaining that application of judgment bar to block suit against employee for intentional misconduct would violate the constitutional guarantee of due process of law).

172. See, e.g., *Nasuti v. Scannell*, 792 F.2d 264, 266–69 (1st Cir. 1986) (lower court remanded plaintiff's intentional tort claims to state court reasoning that under Massachusetts law a person who commits an intentional tort is always acting outside the scope of his employment; the court of appeals affirmed but on different grounds); *Willson*, 649 F. Supp. at 717 (intentional tort claims brought against federal driver are not cognizable by the FTCA and thus, claimants may pursue drivers in their personal capacities); *Smith*, 329 F. Supp. at 442 ("[I]t is obvious that the Drivers Act is not applicable to a federal driver who intentionally injures a plaintiff with his motor vehicle. . . .").

173. 28 U.S.C. § 2676 (2006).

ers Act foreclose suits against the employee on claims of negligence as to which the government accepted vicarious liability. The two provisions thus represent a natural but narrow progression. The judgment bar foreclosed suit against the employee for negligence after the victim had pursued a negligence claim against the government to judgment but left other remedies against the employee intact (including remedies for intentional torts and torts committed outside the scope of employment). The Drivers Act flatly barred the suit against the employee for negligence, thus effectively compelling the victim to pursue such claims against the government. It, however, did not force the employee to pursue relief, if at all, through the FTCA on theories of liability that the FTCA did not embrace.<sup>174</sup> As the *Willson* court recognized, such an interpretation would deny the victim a remedy for intentional misconduct and would have no warrant in the purpose of the Drivers Act.

### 5. *The 1974 Amendments*

In 1971, the Supreme Court decided the landmark case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, recognizing a federal right of action similar to the one provided under § 1983 yet applicable only to federal officers.<sup>175</sup> Just three years later, in 1974, Congress amended § 2680(h) to provide a remedy against the United States for the intentional torts of its investigative or law enforcement officers. That amendment provides:

That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. . . .<sup>176</sup>

In effect, the amendment expands the scope of § 1346(b) by waiving the Government's sovereign immunity from certain common law intentional tort claims arising out of the acts or omissions of a law enforcement or investigative officer.

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174. The Court recently held, in *Hui v. Casteneda*, 130 S. Ct. 1845, 1850–51 (2010), that another provision, 42 U.S.C. § 233, that is nearly identical to the Drivers Act—except that it applies to members of the Public Health Service rather than federal drivers—was intended to absolutely immunize Public Health Service employees from suit, including *Bivens* suits. While we believe that *Hui* was wrongly decided, we leave that discussion for another day. For now, we believe it sufficient to note that the provision at issue in *Hui* is readily distinguishable from the modern Westfall Act. The Westfall Act (as will be discussed below) includes an explicit savings clause which provides that federal employees are not immune from *Bivens* suits. 28 U.S.C. § 2679(b)(2) (2006). Thus, even if *Hui* was correctly decided, its affect does not reach employees who are not protected under a more narrow immunity provision such as 42 U.S.C. § 233.

175. 403 U.S. 388 (1971).

176. 28 U.S.C. § 2680(h) (1974).

The legislative history of the amendment makes clear that Congress intended to provide a cause of action that was parallel and complementary to the remedy already available under *Bivens*.<sup>177</sup> The 1974 amendment was passed in response to reports that federal officers, based out of St. Louis, had conducted unconstitutional “no-knock” raids.<sup>178</sup> In one raid, conducted in Collinsville, Illinois, five shabbily dressed federal officers entered the home of Herbert and Evelyn Giglotto at 9:30 p.m. with guns drawn.<sup>179</sup> After destroying the Giglotts’ television, camera, and furniture, the officers admitted that they had entered the wrong home and departed the residence only to conduct a similar raid on another home just thirty minutes later.<sup>180</sup> Recognizing that federal officers are often judgment proof and characterizing the remedy under *Bivens* as “hollow” for that reason, Congress amended the FTCA to provide “innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois . . . [with] a cause of action against the individual federal agents and the Federal Government.”<sup>181</sup> A Senate report explaining the amendment stated:

[T]his provision should be viewed as a counterpart to the *Bivens* case and its [progeny], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).<sup>182</sup>

Thus, in 1974, Congress, for the first time, explicitly recognized the importance of the *Bivens* remedy for vindicating constitutional rights and took pains to clarify that the amendment was intended to complement, not displace, the *Bivens* action.<sup>183</sup>

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177. *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (“[T]he congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.”).

178. S. REP. NO. 93-588, at 2–3 (1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2791; Jack Boger et al., *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 500 (1976).

179. Boger et al., *supra* note 178, at 500.

180. *Id.* at 501.

181. S. REP. NO. 93-588, at 3.

182. *Id.*; see also *Carlson*, 446 U.S. at 20 (citing the Senate report as proof that Congress intended to supplement, not displace, the *Bivens* remedy).

183. The Supreme Court’s decision in *Carlson v. Green*, rejected the government’s argument that the availability of remedies under the FTCA displaced the *Bivens* right of action. 446 U.S. at 20. The Court concluded that the two remedial schemes were to be viewed as complementary, rather than preemptive. *Id.* Such an approach recalls the Court’s first FTCA decision, refusing to treat other federal disability compensation as impliedly displacing an individual’s remedy under the FTCA. See *Brooks v. United States*, 337 U.S. 49, 54 (1949). As *Brooks* suggested, the solution to statutory overlap was not displacement but coordination to prevent a double recovery.

## 6. *The Westfall Act*

Congress enacted the Westfall Act in 1988<sup>184</sup> several months after the Supreme Court's decision in *Westfall v. Erwin*.<sup>185</sup> In *Westfall*, the Supreme Court held that federal employees were immune from state tort liability only if their conduct was discretionary in nature and was within the scope of their employment.<sup>186</sup> Congress enacted the Westfall Act to broaden employee immunity and to "remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment."<sup>187</sup> Importantly, Congress explicitly provided that the immunity provision of the Westfall Act did not extend or apply to *Bivens* claims,<sup>188</sup> for the first time statutorily recognizing the viability of the *Bivens* remedy.

Central to the Westfall Act was the expansion of official immunity that Congress had previously conferred on federal employees in the Drivers Act.<sup>189</sup> As with the Drivers Act, however, Congress was careful to narrow the scope of immunity to claims that were cognizable under the FTCA. To that end, Congress retained the "by reason of the same subject matter" limitation that had served in the Drivers Act to ensure that intentional tort claims against federal employees were not precluded. With the adoption of the Westfall Act, the whole range of state common law claims against federal employees acting within the scope of their employment was transferred to federal court and made actionable, if at all, only through suits brought under the FTCA. While this broad immunity language would foreclose common law tort claims against federal employees, however, it would not displace *Bivens* litigation. Indeed, Congress made that conclusion even

184. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988).

185. 484 U.S. 292 (1988).

186. *Id.* at 300.

187. H.R. REP. NO. 100-700, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947.

188. 28 U.S.C. § 2679(b)(2) (2006).

189. One can best understand the Westfall Act's operation by superimposing its provisions on top of the Drivers Act:

(1) The remedy against the United States as provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, *arising or resulting from the negligent or wrongful act or omission of operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be* is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government -

- (A) which is brought for a violation of the Constitution of the United States, or
- (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(emphasis added).

more certain by exempting suits against government employees for “constitutional violations” from the exclusivity regime of the Westfall Act.<sup>190</sup>

## II. THE JUDGMENT BAR TODAY

One can scarcely overstate the degree to which the judgment bar today has overleapt its textual and historical boundaries. The *Bivens* action has never been brought within the framework of the FTCA in the sense that the government has never waived its immunity from suit for the constitutional torts committed by its employees.<sup>191</sup> Rather, Congress has preserved separate theories of liability: the Constitution provides the foundation for *Bivens* liability, and state common law tort theories coupled with *respondeat superior* provide the foundation for FTCA liability.<sup>192</sup> Despite this careful separation of the basis for liability, the federal courts have concluded that the judgment bar also applies to *Bivens* claims.<sup>193</sup> Moreover, the federal courts have held that pro-government judgment based on a finding that the claim in question falls outside the ambit of the FTCA will bar a *Bivens* action.<sup>194</sup>

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190. See 28 U.S.C. § 2679(b)(2) (2006).

191. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477–78 (1994) (holding that a claim arising under the Constitution is not cognizable under the FTCA because the FTCA only recognizes claims that arise under state law whereas a claim arising under the Constitution is necessarily a federal cause of action).

192. *Carlson v. Green*, 446 U.S. 14, 20 (1980) (“[T]he congressional comments accompanying the [1974 intentional torts amendment] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.”); S. REP. NO. 93-588, at 3 (1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2791 (“[The 1974 intentional torts amendment] should be viewed as a counterpart to the *Bivens* case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual government officials involved).”); Pfander & Baltmanis, *supra* note 6, at 132–33 (discussing the purpose of the 1974 intentional torts amendments).

193. *E.g.*, *Unus v. Kane*, 565 F.3d 103, 122 (4th Cir. 2009) (barring the claimant from pursuing a contemporaneously filed *Bivens* claim after claimant’s FTCA claims were resolved in the government’s favor on summary judgment); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (applying the judgment bar to vacate a contemporaneously entered *Bivens* judgment); *Harris v. United States*, 422 F.3d 322, 334 (6th Cir. 2005) (refusing to reinstate claimant’s *Bivens* claims although district court had incorrectly dismissed them as time barred because the claimant had pursued his FTCA claims to judgment); *Williams v. Fleming*, 597 F.3d 820, 821 (7th Cir. 2010) (applying the judgment bar to *Bivens* claims after dismissing claimant’s FTCA claims for lack of subject matter jurisdiction); *Gasho v. United States*, 39 F.3d 1420, 1437–38 (9th Cir. 1994) (applying the judgment bar to preclude a subsequently filed *Bivens* claim); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir. 2005) (giving the judgment bar retroactive effect by vacating a previously entered *Bivens* judgment).

194. FTCA claims can be dismissed on non-meritorious grounds for a variety of reasons including: 1) the employee was acting outside the scope of his employment; 2) the claims are time barred; 3) the claims do not arise under state law; 4) the claimant failed to exhaust his administrative remedies; or 5) the claims are excepted under the FTCA. See 28 U.S.C. § 1346(b) (2006), 28 U.S.C. § 2401 (2006), 28 U.S.C. § 2672 (2006), 28 U.S.C. § 2680 (2006). The majority of courts that have confronted this issue hold that a non-merits based dismissal of an FTCA claim will trigger the judgment bar. *E.g.*, *Hoosier v. Bancorp*, 90 F.3d 180, 184–85 (7th Cir. 1996) (statute of limitations); *Farmer v. Perrill*, 275 F.3d 958, 964–65 (10th Cir. 2001) (FTCA claims dismissed for failure to prosecute); *Gasho*, 39 F.3d at 1436–38 (abuse of process); *Williams*, 597 F.3d at 823

Finally, the courts have refused to coordinate relief in a way that preserves the litigant's right to trial by jury in the *Bivens* action, treating a subsequent defense judgment under the FTCA as retroactively invalidating an earlier jury verdict for the plaintiff.<sup>195</sup> If not a violation of the Seventh Amendment, such conclusions at least represent a burden on Seventh Amendment rights that is strikingly inconsistent with the spirit of accommodation reflected in earlier cases.

The federal courts committed their decisive interpretive error when they concluded that *Bivens* suits were subject to preclusion under the FTCA's judgment bar. As we have seen, the judgment bar included a term of art (i.e., "by reason of the same subject matter") designed to clarify that it applied only to judgments rendered in the context of primary-secondary *respondeat superior* liability.<sup>196</sup> The judgment bar effected a modest relaxation of the rules of mutuality to eliminate duplicative litigation in a narrow situation; it came into play only when there had been an earlier judgment and a subsequent suit against the employee brought "by reason of the same subject matter."<sup>197</sup> This "same-subject-matter" formulation was meant to limit the statute's application to situations in which the suit against the employee was based on the same theory of tort liability that had previously been litigated under the FTCA.<sup>198</sup> Congress concluded that a judgment for the victim would provide full compensation (through the operation of the Judgment Fund)<sup>199</sup> and that a judgment for the government would necessarily entail a finding of non-negligence that should entitle the employee to relief from duplicative litigation. With its "same-subject-matter" limitation, however, the judgment bar did not foreclose all suits against the employee that arose from the same transaction or occurrence as those terms have been

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(FTCA claims not cognizable); *Janis v. United States*, No. 03-6221, 2011 WL 1258521, at \*1-2 (2d Cir. Oct. 22, 2004) (statute of limitations). *But see* *Hallock v. Bonner*, 387 F.3d 147, 156 (2d Cir. 2004), *rev'd on other grounds sub nom.* *Will v. Hallock*, 546 U.S. 345 (2006) (holding that dismissal for lack of subject matter jurisdiction does not trigger the judgment bar).

195. *See* *Manning v. United States*, 546 F.3d 430, 437 (7th Cir. 2008); *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994); *McCabe v. Macaulay*, No. 05-CV-73-LRR, 2008 WL 2980013, at \*14 (N.D. Iowa Aug. 1, 2008); *Aguilar*, 397 F.3d at 859.

196. The judgment bar limited its operative scope to subsequent claims that could be categorized as "by reason of the same subject matter." 28 U.S.C. § 2676 (2006).

197. *Id.*

198. As discussed above, the judgment bar was meant to codify preclusion law as it stood in 1946. Congressional testimony discussing the judgment bar indicates that Congress anticipated that the judgment bar would only bar subsequent claims that were functionally equivalent to claims that had been tried to judgment against the government under the FTCA. *Tort Claims*, *supra* note 3, at 31 (discussing the judgment bar and stating "the judgment in a tort action constitutes a bar to further action upon *the same claim* not only against the Government (as would have been true [in the absence of the judgment bar]) but also against the delinquent employee") (emphasis added); *see also id.* at 32 ("the judgment rendered will constitute a bar to further action upon *the same claim* not only against the Government but also against the employee.") (emphasis added).

199. 31 U.S.C. § 1304 (2010).



used to define modern notions<sup>200</sup> of supplemental jurisdiction and claim preclusion.<sup>201</sup> Indeed, as we have seen, the early decisions quite clearly recognized (in keeping with the common law contours of the judgment bar rule) that a judgment of government non-liability on the scope of employment grounds would not foreclose a subsequent suit against the employee for intentional misconduct even if that second action arose from the very same set of events and thus met the transaction or occurrence test.<sup>202</sup>

The same-subject-matter limitation that prevents application of the judgment bar does not, of course, foreclose judicial efforts to address duplicative litigation or double recovery. It simply means that the federal courts must justify their decisions to coordinate litigation under the FTCA and *Bivens* on other grounds. The first step comes in a forthright acknowledge-

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200. See *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 5 (1st Cir. 1985) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)) (defining the modern transaction test as barring a subsequent action if it is related to the former action “in time, space, origin, or motivation, whether the two claims would have formed a convenient trial package, and whether their treatment as a unit would have conformed to the parties expectations or business understanding or usage.”).

201. The definition of the term “cause of action” has changed considerably since 1946. *Nevada v. United States*, 463 U.S. 110, 130–31 (1983) (comparing RESTATEMENT (FIRST) OF JUDGMENTS § 61 (1942) with RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)). “Definitions of what constitutes the ‘same cause of action’ have not remained static over time.” *Id.* In a footnote, the *Nevada* court explained that under the First Restatement of Judgments section 61 causes of action were “deemed the same if the evidence needed to sustain the second cause of action would have sustained the first action.” *Id.* § 24 n.12. However, under the Restatement (Second) of Judgments section 24, a more “pragmatic approach” was taken whereby two causes of action were considered the same if they arose from the same “transaction.” *Id.*; see generally *Finley v. United States*, 490 U.S. 545, 562 (1989) (Stevens, J., dissenting) (“[T]he contours of the federal cause of action—or ‘case’—were then more narrowly defined than they are today, see, e.g., *Hurn v. Oursler*. . . .”); RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982) (“The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.”). Thus, in 1946, the term “cause of action” was defined narrowly by reference to the “rights and wrongs” test. *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 321–22 (1927) (“The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here to rely upon them by piecemeal in successive actions to recovery for the *same wrong and injury*.”) (emphasis added). In 1966, the Supreme Court overruled the *Hurn* rights and wrongs test as “unnecessarily grudging.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (The rights and wrongs test is “unnecessarily grudging. Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim ‘arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,’ and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’ The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a *common nucleus of operative fact*.”) (emphasis added) (citations omitted). Although *Gibbs* was speaking with reference to supplemental jurisdiction, modern courts utilize the *Gibbs* transactional test in the context of preclusion law as well. See *Manego*, 773 F.2d at 5.

202. See *supra* note 170 and accompanying text (collecting authority).

ment that the judgment bar has not specified the rules of coordination. Such an acknowledgement would require the federal courts to take responsibility for the rules they apply and to justify those rules as part of the common law process. As it turns out, the Supreme Court provided guidance on this subject in the very first case it decided under the FTCA. In *Brooks v. United States*, the Court treated the FTCA remedy as supplementary to the remedy available to members of the armed forces but was quick to add that the victims would be entitled only to a single satisfaction of their injuries.<sup>203</sup> Building on the common law “single satisfaction” rule,<sup>204</sup> we offer some suggestions about how these rules of coordination might develop, taking account of both modern notions of supplemental jurisdiction and the need to protect the right to trial by jury. First, however, we must catalog some of the more striking consequences of the federal courts’ mistaken decision to bring *Bivens* suits within the scope of the judgment bar.

#### A. *Application of the Judgment Bar to Invalidate Bivens Claims*

As noted above, the federal courts took a crucial misstep when they concluded that a judgment for (or against) the government under the FTCA would bar a suit against an employee under *Bivens*. At least three factors helped confirm the federal courts in their error. First, Congress’s decision in 1974 to subject the government to liability for certain intentional torts created a need for coordination.<sup>205</sup> The same alleged misconduct (such as the unconstitutional invasion of private homes in East St. Louis that triggered the adoption of the 1974 statute) could give rise to intentional tort claims under the FTCA and constitutional tort claims under *Bivens*.<sup>206</sup> Although the Supreme Court acknowledged the overlap in *Carlson v. Green*, it sensibly concluded (based on fairly clear statutory text and history) that Congress did not intend the FTCA to displace the *Bivens* remedy.<sup>207</sup> As a result,

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203. As the Court explained in *Brooks*, confronting potential overlap between the FTCA and other provisions for the compensation of injured service members, “[w]e will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so.” 337 U.S. 49, 53 (1949).

204. RESTATEMENT (SECOND) OF JUDGMENTS § 50 (1982); see *infra* note 254.

205. As discussed above, in 1974 Congress amended 28 U.S.C. § 2680(h) to allow claimants to bring claims for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution against the federal government where the act or omission giving rise to the claim was committed by an “investigative or law enforcement officer of the United States government.”

206. *E.g.*, *Unus v. Kane*, 565 F.3d 103, 111–12 (4th Cir. 2009) (claimants alleged state law claims for assault, battery, and false imprisonment under the FTCA and constitutional claims under the First and Fourth Amendments wherein all claims arose from the same conduct—a search of the claimants’ home); *Harris v. United States*, 422 F.3d 322, 326 (6th Cir. 2005) (claimant brought claims under the FTCA for malicious prosecution, false imprisonment, battery, assault, and abuse of process as well as constitutional claims where all claims arose from the same conduct); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (claimants alleged constitutional claims as well as state law claims under the FTCA stemming from the same high speed chase).

207. 446 U.S. 14, 19–20 (1980) (citing S. REP. NO. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2879 (“Congress amended FTCA in 1974 to create a cause of action against the

the Court confirmed the existence of parallel and potentially duplicative remedies without providing any guidance as to how the two overlapping claims might coexist.<sup>208</sup> Second, liberal rules of joinder, coupled with the recognition of a federal right of action against officials, meant that victims of alleged wrongdoing were entitled to bring *Bivens* claims and FTCA claims in a single proceeding.<sup>209</sup> Third, the language of the judgment bar, with its reference to the same subject matter, appears to modern eyes less like a restatement of the historically narrow conception of the mutuality exception (non-mutual issue preclusion) and more like a standard of transactional relationship.<sup>210</sup>

What happened, in short, was a form of dynamic statutory interpretation. A term of art, same-subject-matter, that had been used in the 1940s to limit the reach of the judgment bar to the same legal claim on which the government had waived its immunity was read in the 1980s and 1990s to

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United States for intentional torts committed by federal law enforcement officers, the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.”) (citation omitted)).

208. Although the *Carlson* court did not provide guidance as to how courts should coordinate between overlapping *Bivens* and FTCA claims, the Court more recently stated, in dicta, that where a *Bivens* and FTCA claim are brought contemporaneously the judgment bar plays no role in coordinating between the claims. *See Will v. Hallock*, 546 U.S. 345, 354 (2004) (“If a *Bivens* action alone is brought, there will be no possibility of a judgment bar, nor will there be so long as a *Bivens* action against officials and a Tort Claims Act against the Government are pending simultaneously . . .”).

209. In 1971, the Supreme Court established an independent jurisdictional hook over federal employees when it acknowledged a private right of action against agents of the Government for deprivations of constitutional rights. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Thus, after 1971, courts could establish jurisdiction over federal employees under *Bivens*, but because many *Bivens* actions alleged claims that arose out of an excepted intentional tort, section 2680(h) prevented courts from asserting jurisdiction over the Government in the same action. S. REP. NO. 93-588, at 2–3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789. By amending section 2680(h) in 1974 to allow claimants to file certain intentional tort claims against federal employees, Congress enabled courts to assert jurisdiction over the Government and federal employees in those instances where a plaintiff alleged conduct that could be pled as a constitutional violation as well as a tort cognizable under 1346(b). Prior to 1974, claimants rarely had the opportunity to pursue a claim under the FTCA and a claim against the federal employee in the same action. The rules of supplemental jurisdiction simply did not allow a claimant to join his claims against the federal employee and his claims against the government in a single action. *See, e.g., United States v. Lushbough*, 200 F.2d 717, 721–22 (8th Cir. 1952) (stating in dicta that where there is no diversity of citizenship between claimant and employee, court cannot exercise jurisdiction over employee); *Donovan v. McKenna*, 80 F. Supp. 690, 690 (D. Mass. 1948) (“I find no language in the Act whereby the Government consented to be sued along with its employees.”); *Benbow v. Wolf*, 217 F.2d 203, 205 (9th Cir. 1954) (dismissing suit against government employee because claimant and employee were not diverse); *Williams v. United States*, 405 F.3d 951, 954 (9th Cir. 1969) (claimant cannot join federal or state employees in a suit against the United States unless an independent ground of jurisdiction exists). Note, however, that federal courts could assert jurisdiction over a federal employee if that employee elected to remove an action brought against him in state court to federal court pursuant to 28 U.S.C. § 1442(a) (1948). *See Bivens*, 403 U.S. at 391 n.4 (1971) (“[I]t is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment . . .”).

210. *See infra* note 211 and accompanying text.

reach *Bivens* claims (for which there was no waiver of immunity) on the theory that they arose from the same set of events. One can see this statutory dynamism in operation in many of the leading cases that extend the judgment bar to *Bivens* actions. As the Sixth Circuit explained in 1986, federal courts “have consistently read the [judgment bar] to bar a *Bivens* claim against a government employee ‘arising out of the same actions, transactions, or occurrences’ as an FTCA claim.”<sup>211</sup> The court thus substituted the language of transactional relationship for the statute’s reference to the same subject matter, concluding that a “judgment” on the merits of FTCA claims triggers the bar whenever “those claims ‘aris[e] out of the same actions, transactions, or occurrences’ as his *Bivens* claims.”<sup>212</sup> Missing was any discussion of the origins of the judgment bar and its limited original application to claims brought against employees for which the FTCA also provides a remedy against the government.<sup>213</sup>

Underlying this statutory dynamism, one can identify a concern with coordination of remedies and a fear of double recovery. These concerns doubtless have merit; an alleged victim of government wrongdoing cannot fairly claim to have a right to secure a judgment against the government, satisfy that judgment through the judgment fund,<sup>214</sup> and then pursue additional compensation for the same invasion from the employee in a *Bivens* action. As a result, we find the theme of avoiding double recovery running through the cases on the judgment bar’s application to *Bivens*.<sup>215</sup> One court explained the concern as follows:

Of course, a plaintiff still may bring a *Bivens* claim and pursue it to judgment. But having chosen to bring an FTCA claim as well,

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211. *E.g.*, *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986); *see also* *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994); *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir. 2001); *Harris v. United States*, 422 F.3d 322, 333–34 (6th Cir. 2005); *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008); *Unus v. Kane*, 565 F.3d 103, 122 (4th Cir. 2009); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir. 2005); *Abuhouran v. Morrison*, No. 07-5513, 2011 WL 1004038, at \*6 (E.D. Pa. Mar. 18, 2011); *Andrews v. Gee*, 599 F. Supp. 251, 253 (D.S.C. 1984).

212. *Harris*, 422 F.3d at 333.

213. Textualism has influenced other courts as well. In a Seventh Circuit opinion from 1991, the court found the breadth of the statutory text decisive, explaining the “[o]ther circuits have held that a ‘complete’ bar to ‘any’ action by the claimant means that a judgment against the United States in an FTCA action precludes recovery of a judgment against individual defendants in a *Bivens* action for the same acts or omissions.” *Clifton v. Miller*, No. 97-2342, 1998 WL 78992, at \*2 (7th Cir. Feb. 19, 1998). Here again, the court focused on the reference to acts or omissions and did not give any special weight to the same-subject-matter limitation.

214. 31 U.S.C. § 1304 (2010).

215. *E.g.*, *Hallock v. Bonner*, 387 F.3d 147, 156 (2d Cir. 2004) (stating that the principal purpose of the judgment bar is to prevent duplicative recoveries), *rev’d on other grounds*; *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992) (“We thereby read [the judgment bar] to preclude dual recover[ies].”); *Clifton v. Miller*, No. 97-2342, 1998 WL 78992, at \*2 (7th Cir. Feb. 19, 1998) (declaring that the judgment bar prevents double recoveries); *Ting v. United States*, 927 F.2d 1504, 1513 (9th Cir. 1991) (similar holding); *Henderson v. Blumink*, 511 F.2d 399, 404 (D.C. Cir. 1974) (similar holding).

the statute provides that a “judgment in [that] action . . . constitute[s] a complete bar to any action by the claimant . . . against the employee of the government whose act or omission gave rise to the claim.” [In other words,] a “decision to sue the government . . . affects the availability of a *Bivens* action against the federal officer. Although the plaintiff may elect initially to bring his action against either defendant, a judgment against the United States under the FTCA constitutes ‘a complete bar to any action by the claimant.’” [Or, to quote another decision,] “[t]he FTCA . . . imposes an election of remedies. While a plaintiff may maintain both a FTCA and a *Bivens* action, . . . recovery against the United States bars recovery against the employee.”<sup>216</sup>

The courts’ willingness to apply the judgment bar to block a *Bivens* action thus appears to draw support from its concern with double recovery, a concern (as the court observes) that led common law courts to impose an election of remedies.

#### B. *Retroactive Invalidation of Jury Verdicts*

Building on the (mistaken) perception that the judgment bar imposes an election of remedies, the federal courts have held that an FTCA judgment bars all *Bivens* judgments, including those based upon an earlier jury verdict.<sup>217</sup> Consider *Manning v. United States*. There, the jury agreed with Manning that agents of the FBI had conspired to secure his wrongful conviction for kidnapping and other charges.<sup>218</sup> The district court directed the entry of judgment on the jury’s \$6.5 million verdict on Manning’s *Bivens* claims against the agents.<sup>219</sup> Later, the district court conducted a bench trial, assessing Manning’s claims under the FTCA for the same misconduct. Remarkably, the district court failed to treat the prior jury resolution as controlling on the question of wrongful conspiracy, concluding instead that the government bore no liability for the claims at issue.<sup>220</sup> Even more remarkably, the district court cited its own judgment for the government on the FTCA claims as the basis for invalidating the prior *Bivens* verdict.<sup>221</sup>

*Manning* represents only the most striking example of the willingness of federal judges to set aside jury verdicts under *Bivens* on the basis of their own view of the facts. In a common scenario, district courts conduct simultaneous trials of claims under *Bivens* and the FTCA and treat the entry of judgment under the FTCA (whether favorable or unfavorable to the claim-

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216. *Harris*, 422 F.3d at 337.

217. See *supra* note 195 and accompanying text (citing *Engle*, among others).

218. *Manning v. United States*, 546 F.3d 430, 432 (7th Cir. 2008).

219. *Id.*

220. *Id.*

221. *Id.*

ant) as the basis for invalidating any *Bivens* claim.<sup>222</sup> Here again, the courts deploy the supposedly plain and unyielding terms of the statutory text as the basis for these dysfunctional and unjust results. When the judgment bar speaks of the foreclosure of “any claim” against the employee,<sup>223</sup> the federal courts apply the terms with a vengeance. Missing from the evaluation has been any concern with the jury trial rights of individuals pursuing claims against federal officers for a violation of their constitutional rights. Indeed, few cases acknowledge that the claimants’ jury trial rights might be implicated.<sup>224</sup>

This result represents a dramatic departure from the nation’s early history when fear of federal overreaching led to demands for jury trial protection and the eventual ratification of the Seventh Amendment. In one of the most striking images from the debates over the Constitution’s ratification, one Anti-Federalist imagined a federal officer rummaging around in the bedroom and bedclothes of a suspect’s family and then evading trial before a local jury on the common law action for damages that would otherwise surely follow.<sup>225</sup> While one can cheerfully acknowledge that the Seventh Amendment does not apply to suits against the government, one must also recognize that the Supreme Court in other contexts has urged the federal courts to coordinate litigation to preserve the jury trial right as it applies to claims against individuals (including federal officials).<sup>226</sup> In early cases

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222. *E.g.*, *Harris v. United States*, 422 F.3d 322, 334 (6th Cir. 2005) (“[W]e have held that [the judgment bar] applies even when ‘the claims were tried together in the same suit and [ ] the judgments were entered simultaneously.’”) (citation omitted); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (“The moment judgment was entered against the government, then by virtue of [the judgment bar], [defendant] was no longer answerable to [claimant] for damages.”); *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978) (“[A] judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [government officials].”); *Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986) (“[I]t is inconsequential that the claims were tried together in the same suit and that judgments were entered simultaneously.”); *United States v. Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) (“The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of the Act, order judgment against [the government employee] in the same action.”).

223. 28 U.S.C. § 2676 (2006).

224. To be sure, no right to trial by jury attaches to claims under the FTCA. 28 U.S.C. § 2402 (2011). But plaintiffs surely enjoy a Seventh Amendment right to trial by jury in the litigation of an otherwise valid *Bivens* claim. *Hui v. Casteneda*, 130 S. Ct. 1845, 1850 (2010) (“*Bivens* cases may be tried before a jury.”).

225. *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788*, at 154 (John B. McMaster & Frederick D. Stone eds., 1888) (anonymous remarks made in 1787 in response to Federalist delegate James Wilson’s convention speech on the initial exclusion of a Bill of Rights).

226. *See also* *United States v. Yellowcab*, 340 U.S. 543, 555–56 (1951) (citing *Ryan Distributing Corp. v. Caley*, 51 F. Supp. 377 (E.D. Pa. 1943)); *Ford v. C.E. Wilson & Co.*, 30 F. Supp. 163, 165 (D. Conn. 1939); *Munkacsy v. Warner Bros. Pictures*, 2 F.R.D. 380, 381 (E.D.N.Y. 1942); *Mealy v. Fidelity Nat’l Bank*, 2 F.R.D. 339, 339–40 (E.D.N.Y. 1942); *Elkins v. Noble*, 1 F.R.D. 357, 358 (E.D.N.Y. 1940); *FED. R. CIV. P.* 38(c), 39, 42 (providing examples of how courts should try non-FTCA claims when brought contemporaneously with FTCA claims); *Beacon Theaters v. Westover*, 359 U.S. 500, 509 (1959) (holding that when equitable and legal claims are brought in the same suit, the legal claims should be tried to a jury before the equitable claims

under the FTCA, therefore, both the Supreme Court and the lower federal courts used coordination strategies designed to prevent unnecessary erosion of the jury trial right. Thus, in *United States v. Yellowcab*,<sup>227</sup> an early FTCA case, the Court anticipated later Seventh Amendment decisions by urging coordination of claims against individual and government defendants to preserve jury trial rights.<sup>228</sup> An early example of this effective coordination appears in *Moon v. Price* where the district court first tried the claims against the employee to the jury and then incorporated the jury's findings into its own assessment of the FTCA claim.<sup>229</sup> Part III suggests tools of coordination that modern courts might use to achieve similar results.

### C. *Invalidation Based on Judgments that the FTCA Does Not Apply*

In perhaps the most wooden application of the judgment bar, a series of cases hold that claims falling outside the scope of the FTCA nonetheless bar claims under *Bivens*.<sup>230</sup> For a representative illustration of this application of the judgment bar, consider *Williams v. Fleming*.<sup>231</sup> There, Williams brought suit under the FTCA, alleging that a bank examiner at the FDIC had acted on the basis of racial animus in encouraging the plaintiff's bank to stop making loans to the plaintiff and other African Americans.<sup>232</sup> The plaintiff also brought a racial discrimination claim against the examiner under *Bivens*.<sup>233</sup> In evaluating the FTCA claim, the district court consulted Illinois law and concluded that the nearest analogous tort claim was slander.<sup>234</sup> (Illinois state law was interpreted as failing to recognize a tort of

are decided by the court); *Chauffers, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 579 (1990) (explaining courts must try legal issues to a jury before trying equitable claims with the attendant collateral estoppel effects).

227. In *United States v. Yellowcab*, the Court held that the United States had consented to be impleaded as a third party defendant for contribution under the FTCA. 340 U.S. 543, 553 (1951).

228. *Id.* at 555–56 (instructing federal courts to try non-FTCA claims brought contemporaneously with FTCA claims in the same manner as legal and equitable claims are tried when brought in the same action).

229. 213 F.2d 794, 797 (5th Cir. 1954) (trying non-FTCA claims to a jury before issuing a decision as to claimant's FTCA claims and then providing plaintiff with an election of remedies pursuant to Georgia preclusion law).

230. See, e.g., *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184–85 (7th Cir. 1996) (“[A]ny FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct . . . .”) (citation omitted); *Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010) (holding FTCA claims not cognizable); see also *Farmer v. Perrill*, 275 F.3d 958, 964–65 (10th Cir. 2001) (finding FTCA claims dismissed for failure to prosecute); *Gasho v. United States*, 39 F.3d 1420, 1436–38 (9th Cir. 1994) (abuse of process); *Janis v. United States*, No. 1:04–CV–05812–SKO PC, 2011 WL 1258521, at \*1–2 (E.D. Cal. Mar. 30, 2011) (statute of limitations). But see *Hallock v. Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), *rev'd on other grounds sub nom.* *Will v. Hallock*, 546 U.S. 345, 354 (2006) (holding that dismissal for lack of subject matter jurisdiction does not trigger the judgment bar).

231. 597 F.3d at 820.

232. *Id.* at 821.

233. *Id.*

234. *Id.*

racial discrimination.) Looking to the FTCA, the district court found that defamation claims were excluded from the Act's coverage.<sup>235</sup> It thus entered judgment for the government on the FTCA claim.<sup>236</sup> Having done so, the court next concluded that the judgment bar was triggered and foreclosed the *Bivens* claim for racial discrimination.<sup>237</sup> The plaintiff was thus denied his day in court on his constitutional claim for race-based discrimination.

A moment's reflection will reveal the problem with the approach taken in these cases. The judgment bar was designed to deal with *respondeat superior* liability; a finding of non-negligence in litigation against the government would bar a later attempt to pursue the same negligence claim against the employee.<sup>238</sup> When, however, the government escaped liability by arguing that the actions of the employee were intentional and thus outside the scope of the FTCA's waiver of immunity for negligence claims, the judgment bar had no application, and suit against the employee was permitted.<sup>239</sup> Similarly, if the court found that the employee was acting outside the scope of employment, a judgment for the government on that basis would not bar a later suit against the employee.<sup>240</sup> Indeed, the whole structure of the FTCA assumed the viability of suits against the employee if the government succeeded in arguing that the conduct in question fell outside the scope of its acceptance of *respondeat superior* liability or into another exception (like libel or slander). Far from barring suit against the employee, the entry of judgment for the government in such situations served to confirm that the employee was the proper defendant. The FTCA achieved this goal of coordination by limiting the judgment bar to claims against the employee by "reason of the same subject matter."

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235. *Id.* at 821–22. One might have more fairly characterized the claim as one for interference with advantageous business relations, a tort not expressly exempted from the FTCA. *See* 28 U.S.C. § 2680(h) (2006) (exempting intentional interference with contract but not with business relations).

236. *See Williams*, 597 F.3d at 820–21.

237. *Id.* at 822.

238. *See supra* note 198 (noting legislative commentary regarding meaning of same subject matter).

239. *See, e.g., Lojuk v. Quandt*, 706 F.2d 1456, 1460–61 (7th Cir. 1983) (finding where plaintiff brought suit for negligence and assault against a doctor of the Veterans Administration and the Government, the plaintiff's claims as to the Government were dismissed for lack of subject matter jurisdiction under section 2680(h), but let the plaintiff's claims stand as to the doctor in his personal capacity without discussing the Judgment Bar); *Smith v. DiCara*, 329 F. Supp. 439, 442 (E.D.N.Y. 1971) (holding where claimant brought suit against doctor for defamation in state court, the Attorney General removed to federal court under 38 U.S.C. § 4116, and the court dismissed the action against the Government for lack of subject matter jurisdiction under section 2680(h), claimant was free to pursue his claim against doctor in state court—where Judgment Bar was not discussed); *see also supra* note 170 and accompanying text (string cite of cases starting with *Willson v. Cagle*).

240. *See, e.g., Carr v. United States*, 422 F.2d 1007, 1011 (4th Cir. 1970) (holding that where court determines that employee was acting outside the scope of his employment and dismisses an FTCA suit on that basis for lack of subject matter jurisdiction, the court must remand to state court); *see also supra* note 170 and accompanying text.



Stepping back from the statutory particulars, the unfairness of the result in *Williams* deserves mention. The court barred Williams from offering proof of his claim that racial animus led to the cancellation of the favorable credit-relationship that he had previously enjoyed with his bank.<sup>241</sup> The justification for that result ultimately rests on the claim that Williams sued the wrong party on the wrong theory of liability.<sup>242</sup> Such an error can fairly foreclose further litigation against the government. It, however, cannot fairly foreclose litigation against another defendant who may bear liability for the events in question on a constitutional tort theory. As we will see, a finding that one possible obligor has no liability to the plaintiff does not ordinarily bar claims against other possible obligors, and the judgment bar was not designed to impose a broader rule of non-party preclusion.

Struck with the unfairness of preclusion based on a prior non-merits determination of an FTCA claim, some courts have struggled to avoid the conclusion reached in the *Williams* line of cases.<sup>243</sup> Thus, in *Hallock v. Bonner*, the Second Circuit refused to endorse the Seventh Circuit's approach.<sup>244</sup> The case arose from an apparently botched child pornography investigation; federal agents seized and allegedly destroyed the Hallocks' computer equipment but found no evidence that the Hallocks were anything more than the innocent victims of identity theft.<sup>245</sup> The Hallocks first sued under the FTCA but lost when the district court found that the seizure of their property fell within an exception for property detained by the government.<sup>246</sup> The Hallocks subsequently sued under *Bivens*.<sup>247</sup> In evaluating the *Bivens* claim, the Second Circuit correctly noted that application of the judgment bar would make no sense; statutory limits on the scope of the government's acceptance of liability under the FTCA simply did not bear on the viability of a constitutional tort claim against federal officers for wrongful home invasion and destruction of property.<sup>248</sup> The Second Circuit avoided a finding of preclusion by characterizing the FTCA disposition as one based on Congress's decision to retain the government's sovereign immunity.<sup>249</sup> Judgments based on sovereign immunity were said to rest on a lack of subject matter jurisdiction and to lack preclusive effect.<sup>250</sup>

One can certainly question the wisdom of the *Hallock* court's decision to rely on a supposed lack of jurisdiction as the basis for denying preclusive

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241. See *Williams*, 597 F.3d at 821.

242. See *id.* at 821–22 (the district court dismissed the action because it determined that the claim was one for slander, a claim excepted under 28 U.S.C. § 2680(h)).

243. See *supra* note 193.

244. 387 F.3d 147, 155 (2d Cir. 2004), *rev'd on other grounds*.

245. *Id.* at 150.

246. *Id.* at 151.

247. *Id.*

248. *Id.* at 155.

249. See *id.* at 155.

250. *Id.*

effect to the prior FTCA judgment,<sup>251</sup> but the decision not to apply the judgment bar was entirely sound. The court could have better achieved its sensible goal by drawing on the history of the same-subject-matter limitation as a predicate for narrowing the ambit of the judgment bar. On that view, the *Bivens* action against the government employees would have been regarded as arising from a subject matter different from the FTCA claim for destruction of property that was brought against the government.

#### D. *Alternative Tools of Coordination: Preclusion Law and the Single Satisfaction Rule*

Federal courts apparently fear that a limited (though historically accurate) view of the ambit of the judgment bar would lead to double recovery and uncoordinated litigation.<sup>252</sup> The common law, however, furnishes the federal courts with an ample set of tools to address these concerns. While a plaintiff may pursue claims successively against a range of potential parties, rules of non-party preclusion ensure that determinations in related litigation can be given effect in subsequent suits against different parties.<sup>253</sup> In addition, the single satisfaction rule ensures that a plaintiff may recover but a single satisfaction for any particular injury.<sup>254</sup> These modes of coordination

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251. The decision created a circuit split that remains unresolved. The Supreme Court granted review in *Hallock* but ultimately concluded that a judgment bar defense to a *Bivens* action was not the sort of defense to which the collateral order doctrine applied and dismissed for want of appellate jurisdiction. *Will v. Hallock*, 546 U.S. 345, 354–55 (2006). Since then, the Seventh Circuit has reaffirmed its view both that dismissals based on the inapplicability of the FTCA should be regarded as judgments on the merits, rather than as jurisdictional, *see Collins v. United States*, 564 F.3d 833, 837–38 (7th Cir. 2009), and that such dismissals trigger the application of the judgment bar. *See Williams v. Fleming*, 597 F.3d 820, 824 (7th Cir. 2010).

252. *See supra* note 36.

253. *See* WRIGHT, MILLER & COOPER, *supra* note 62, § 4464.

254. *See, e.g., Losito v. Kruse*, 24 N.E.2d 705, 705 (Ohio 1940) (“Where a liability arises against both a master and his servant in favor of a party injured by the sole negligence of the latter while acting for the master, such injured party may sue either the servant, primarily liable, or the master, secondarily liable, or both, in separate actions, as a judgment in his favor against one, until satisfied, is no bar to an action against the other, the injured party being entitled to full satisfaction from either the master or servant or from both.”); *Hart v. Guardian Trust Co.*, 75 N.E.2d 570, 583 (Ohio Ct. Com. Pl. 1945) (“For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied.”); *Huey v. Dykes*, 82 So. 481, 482 (Ala. 1919) (satisfaction of judgment by master or servant will bar subsequent action against the other); *O’Brian v. Pryor*, 195 S.W. 759, 760 (Mo. Ct. App. 1917) (“Where, for example, a master is liable for the tort of his servant, a satisfaction from one discharges both . . . .”) (citation omitted); *Andrews v. Gee*, 599 F. Supp. 251, 254 (D.S.C. 1984) (“Because a plaintiff may have but one satisfaction for a wrong, once a party is fully compensated for his or her injuries, he or she is barred from filing a second lawsuit based on the same injuries.”); *Brown v. United States*, 838 F.2d 1157, 1161 (11th Cir. 1988) (where claimant settled with employee for amount in excess of judgment in FTCA suit, Government was entitled to total setoff in accordance with Florida law); *Sanchez v. Rowe*, 651 F. Supp. 571, 576 (N.D. Tex. 1986) (where judgment was entered against government and employee simultaneously, claimant was entitled to an election of remedies whereby he could elect whether to collect from the employee or the United States).

help to ensure judicial economy and fairness to litigants without the harshness of imposing a required election of remedies under the judgment bar. As explained in the Restatement (Second) of Judgments,

[An election of remedies was] often justified as a means of preventing double recovery for the loss involved. These rules are now obsolete. Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments . . . . Requiring that a single action be brought or that the injured party make an election of remedies also formerly had justification insofar as it precluded relitigation of matters previously adjudicated, particularly the issue of the amount of damages sustained. This objective is now accomplished by the modern rule that a claimant may not relitigate issues determined adversely to him in a prior action against another adversary, including issues relating to the damage he has sustained.<sup>255</sup>

In short, the common law now permits victims of alleged wrongdoing to pursue tort claims to judgment against a range of potential tort “obligors” without being forced to an election of remedies.<sup>256</sup> The amount of a plaintiff’s damages for any particular injury, however, cannot exceed the amount awarded in a litigated case.<sup>257</sup> Nor can the plaintiff obtain a double recovery; the second judgment debtor will receive a credit for any amounts paid by the first obligor.<sup>258</sup>

Embedded in the Second Restatement, these well-established common law rules apply to constitutional tort litigation in the federal courts. The first element of the rule, reflected in Restatement 2d section 49, allows a plaintiff with claims against a variety of co-obligors to pursue claims against each of them independently.<sup>259</sup> Entry of judgment in litigation against one

255. RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a (1982).

256. *Id.* (“A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor.”).

257. *See id.* § 51 (collecting authority); RESTATEMENT (FIRST) OF JUDGMENTS § 96(1)(b) (1942) (providing that a judgment for the victim in a suit against the servant will bind the victim as to the amount of the recovery in a subsequent action against the master).

258. *E.g.*, *Branch v. United States*, 979 F.2d 948, 951–52 (2d Cir. 1992) (where claimant settled claim against employee, claimant was entitled to pursue Government in subsequent suit but Government was entitled to offset the prior settlement in accordance with New York law); *Brown*, 838 F.2d at 1161 (where claimant settled with employee for amount in excess of judgment in FTCA suit, Government was entitled to total setoff in accordance with Florida law).

259. *See also Gargiul v. Tompkins*, 704 F.2d 661, 663 (2d Cir. 1983) (a Second Circuit decision that upheld the right of a teacher to pursue successive suits to challenge her suspension without pay). The teacher’s first action, against the school board in state court, resulted in a defense judgment on a claim based upon state law. *Id.* at 664. The teacher sued again, this time on a constitutional tort claim under section 1983, and named both the school board and individual members of the board as defendants. *Id.* at 665. The trial court dismissed all of the claims on preclusion grounds. *Id.* The Second Circuit reversed in part, holding that preclusion barred the suit against the school board but not against the individual board members. *Id.* at 669. As potential co-obligors who were not made parties to the state court action, the board members were subject to

co-obligor does not bar successive litigation against a different obligor.<sup>260</sup> One can see the rule illustrated in *Headley v. Bacon*, an Eighth Circuit decision that upheld the right of a former police officer to pursue successive harassment claims.<sup>261</sup> The officer's first action was brought against the city under Title VII for sexual harassment and resulted in a judgment in her favor.<sup>262</sup> The second action named her former fellow police officers (those who had engaged in the acts of harassment identified in the earlier litigation) and sought damages from them in their personal capacities.<sup>263</sup> Although the Eighth Circuit agreed that the claims were the same for preclusion purposes (and could have been joined to the Title VII action), the court ultimately concluded that the individual defendants were not parties to the first proceeding and were thus incapable of invoking the doctrine of preclusion to block the second suit.<sup>264</sup> The court acknowledged that the same conduct was at issue in both proceedings and that the city's liability, under *respondeat superior*, was based on that very conduct.<sup>265</sup> In keeping with settled law, however, the city's vicarious liability for the acts of its employees did not bring the parties into privity for purposes of precluding the second action.<sup>266</sup>

Two other features moderate the rule permitting separate pursuit of co-obligors. First, defendants in the second proceeding can rely on a variety of defensive non-mutual preclusion doctrines. If the plaintiff fails to succeed in the first action, findings made in the course of the rejection of the claim will apply to bar aspects of the second litigation on theories of non-mutual preclusion.<sup>267</sup> For this reason and for reasons of economy generally, litigants will often prefer to pursue claims against the government and its employees in a single proceeding.<sup>268</sup> Second, the single satisfaction rule will prevent the plaintiff from obtaining a double recovery, thus providing a mechanism for coordinating potentially overlapping claims in constitutional

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being named as defendants in the teacher's second proceeding (although the appellate court concluded that qualified immunity barred the claims against them). *Id.* at 666–67; *see also* *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983).

260. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 49 (1982).

261. 828 F.2d 1272, 1279–80 (8th Cir. 1987).

262. *Id.* at 1276.

263. *Id.* at 1274.

264. *Id.* at 1279–80.

265. *Id.* at 1279.

266. *Id.* at 1276. This explains why courts have reached the (superficially odd) conclusion that a government official sued in his official capacity is not necessarily in privity with himself, when sued in his individual capacity. *See also* *Andrews v. Daw*, 201 F.3d 521, 526 (4th Cir. 2000) (“[A] government official in his official capacity is not in privity with himself in his individual capacity for purposes of *res judicata*.”); *Roy v. City of Augusta*, 712 F.2d 1517, 1521–22 (1st Cir. 1983) (determining that a city councilman and city attorney were not privies with the city and therefore not parties to a prior action).

267. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

268. *See id.* § 51 cmt. a.

tort litigation.<sup>269</sup> These tools of coordination have been routinely applied in litigation under § 1983,<sup>270</sup> confirming that the federal courts can abandon their overbroad interpretation of the judgment bar without inviting double recoveries and duplicative litigation.

Consider *Gonzales v. Hernandez*,<sup>271</sup> which nicely illustrates the use of coordination tools in § 1983 litigation. There, the plaintiff brought suit against her former employer—a state-run hospital—in state court and obtained a mixed result: the jury rejected her discrimination claim but returned a verdict of \$170,000 on her retaliation claim.<sup>272</sup> Then, the plaintiff brought a second action in federal court, seeking damages under § 1983 from the employees on theories of discrimination and retaliation.<sup>273</sup> Following the Restatement (Second) of Judgments section 51 and the law of New Mexico, the Tenth Circuit found that the prior rejection of the discrimination claim against the employer operated to foreclose the discrimination claim against the employees.<sup>274</sup> Because the plaintiff had won on her retaliation claim, however, she could proceed on that claim against the employees in federal court; they were not in privity with their employer, and she was not obligated to join them as defendants in the state proceeding.<sup>275</sup> Still, the measure of damages was controlled in part by the prior litigation.<sup>276</sup> As for compensatory damages, the plaintiff could recover no more than the \$170,000 that the jury had previously awarded her.<sup>277</sup> As for punitive damages, the plaintiff was free to pursue them in federal court inasmuch as there was no provision for an award of punitive damages in the prior proceeding.<sup>278</sup> In the end, the result achieves a measure of coordination while pre-

269. Notably, the Supreme Court invoked the single satisfaction rule in attempting to suggest a mode of coordination in its first decision under the FTCA. In *Brooks v. United States*, the Court refused to treat a compensation remedy for service members as exclusive of the remedy under the FTCA. 337 U.S. 49, 53–54 (1949). But the Court nonetheless observed that the victims were entitled to but a single satisfaction for their losses and remanded to allow the district court to explore how best to coordinate relief. *Id.* at 54. Today, the Restatement provides that any consideration the plaintiff receives from a judgment debtor discharges, to that extent, the liability of all others liable for the loss. See RESTATEMENT (SECOND) OF JUDGMENTS § 51(2) (1982).

270. See, e.g., *Minix v. Canarecci*, 597 F.3d 824, 830 (7th Cir. 2010); *Gonzalez v. Hernandez*, 175 F.3d 1202, 1207–08 (10th Cir. 1999); cf. *Gargiul v. Tompkins*, 790 F.2d 265, 272–73 (2d Cir. 1986) (concluding that prior suit against the school board in state court did not bar subsequent action against the individuals for a constitutional violation).

271. 175 F.3d 1202 (10th Cir. 1999).

272. *Id.* at 1204.

273. *Id.*

274. *Id.* at 1206.

275. See *id.* at 1206–07.

276. *Id.* at 1207–08.

277. *Id.* Obviously, if the federal jury were to award compensatory damages against the employees, their obligation to pay would be reduced by the amount the plaintiff was paid by the employer to satisfy the state retaliation judgment. *Minix v. Canarecci*, 597 F.3d 824, 830 (7th Cir. 2010).

278. *Gonzalez*, 175 F.3d at 1207–08.

serving the plaintiff's right to recover the distinctive damages available for the commission of constitutional torts.<sup>279</sup>

Applied to litigation under the FTCA and *Bivens*, these rules provide an entirely sensible and straightforward set of results. In cases such as *Williams v. Fleming*, there would be no warrant for the application of a preclusion rule. The judgment in favor of the government was based not on the merits of the underlying FTCA claim but, in the words of the Restatement (Second) of Judgments, on a defense specific to the federal government.<sup>280</sup> The judgment could thus have no preclusive effect on the *Bivens* claim against the FDIC examiner. Similarly, in cases like *Manning v. United States*, the jury verdict on the *Bivens* claim against the employees would stand, and the judgment in favor of the government on the FTCA claim would simply foreclose any award of damages payable through the Judgment Fund.<sup>281</sup>

One final puzzle arises from the failure of the district court to coordinate liability in the *Manning* litigation. Under the terms of the Restatement of Judgments section 84 (and the related provisions in the Second Restatement),<sup>282</sup> a party (like the government) who controls litigation (such as that brought against an employee on a *Bivens* theory) may be bound by the result.<sup>283</sup> Section 84 provides for such a result when the party "controls an action" and has a "proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction."<sup>284</sup> The Restatement's comments make clear that the master's decision to assume control of the defense of a negligence claim against the servant would be sufficient to bring the rule into play, barring the government from contesting negligence if the issue had been resolved in the plaintiff's favor in the earlier proceeding.<sup>285</sup>

We do not believe that this rule of preclusion through control necessarily applies when the government has assumed defense of a *Bivens* action.

279. See *Minix*, 597 F.3d at 830. The court found that a settlement with one defendant did not necessarily cap the amount of compensatory damages and that, in any case, the plaintiff was potentially entitled to recover punitive damages from the other defendants, damages that were not included in the settlement figure. *Id.* As a result, the plaintiff was free to pursue claims against the other defendants, notwithstanding the receipt of a measure of satisfaction from one defendant. *Id.*

280. *Williams v. Fleming*, 597 F.3d 820, 821 (7th Cir. 2010) (affirming the dismissal of a slander claim against the government because claims for slander are excepted under 28 U.S.C. § 2680(h)).

281. See 31 U.S.C. § 1304 (2010) (appropriating funds to pay final judgments, awards, or settlements payable under the FTCA). The judgment fund does not apply to *Bivens* judgments, which establish liability personal to the officer.

282. See RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982) (discussing rule for persons who control participation).

283. See RESTATEMENT (FIRST) OF JUDGMENTS § 84 (1942).

284. *Id.*

285. See *id.* § 84 cmt. c, illus. 9 (treating the master's control of a negligence suit against the servant as sufficient to bind the master to a judgment in favor of the plaintiff on the question of negligence).

As we have explained, the issues to be resolved in a *Bivens* action differ from those that control the resolution of an intentional tort claim under the FTCA. Just as the FTCA disposition should not displace a *Bivens* action, so too a *Bivens* decision should not necessarily control claims under the FTCA.<sup>286</sup> Still, we think that the district court and the parties could identify common issues of fact and law and agree to have them determined in a single proceeding. Following the approach of *Moon v. Price*, district courts might submit the *Bivens* claim to a jury and treat agreed-upon elements of any disposition favoring the plaintiff as binding on the government in any subsequent determination under the FTCA.<sup>287</sup> That would avoid the spectacle of a district court overruling a jury verdict on the basis of a disagreement with the jury's assessment of official misconduct.

### III. *BIVENS* SKEPTICISM AND DYNAMIC TEXTUALISM

In this final part of the article, we consider what the story of the judgment bar can teach us about statutory interpretation. Among the most provocative and challenging contributions to the theory of statutory interpretation in the past generation have come from textualists,<sup>288</sup> those who insist along with Professor John Manning that “judges should seek statutory meaning in the semantic import of the enacted text.”<sup>289</sup> The focus on the enacted text has been said to yield two virtues: to avoid misleading references to legislative intent (and the problems of delegation inherent in assigning weight to the comments of a privileged committee chair or floor leader)<sup>290</sup> and to constrain judges more effectively than modes of interpretation that include references to legislative history.<sup>291</sup> On this account, textualist judges play a more modest and faithful role as the agents of the legislative body than intentionalist judges who may engage in some selec-

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286. See *Sterling v. United States*, 85 F.3d 1225, 1227–28 (7th Cir. 1996) (discussing that where claimant pursued *Bivens* claim against employee to judgment and lost, claimant was not precluded from bringing a subsequent action against the United States for negligence because estoppel will only act to bar an identical claim).

287. See *Moon v. Price*, 213 F.2d 794, 796–97 (5th Cir. 1954) (holding that, even though two separate actions were filed, plaintiff can only collect one satisfaction for the injury).

288. Leading first-generation textualists include Justice Antonin Scalia and Judge Frank Easterbrook, both of whom emphasized a public choice account of the legislative process as a justification for focusing on the enacted text. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). On textualism generally, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); see also ESKRIDGE, FRICKEY & GARRETT, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 765–97 (4th ed. 2007) (reviewing the literature on the textualism-intentionalism debate).

289. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1288 (2010).

290. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712–15 (1997) (arguing that textualism can serve to implement constitutional constraints on the delegation of lawmaking authority to a subset of the legislative assembly).

291. See *id.* at 718–20 (arguing that textualism minimizes reliance on legislative history to interpret ambiguous statutory language).

tivity in deciding how to assign weight to one or more sources of legislative history.<sup>292</sup>

The judicial expansion of the judgment bar over the last twenty-five years calls into question the power of textualism to constrain the interpretive process. At no step in the process of drafting or amending the FTCA did Congress embrace the extension of the judgment bar to *Bivens* claims (which is not to say, of course, that judges cannot use other tools of coordination to link FTCA litigation and *Bivens* liability). As initially drafted, the provision applied only to claims against employees for negligence and only where those very claims were resolved in the context of vicarious liability litigation against the government. There was no basis for protecting employees from suit on theories of liability that had not been resolved in the earlier litigation. (Thus, a finding of government non-liability based on a judgment that the employee had committed an intentional tort or had acted outside the scope of employment would not bar a subsequent suit against the employee.) Congress achieved this sensible result by narrowing the judgment bar to claims brought “by reason of the same subject matter.”<sup>293</sup> It borrowed this language from the Restatement of Judgments to clarify that the non-mutual issue preclusion of the judgment bar applied only to the issues resolved in the earlier litigation.

Of course, one might regard the misinterpretation of the judgment bar as an instance of bad interpretation rather than as an instance of (revealingly) bad textualism. Textualists, after all, do not believe in willfully blinding themselves to the context in which the legislation was adopted and to the mischief that gave rise to its adoption.<sup>294</sup> On this view, textualists might well accept our account of the judgment bar and join us in calling for a repudiation of such results as those in *Manning v. United States*<sup>295</sup> and *Williams v. Fleming*.<sup>296</sup> Indeed, we have been heartened by the reaction of well-informed students of the legislative process in general and of the FTCA in particular who share our suggested interpretation of the judgment

292. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 371–72 (2005) (describing faithful agency as a common trope among textualists); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 16 (2001) (describing textualists as faithful agents and collecting historical support for the view that faithful agency was a common mode of interpretation at the time of the framing).

293. 28 U.S.C. § 2676 (2010).

294. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 90–93 (2006) (describing the willingness of textualists to accept arguments from semantic, if not political, context and from mischief); cf. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 733 (2010) (suggesting that the embrace of context and mischief-based arguments can make textualists sound like members of the legal process school).

295. *Manning v. United States*, 546 F.3d 430 (7th Cir. 2008) (holding an FTCA action acts as a complete bar to any action by a claimant).

296. *Williams v. Fleming*, 597 F.3d 820 (7th Cir. 2010) (holding that the FTCA’s judgment bar prohibits a *Bivens* suit).



bar. Perhaps, then we can complete our work with a simple call for a judicial about-face.

As much as we hope that the judicial process will correct its interpretive errors, we cannot escape the disquieting perception that the results achieved in the name of the judgment bar reveal something fundamental about the process of textualist interpretation. If textualism has grown as a force in statutory interpretation, there can be no gainsaying its significance in the courts' current approach to defining the judgment bar's relevance to *Bivens* liability. As we saw in Part II, lower courts applying the judgment bar have tended to begin and end with an evaluation of the statutory text. Viewed in isolation or against the backdrop of recent decisions, the language of the judgment bar might bear the meaning that the federal courts have ascribed to it.<sup>297</sup> The lower courts' embrace of an interpretation so clearly at odds with the expectations of Congress and the rights of litigants may reveal something about judicial attitudes towards constitutional tort claims.

We suspect that the expansive view of the judgment bar rests as much on what one of us has elsewhere described as *Bivens* skepticism as it does on the text of the statute.<sup>298</sup> *Bivens* skepticism has certainly gained a good deal of traction at the Supreme Court. The Court has not only taken a narrow view of the range of constitutional provisions that individuals can enforce with a *Bivens* action<sup>299</sup> but has also steadily expanded the doctrine of official immunity to shield official conduct from potential liability.<sup>300</sup> In whittling away at the right of individuals to seek redress from the federal government, the Court proceeds on the assumption (often mistakenly) that alternative remedies, although perhaps imperfect, provide adequate protections. Furthermore, the most skeptical of the *Bivens* critics, Justices Scalia and Thomas, have assailed that decision from a textualist vantage point, taking the view that the Court's decision to fashion a judge-made right of action in the first place was illegitimate.<sup>301</sup>

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297. Of course, as we have tried to show, the results achieved through resort to the text make little functional sense and cannot fairly be attributed to the Congress that enacted the judgment bar in the first instance or to the Congress that broadened the FTCA to supplement *Bivens* liability. To the contrary, Congress appears to have relied on the "same-subject-matter" restriction to limit the preclusive effect of the judgment against the government.

298. See James E. Pfander, *Iqbal and Constitutional Torts: Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. ST. L. REV. 1387, 1405–10 (2010) (explaining skepticism toward the expansion of the *Bivens* decision).

299. See generally *Wilkie v. Robbins*, 551 U.S. 537 (2007) (denying Plaintiff's proposal to expand *Bivens* actions to include redress for retaliation against a claimant exercising property rights to exclude or unjustly burden a claimant's rights).

300. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (holding that official immunity shields officials from all litigation concerns, including discovery).

301. See Pfander & Baltmanis, *supra* note 6, at 118 (citing Justice Scalia's critique of *Bivens* as the by-product of the heady days of judicial activism in the recognition of judge-made rights of action).

We think the textualist critique of *Bivens* has worked to frame judicial attitudes toward the preclusive effect of the judgment bar. For skeptics, *Bivens* lacks legitimacy and encourages frivolous litigation.<sup>302</sup> *Bivens* himself was in prison at the time he filed his famous action against unknown agents of the Federal Bureau of Narcotics—a factor that may have influenced Justice Black’s otherwise curious dissent from the recognition of his right to sue in federal court.<sup>303</sup> Certainly, many of the claims brought in *Bivens*’s name since 1971 have sought to address the concerns of *pro se* prison litigants.<sup>304</sup> The connection to prison litigation can make the *Bivens* action appear doubly suspect; it was not only judge-made, but it has also served to encourage prison complaints that courts may view in general as lacking any merit and any claim to a place on crowded federal dockets. Perhaps, these framing assumptions explain harsh results. As we have seen, today’s judgment bar decisions almost routinely deny litigants a day in court (on the basis of an election-of-remedies rationale that the Restatement (Second) of Judgments termed obsolete thirty years ago) and invalidate favorable verdicts without any apparent concern for jury trial rights.

To the extent textualist judges bring skeptical views of *Bivens* to bear in their interpretation of the judgment bar, they engage in what we regard as a fundamentally improper form of statutory interpretation. Whatever one can say for the legitimacy of *Bivens* litigation (and the story is more complex than often assumed),<sup>305</sup> Congress has never embraced *Bivens* skepticism as a general matter or in connection with the judgment bar. For starters, congressional attitudes towards *Bivens* surely had little impact on the drafting of the judgment bar, which was adopted in 1946 some twenty-five years before the decision came down.<sup>306</sup> To the extent claims of serious official wrongdoing were in view at the time, Congress simply refused to accept vicarious liability for the intentional torts of government employ-

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302. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 828 n.95 (2010) (citing figures on ratio between the number of *Bivens* suits filed to those which resulted in judgments for, or payments to, plaintiffs).

303. See James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, in FEDERAL COURTS STORIES 288–89 (Vicki Jackson & Judith Resnik eds., 2009) (discussing Justice Black’s dissent in *Bivens*).

304. For an effort to catalog and refute the commonly held view of *Bivens* claims as predominantly frivolous, see Reinert, *supra* note 302.

305. See Pfander & Baltmanis, *supra* note 6, at 136–38 (describing the *Bivens* action as a legitimate federal common law response to the concerns with state-to-state variability in the recognition of officer suits); see also Pfander, *supra* note 298, at 1410–12 (noting that Congress’s adoption of the Prison Litigation Reform Act of 1995 tends to ratify and qualify, rather than reject, the availability of a *Bivens* remedy).

306. In 1971, the Supreme Court established an independent jurisdictional hook over federal employees when it acknowledged a private right of action against agents of the Government for deprivations of constitutional rights. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

ees.<sup>307</sup> Congress, however, gave no indication that it meant to foreclose such litigation or that the judgment bar would block intentional tort claims. Quite the contrary, all of the evidence suggests that a judgment for the government on the basis that the FTCA did not apply would leave the plaintiff free to pursue intentional tort claims against the employee. Moreover, to the extent Congress has spoken in the succeeding years, its enactments in 1974 and 1988 seek to preserve and accommodate the *Bivens* action rather than displace it. On a faithful agency theory of statutory interpretation, judges have little warrant for allowing their skepticism towards *Bivens* litigation to inform their interpretation of the judgment bar. Congress has not enacted a policy of hostility towards *Bivens*.

If we can generalize from the example of the judgment bar, textualism may pose a greater risk of infusing judicial values into the interpretive process—interpretive dynamism—than competing interpretive theories that consider a broader range of sources. As the judgment bar so vividly illustrates, a textualist judge may encounter the text of a statutory provision from a perspective quite different from the enacting Congress. In the sixty-five years since the FTCA became law, federal courts have witnessed and participated in a dramatic expansion of the scope of the litigated case to the point where claims against individuals under *Bivens* and against the government under the FTCA now obviously arise from the same transaction or occurrence for joinder purposes under Rule 20.<sup>308</sup> Given the obvious transactional connection between the claims, judges have tended to uncritically assume that they are “brought by reason of the same subject matter”<sup>309</sup> within the meaning of the judgment bar. The text, coupled with a changing interpretive framework and perhaps a measure of hostility to *Bivens* claimants, enables the textualist judge to reach a nominally straightforward answer.

In contrast with the textualism on display in the judgment bar cases discussed in Part II, we argue for a form of textualism that takes into account the context of the legislation and the likely purpose of the enacting Congress. (Elsewhere, one of the authors has referred to this mode of interpretation as “sympathetic textualism” to capture the idea of sympathy to the

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307. Federal Tort Claims Act, ch. 753, § 421(h), 60 Stat. 842 (1946); 28 U.S.C. § 2680(h) (1948) (excepting “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights”).

308. See FED. R. CIV. P. 20 (allowing the plaintiff to join claims against more than one defendant so long as the claims meet the same-transaction-or-occurrence test).

309. *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986) (quoting 28 U.S.C. § 2676 (2006)); *Arevalo v. Woods*, 811 F.2d 487, 489 (9th Cir. 1987) (quoting 28 U.S.C. § 2676); *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994) (quoting *Serra*, 786 F.2d at 242); *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir. 2001) (quoting *Engle*, 24 F.3d at 135); *Harris v. United States*, 422 F.3d 322, 333 (6th Cir. 2005) (quoting 28 U.S.C. § 2676); *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008) (quoting 28 U.S.C. § 2676); *Unus v. Kane*, 565 F.3d 103, 122 (4th Cir. 2009) (quoting 28 U.S.C. § 2676).

aims of the enacting Congress.<sup>310</sup>) Such a mode of interpretation leaves room for a serious engagement with the goals of the enacting Congress while recognizing that one must take the words of the text quite seriously indeed. We thus regard the explanation of the need for the judgment bar—proffered by the government attorney Francis Shea in 1942<sup>311</sup>—as a useful source of insight into the likely purpose of the legislation. Knowledge of this likely purpose can, in turn, play a crucial role in encouraging a careful evaluation of the then-prevailing legal context and the likely consequences of the enacted statutory language in light of the background common law rules that informed its enactment. By contrast, textualist judges will tend to discount statements by witnesses and others that purport to explain the purpose of a particular provision. Distrust of such comments may tend to encourage a form of textualism that leaves greater room for the play of judicial priors and intuition. Unconstrained by sympathy with the goal of the legislation, textualism can create space for judicial value judgments quite difficult to justify by reference to a faithful agent view of the interpretive process.

#### CONCLUSION

Perhaps more than any other figure in the interpretive wars of the past generation, Justice Scalia deserves credit for sparking a renewed interest in the legal text (be it constitutional or statutory). If, however, as Professor Monaghan has suggested, “we’re all textualists now,”<sup>312</sup> we remain divided about what sources judges should use in constructing an interpretive context in which to evaluate the meaning of the text. The critique of legislative history has dealt an important blow to committee reports, witness statements, and the like as sources of interpretive insight.<sup>313</sup> The critique, however, has left textualist judges free to assess the meaning of statutory texts without coming to grips with the purpose of the statute or the mischief Congress sought to address. Unconstrained by any rigorous inquiry into context and purpose, textualist judges may draw their interpretive values from a range of sources, including their own intuition about the value of a particular brand of litigation. So practiced, textualism may produce interpretations of statutes far more dynamic than anything one could achieve through the guise of legislative history.

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310. See generally James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109 (1999) (defining sympathetic textualism and applying it to interpretation of 28 U.S.C. § 1367).

311. See *supra* note 58 and accompanying text.

312. Monaghan, *supra* note 293, at 740.

313. See *Exxon Mobil v. Allapattah Servs. Inc.*, 545 U.S. 546, 568–69 (2005) (casting doubt on the reliability of committee reports and other forms of legislative history as a source of insight into statutory meaning).

The judgment bar may offer a case in point. Designed to achieve the modest goal of ensuring the availability of non-mutual issue preclusion in favor of government employees, the judgment bar was framed at a fairly high level of particularity to foreclose not all follow-on litigation against employees but only such claims as were brought by reason of the “same subject matter.” Congress did not enact a freestanding principle of non-duplication but was content to rely upon the common law of claim and issue preclusion to ensure respect for prior adjudication and limit the plaintiff to a single satisfaction. In the hands of textualist judges acting with a measure of skepticism towards *Bivens* litigation, the judgment bar has nevertheless become an important burden on the right of individuals to pursue constitutional tort claims against the federal government. While the prospect of Supreme Court correction remains, the growing power of the judgment bar illustrates the perils of dynamic textualism.