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# IS *BARRIOS* THE DEATH KNELL OF *BOSH* CLAIMS? THE SOVEREIGN IMMUNITY BATTLE BETWEEN THE OKLAHOMA SUPREME COURT AND LEGISLATURE OVER CONSTITUTIONAL TORTS

HAYLEY STILLWELL\*

## *Introduction*

The mission of the Founding Fathers, in large part, was to make America as different from England as possible. But not everything learned from England was rebelliously discarded. The doctrine of sovereign immunity, that “the king can do no wrong,” made its way across the Atlantic and is still today embedded in the fabric of American jurisprudence. Put simply, this doctrine means that a sovereign cannot be sued unless it consents.<sup>1</sup> This idea is not rooted in the United States Constitution, or any other written law from the legislature.<sup>2</sup> Instead, sovereign immunity emerged in American jurisprudence via the common law,<sup>3</sup> with courts recognizing it as “an inherent right [of a sovereign] to protect itself against suits,”<sup>4</sup> a “universally received” concept,<sup>5</sup> and “an established principle of jurisprudence.”<sup>6</sup>

The State of Oklahoma has explicitly adopted sovereign immunity for a broad array of tort claims, including constitutional torts—legal wrongs by government actors in violation of duties imposed by the Oklahoma

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1. See *United States v. Lee*, 106 U.S. 196, 226 (1882); *The Siren*, 74 U.S. (7 Wall.) 152, 153–54 (1868); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857).

2. *Lee*, 106 U.S. at 207 (“[T]he principle [of sovereign immunity] has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”) (citing *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834); *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846); *Hill v. United States*, 50 U.S. (9 How.) 386 (1850); *Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860); *Siren*, 74 U.S. (7 Wall.) at 152; *The Davis*, 77 U.S. (10 Wall.) 15 (1869)).

3. *Vanderpool v. State*, 1983 OK 82, ¶ 8, 672 P.2d 1153, 1154 (“The doctrine [of sovereign immunity] found its way into the common law of the United States, and in 1821, . . . [it was] applied . . . in suits against the United States, declaring that suits could not be commenced or prosecuted against the federal government without its consent. Subsequently, the doctrine was applied to the states.”).

4. *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868).

5. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411 (1821).

6. *Beers*, 61 U.S. (20 How.) at 529.

Constitution. In the years before and after this explicit invocation of sovereign immunity for constitutional torts, however, the question in Oklahoma was whether the Oklahoma Legislature had the authority to do this. Even though the Oklahoma Legislature enacted a statute that invoked sovereign immunity as to certain torts, utilizing a seemingly all-encompassing definition of “tort,” the Oklahoma Supreme Court nevertheless found that private rights of action—commonly referred to as “*Bosh* claims”—existed for violations of the Oklahoma Constitution.<sup>7</sup> The Oklahoma Supreme Court offered no useful reasoning for this finding, but it could be inferred that it must have viewed constitutional tort rights of action as arising out of the Oklahoma Constitution itself, not the common law, because the court validated these actions notwithstanding the legislature’s attempt to invoke sovereign immunity for the same.

In its recent decision, *Barrios v. Haskell County Public Facilities*, the Oklahoma Supreme Court confronted the aforementioned question head-on and reversed course, finding that the Legislature is free to limit monetary remedies available for such tort claims because private rights of action for violations of the Oklahoma Constitution are products of common law.<sup>8</sup> Thus, courts will not recognize new *Bosh* claims, and previously recognized *Bosh* claims may not even be recognized by the Oklahoma Supreme Court going forward. This result is technically correct because it is consistent with the Constitutions of the United States and Oklahoma, as well as relevant policies. But it is functionally deficient in that it limits the remedy for violations of certain Oklahoma constitutional provisions to prospective injunctive relief, providing no redress for violations of the past. This result fails to appreciate the purpose of a remedy, which is to make the injured whole and deter legal wrongs. The *Barrios* decision, in contravention of the Oklahoma Constitution, effectively leaves constitutional rights that may only be vindicated with prospective injunctive relief, without remedies and should, therefore, be reconsidered by the Oklahoma Supreme Court.

Part I of this Note analyzes the development of sovereign immunity as to torts in Oklahoma’s jurisprudence. Part II provides an overview of the Oklahoma Supreme Court’s *Barrios* opinion that addresses whether a private right of action exists in tort for violations of the Oklahoma Constitution even though the Legislature says otherwise. In addition, it comments on the timing of relevant legislative amendments and Oklahoma

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7. *Bosh v. Cherokee Cty. Governmental Bldg. Auth.*, 2013 OK 9, ¶ 23, 305 P.3d 994, 1001.

8. 2018 OK 9, ¶¶ 17–18, 432 P.3d 233, 240–41.

Supreme Court decisions, arguably exposing contradictory views. It also summarizes the state of the law following *Barrios* and provides insight into how the Oklahoma Supreme Court is likely to treat both previously-recognized and new constitutional tort claims, commonly referred to as “*Bosh* claims.” Finally, Part III analyzes *Barrios*’s validity in light of the United States and Oklahoma Constitutions and relevant policy considerations. While the result in *Barrios* may technically be correct, it functionally leaves certain Oklahoma constitutional rights without a remedy, which creates a conflict with the Oklahoma Constitution. Thus, the Oklahoma Supreme Court should examine more closely whether prospective injunctive relief, without more, remedies past constitutional violations and ensure that its holding in *Barrios* does not inadvertently deteriorate any Oklahoma constitutional rights.

### *I. Tort Sovereign Immunity Jurisprudence in Oklahoma*

#### *A. “Goes Without Saying” to “Only Goes If You Say It”*

Sovereign immunity from tort suit in Oklahoma was recognized as an inherent power of the state<sup>9</sup> until the Oklahoma Supreme Court decided that the reason for this rule no longer existed.<sup>10</sup> In adherence with the national trend at the time to retreat from governmental immunity as a bar to claims based in tort,<sup>11</sup> the Oklahoma Supreme Court abrogated the doctrine of sovereign immunity as to the State of Oklahoma in *Vanderpool*.<sup>12</sup> Although the court opined that “[w]here the reason for the rule no longer exists, that alone should toll its death knell,”<sup>13</sup> it importantly noted its decision was “not to be taken as in any way rendering ineffective any act of the Legislature in the area of governmental immunity whether presently in effect or hereafter passed.”<sup>14</sup>

Accordingly, while there was no need for the State to affirmatively invoke its sovereign immunity before *Vanderpool*, subsequently, the State must explicitly invoke its sovereign immunity to enjoy immunity from suit.

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9. See *Vanderpool v. State*, 1983 OK 82, ¶¶ 7–8, 672 P.2d 1153, 1154.

10. *Id.* ¶ 24, 672 P.2d at 1157.

11. *Id.* ¶ 19, 672 P.2d at 1156.

12. *Id.* ¶¶ 19–25, 672 P.2d at 1156–57.

13. *Id.* ¶ 24, 672 P.2d at 1157.

14. *Id.* ¶ 25, 672 P.2d at 1157.

This is exactly what the Oklahoma Legislature did in 1984 when it enacted the Oklahoma Governmental Tort Claims Act (OGTCA).<sup>15</sup>

*B. The Oklahoma Legislature Strikes Back*

The Oklahoma Legislature heard the *Vanderpool* Court loud and clear, announcing via the OGTCA that “[t]he State of Oklahoma does hereby adopt the doctrine of sovereign immunity [ ]” from tort suits.<sup>16</sup> At the time, the OGTCA defined “tort” as

a legal wrong, independent of contract, involving violation of a duty imposed by general law or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.<sup>17</sup>

This broad definition of “tort” seemed to demonstrate the Legislature’s intent to invoke sovereign immunity for every possible non-contractual legal wrong that fit the remaining definitional and statutory requirements.

Although the Oklahoma Legislature expressly and broadly invoked sovereign immunity as to torts generally, it simultaneously waived sovereign immunity for certain torts specified in the OGTCA.<sup>18</sup> As a result, “in cases including tort claims against the State and state actors . . . the State is statutorily immune from tort suit unless the Legislature has expressly waived that immunity.”<sup>19</sup>

*C. The Oklahoma Supreme Court and Constitutional Torts*

In the following years, the Oklahoma Supreme Court grappled with claims wherein a plaintiff was allegedly deprived of an Oklahoma constitutional right and the State invoked its sovereign immunity to avoid tort liability for that deprivation under the OGTCA. This presented the Oklahoma Supreme Court with the opportunity to address whether a tort right of action exists for a violation of an Oklahoma constitutional right

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15. Ch. 226, § 3(A), 1984 Okla. Sess. Laws 811, 813 (codified at 51 OKLA. STAT. § 152.1(A) (2011)).

16. *Id.*

17. *Id.* § 2(11), 1984 Okla. Sess. Laws at 813 (current version at 51 OKLA. STAT. § 152(14) (Supp. 2018)).

18. *Id.* § 3(B), 1984 Okla. Sess. Laws at 813 (codified at 51 OKLA. STAT. § 152.1(B) (2011)).

19. *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 8, 432 P.3d 233, 237.

notwithstanding the OGTCa, which seemed to broadly immunize the State from liability for all torts—even constitutional torts.

### *I. Washington v. Barry*

The Oklahoma Supreme Court first encountered the aforementioned scenario in *Washington v. Barry*.<sup>20</sup> The *Washington* Court analyzed whether a plaintiff-inmate stated a cause of action for the use of excessive force, in violation of the Oklahoma Constitution,<sup>21</sup> by prison guards who were State employees.<sup>22</sup> Prison officials at the facility in which the plaintiff was housed determined that another inmate was to be housed in the same cell.<sup>23</sup> When plaintiff objected, prison authorities subsequently placed him in leg irons and other restraints in order to move the new inmate into his cell.<sup>24</sup> Plaintiff-inmate then refused to allow prison guards to remove his restraints and even slept in them for a night.<sup>25</sup> Plaintiff alleged that as a result of the forcible removal of his restraints, he received a cut and a swollen eye, and “suffer[ed] from dizziness, severe back and neck pain, and blurred vision.”<sup>26</sup> He did not seek, nor require, any medical attention following this incident.<sup>27</sup>

In its analysis of whether plaintiff-inmate stated a cause of action, the *Washington* Court considered his claim in the context of the OGTCa.<sup>28</sup> The court’s analysis was limited, however, to a discussion of what “scope of employment” meant and how it related to plaintiff’s allegation against the prison guards individually.<sup>29</sup> Here, plaintiff-inmate attempted to avoid the application of the OGTCa (and state sovereign immunity) by only suing the prison guards individually, and not the State.<sup>30</sup> His attempt failed. The court held that a plaintiff “may not avoid the immunities granted by and the requirements of the Governmental Tort Claims Act by simply declining to join the state as a party, although he claims the prison employee defendants were acting within the scope of their employment.”<sup>31</sup> This was the extent of

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20. 2002 OK 45, 55 P.3d 1036.

21. *Id.* ¶ 5, 55 P.3d at 1038.

22. *Id.*

23. *Id.* ¶ 2, 55 P.3d at 1037.

24. *Id.* ¶ 2, 55 P.3d at 1037–38.

25. *Id.* ¶ 2, 55 P.3d at 1038.

26. *Id.* ¶ 3, 55 P.3d at 1038.

27. *Id.*

28. *Id.* ¶¶ 6–8, 55 P.3d at 1038–39.

29. *Id.*

30. *See id.* ¶¶ 6–7, 55 P.3d at 1038–39.

31. *Id.* ¶ 8, 55 P.3d at 1039.

the *Washington* Court's discussion about plaintiff-inmate's claims and the OGTC.

The Oklahoma Supreme Court then discussed a "potential" cause of action plaintiff-inmate could have brought but failed to raise.<sup>32</sup> This is arguably dicta, however, as the court was asked to decide whether plaintiff stated a claim,<sup>33</sup> not what claims he potentially could have stated. Nevertheless, the Oklahoma Supreme Court explained that

[a] prisoner in a penal institution has no right to recover for the use of excessive force by prison employees unless the force applied was so excessive that it violated the prisoner's right to be protected from the infliction of 'cruel or unusual punishments' under the state and federal constitutions.<sup>34</sup>

This statement suggests, and subsequent cases interpret, that if a plaintiff can demonstrate that a state actor inflicted cruel or unusual punishment upon them under the constitutional standard,<sup>35</sup> then a private right of action exists, notwithstanding the State's sovereign immunity claimed under the OGTC.<sup>36</sup> It is important to note, however, that the *Washington* Court never reached the question of whether a violation of article II, section 9 of the Oklahoma Constitution provides a private right of action in this factual scenario because the cruel or unusual punishment standard was not met.<sup>37</sup>

## 2. *Bosh v. Cherokee County Governmental Building Authority*

The Oklahoma Supreme Court soon had the opportunity to analyze whether a private right of action exists based on an Oklahoma constitutional violation, notwithstanding the OGTC. The *Bosh* Court was presented with a certified question from a federal court inquiring whether article II, section 30 of the Oklahoma Constitution,<sup>38</sup> which guarantees Oklahomans the right

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32. *Id.* ¶¶ 9–18, 55 P.3d at 1039–42.

33. *Id.* ¶ 4, 55 P.3d at 1038.

34. *Id.* ¶ 10, 55 P.3d at 1039 (citing OKLA. CONST. art. 2, § 9; U.S. CONST. amend. VIII).

35. OKLA. CONST. art. 2, § 9.

36. *See, e.g.*, *Bosh v. Cherokee Cty. Governmental Bldg. Auth.*, 2013 OK 9, ¶¶ 17–18, 305 P.3d 994, 1000–01; *Deal v. Brooks*, 2016 OK CIV APP 81, ¶ 27, 389 P.3d 375, 384 (approved for publication by Oklahoma Supreme Court); *Bryson v. Okla. Cty. ex rel. Okla. Cty. Det. Ctr.*, 2011 OK CIV APP 98, ¶ 13, 261 P.3d 627, 633.

37. *Washington*, ¶¶ 9–18, 55 P.3d at 1039–42.

38. OKLA. CONST. art. 2, § 30 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated;

to be free from unreasonable searches and seizures, “provide[s] a private cause of action for excessive force, notwithstanding the limitations of the Oklahoma Governmental Tort Claims Act.”<sup>39</sup> Plaintiff, a pre-incarcerated detainee at the Cherokee County Detention Center, was brutally attacked by the facility’s jailers while he was standing at a booking desk with his hands restrained behind his back.<sup>40</sup> Video surveillance captured part of the attack and showed the jailers slamming plaintiff’s head on a desk and causing his fall to the floor.<sup>41</sup> The jailers then moved plaintiff to an area outside the view of the video surveillance, where they continued beating him.<sup>42</sup> This attack left plaintiff with extensive injuries, including a fractured vertebra, which the jailers left untreated for two days.<sup>43</sup>

Plaintiff sued the jail, jail administrators, and jailers who attacked him, asserting claims based on 42 U.S.C. § 1983 and state tort law.<sup>44</sup> The federal court later allowed plaintiff to amend his complaint to add a claim against the jail based on its employees’ use of excessive force under article II, section 30.<sup>45</sup> The jail filed a motion to dismiss this claim, and the federal court looked to the Oklahoma Supreme Court for clarification regarding the interplay of the state constitutional provision and the OGTCa.<sup>46</sup>

The *Bosh* Court held that article II, section 30 of the Oklahoma Constitution provides a private right of action for excessive force, notwithstanding the limitations of the OGTCa.<sup>47</sup> Although it recognized that “the OGTCa expressly immunizes the state . . . from liability arising out of the operation of prison facilities,”<sup>48</sup> the court explained that this immunity “does not mean that injured tort victims are at the mercy of their captors to be beaten, assaulted, and left without medical attention without any remedy to deter such conduct.”<sup>49</sup>

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and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.”).

39. *Bosh*, ¶ 0, 305 P.3d at 995–96.

40. *Id.* ¶ 2, 305 P.3d at 996.

41. *Id.* ¶ 3, 305 P.3d at 996.

42. *Id.*

43. *Id.* ¶¶ 3–4, 305 P.3d at 996.

44. *Id.* ¶ 4, 305 P.3d at 996.

45. *Id.* ¶ 5, 305 P.3d at 997.

46. *Id.* ¶ 6, 305 P.3d at 997.

47. *Id.* ¶ 23, 305 P.3d at 1001.

48. *Id.* ¶ 17, 305 P.3d at 1000 (citing 51 OKLA. STAT. § 155 (Supp. 2012)).

49. *Id.* ¶ 17, 305 P.3d at 1000.

The *Bosh* Court noted *Washington*'s holding to be "that a private cause of action may exist for inmates to recover for excessive force under the provisions of the Okla[homa] Const[itution] . . . and the 8th Amendment of the United States Constitution—despite the provisions of the OGTCa."<sup>50</sup> Based on *Washington*, the *Bosh* Court reached the same result for article II, section 30<sup>51</sup> and further emphasized that "[t]he OGTCa cannot be construed as immunizing the state completely from all liability for violations of the constitutional rights of its citizens."<sup>52</sup>

### 3. Problems from *Washington* and *Bosh*

The state of sovereign immunity for constitutional torts in Oklahoma following *Washington* and *Bosh* was, in a word, muddled. Indeed, it is difficult to discern the state of the law based on incongruent opinions that provide little insight into their underlying rationales. A closer look at *Bosh* reveals that it is problematic for multiple reasons.

First, *Bosh* affirmatively stated the holding in *Washington* as "a private cause of action may exist for inmates to recover for excessive force under the provisions of Okla. Const. art. 2, § 9 and the 8th Amendment of the United States Constitution—despite the provisions of the OGTCa."<sup>53</sup> But this is not accurate. The question before the *Washington* Court was whether plaintiff-inmate stated a cause of action for the use of excessive force by prison guards.<sup>54</sup> The *Washington* Court took it upon itself to discuss a "potential" cause of action the plaintiff could have brought but failed to state.<sup>55</sup> Even in this discussion, however, the court did not at all analyze how the OGTCa affects the viability of this potential cause of action. Again, it did not need to, as the court found that plaintiff failed to state such a cause of action because he did not sufficiently plead that he was subjected to cruel or unusual punishment.<sup>56</sup> Thus, there is no discussion in *Washington* that a cause of action based on the use of excessive force exists *notwithstanding the OGTCa*, let alone can the assertion be considered part of the holding or given precedential effect. However, this "holding" appears

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50. *Id.* ¶ 18, 305 P.3d at 1000–01 (footnotes omitted).

51. *Id.* ¶ 23, 305 P.3d at 1001.

52. *Id.*

53. *Id.* ¶ 18, 305 P.3d at 1000–01 (footnotes omitted).

54. *Washington v. Barry*, 2002 OK 45, ¶ 4, 55 P.3d 1036, 1038.

55. *Id.* ¶ 9, 55 P.3d at 1039.

56. *Id.* ¶¶ 9–18, 55 P.3d at 1039–42.

to be, in large part, the basis for *Bosh*'s finding that a private right of action exists for violations of article II, section 30 of the Oklahoma Constitution.<sup>57</sup>

Second, *Bosh* is problematic because the method of determining when a private right of action exists for an Oklahoma constitutional violation remains unclear. Nowhere in *Bosh* (or *Washington*) does the Oklahoma Supreme Court state from what authority this new private right of action derives. Nowhere does the court explain why private rights of action exist for article II, sections 9 and 30, or whether any other constitutional sections enjoy this same private right of action. As a result, *Bosh* left open many questions, including the following:

- Do private rights of action based on Oklahoma constitutional violations exist for *every* constitutional provision?
- If not, how do courts decide which Oklahoma constitutional violations create private rights of action?
- Do these private rights of action arise out of the Oklahoma Constitution, or are they the product of common law?
- Can the Oklahoma Legislature abrogate the *Bosh* holding and extend the State's sovereign immunity, or is it insulated due to the Oklahoma constitutional rights involved?

*Bosh* left courts with the impossible task of understanding an opinion without any guidance for the proper method of prospective application. *Bosh* left citizens unsure about which violations of the Oklahoma Constitution, other than article II, sections 9 and 30, provide a private right of action. *Bosh* left the Oklahoma Legislature without an understanding of the State's exposure to liability for violations of the Oklahoma Constitution or its own power to limit liability for constitutional torts. Again, the state of the law was muddled.

#### *D. The Oklahoma Legislature Strikes Back Again*

Following *Washington* and *Bosh*, the Legislature yet again heard the Oklahoma Supreme Court loud and clear. When *Washington* and *Bosh* were decided, the OGTCa did not explicitly include constitutional torts in the definition of "tort," thereby exposing the State to liability for constitutional torts (at least in the eyes of the Oklahoma Supreme Court). In 2014, the Oklahoma Legislature responded to these cases by amending the OGTCa to specifically apply to "tort suits alleging violations of constitutional

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57. *Bosh*, ¶¶ 22–23, 305 P.3d at 1001.

rights.”<sup>58</sup> Specifically, the Oklahoma Legislature amended the definition of “tort” to include violations of the Oklahoma Constitution:

“Tort” means a legal wrong, independent of contract, involving violation of a duty imposed by general law, *statute, the Constitution of the State of Oklahoma*, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.<sup>59</sup>

In addition, the Oklahoma Legislature amended the section that outlines the scope of the State’s tort liability, explaining that the State’s liability for constitutional torts is wholly governed and limited by the OGTCA.<sup>60</sup> And in case a court interpreted its explicit amendment language to allow State liability for constitutional torts, the Oklahoma Legislature made such claims subject to the OGTCA’s liability limits.<sup>61</sup>

There is no question that the Oklahoma Legislature’s intent with these amendments was to invoke the State’s sovereign immunity as to potential tort liability arising out of violations of the Oklahoma Constitution.<sup>62</sup> What remained a question, however, was whether the Oklahoma Legislature had the authority to do so.

The Oklahoma Constitution imposes a duty upon the Oklahoma Legislature to pass laws that give effect to the constitution.<sup>63</sup> Thus, any law

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58. *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 17, 432 P.3d 233, 240 (citing 51 OKLA. STAT. §§ 152(14), 153(B) (Supp. 2015)); *see* Act of Apr. 21, 2014, ch. 77, §§ 1–2, 2014 Okla. Sess. Laws 245, 249–50 (codified at 51 OKLA. STAT. §§ 152–153 (Supp. 2016)).

59. Act of Apr. 21, 2014, § 1(14), 2014 Okla. Sess. Laws at 249 (codified at 51 OKLA. STAT. § 152(14) (Supp. 2018)).

60. *Id.* § 2, 2014 Okla. Sess. Laws at 250 (codified at 51 OKLA. STAT. § 153(B) (Supp. 2018)) (“The liability of the state or political subdivision under *The Governmental Tort Claims Act* shall be exclusive and *shall constitute the extent of tort liability* of the state, a political subdivision or employee *arising from* common law, statute, *the Oklahoma Constitution*, or otherwise.”).

61. *Id.* (“If a court of competent jurisdiction finds tort liability on the part of the state or a political subdivision of the state based on a provision of the Oklahoma Constitution or state law other than *The Governmental Tort Claims Act*, the limits of liability provided for in *The Governmental Tort Claims Act* shall apply.”).

62. *Barrios*, ¶ 12, 432 P.3d at 239–40.

63. OKLA. CONST. art. V, § 45 (“The Legislature shall pass such laws as are necessary for carrying into effect the provisions of this Constitution.”).

contrary to the Oklahoma Constitution violates the Legislature's duty.<sup>64</sup> If the constitution itself creates a private right of action based in tort for violations of its provisions, then the Oklahoma Legislature has no authority to limit recovery as it attempted to do via the OGTCAs. If, instead, the common law creates such a private right of action, then the Oklahoma Legislature's expression of sovereign immunity as to torts arising from violations of the Oklahoma Constitution is valid and within its authority.

*E. Cases After the OGTCAs Amendments, but Governed by Prior OGTCAs Versions: Still No Help*

*1. Perry v. City of Norman*

Shortly after the OGTCAs amendments went into effect in April 2014, the Oklahoma Supreme Court confronted another tort case based on a city police officer's use of excessive force and governed by pre-amendment versions of the OGTCAs. In *Perry v. City of Norman*,<sup>65</sup> plaintiff and a few of his friends rode their bikes to attend the Norman Music Festival.<sup>66</sup> On their way home, the group was stopped by a police officer who began issuing citations to plaintiff's friends for running a stop sign.<sup>67</sup> The police officer asked plaintiff "if he was interfering with the traffic stop," to which he replied in the negative.<sup>68</sup> Abruptly thereafter, the police officer put plaintiff in a chokehold.<sup>69</sup> More officers arrived and forced plaintiff onto his stomach with their knees and elbows, although Perry was not resisting

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64. *EOG Res. Mktg., Inc. v. Okla. State Bd. of Equalization*, 2008 OK 95, ¶ 16, 196 P.3d 511, 520 ("The [Oklahoma] Constitution is the bulwark to which all [State] statutes must yield.") (citing *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth.*, 2008 OK 4, ¶ 11, 176 P.3d 1217, 1220; *In re Assessments for Year 2005 of Certain Real Prop. Owned by Askins Props., L.L.C.*, 2007 OK 25, ¶ 12, 161 P.3d 303, 311; *Okla. Elec. Co-op., Inc. v. Okla. Gas & Elec. Co.*, 1999 OK 35, ¶ 7, 982 P.2d 512, 514; *Reherman v. Okla. Water Res. Bd.*, 1984 OK 12, ¶ 22, 679 P.2d 1296, 1302).

65. 2014 OK 119, 341 P.3d 689. In *Perry*, the Oklahoma Supreme Court analyzes the 2011 and 2012 versions of the OGTCAs. This is appropriate because the alleged constitutional violation occurred in 2013, when those versions of the OGTCAs were in effect. The statutory language amendments discussed in Section I.D were not controlling in this case, so the version of the OGTCAs in effect for purposes of the *Perry* opinion is not significant.

66. *Id.* ¶ 2, 341 P.3d at 689.

67. *Id.*

68. *Id.* ¶ 3, 341 P.3d at 690.

69. *Id.*

arrest nor guilty of a crime.<sup>70</sup> Plaintiff suffered a severe bone fracture and eventually lost consciousness.<sup>71</sup>

Following this callous encounter, plaintiff sued the City of Norman for its police officers' actions.<sup>72</sup> He brought a *Bosh* claim,<sup>73</sup> alleging that the police officers acted with the intent to use excessive force against him in violation of article II, section 30.<sup>74</sup>

The Oklahoma Supreme Court rejected plaintiff's claim, holding that a "claim for excessive force against a municipality, as applied to police officers and other law enforcement personnel, may not be brought against a municipality when a cause of action under the OGTCA is available."<sup>75</sup> Accordingly, the Oklahoma Supreme Court explained that the distinguishing fact between the *Bosh* plaintiff and the *Perry* plaintiff "is that the *Bosh* plaintiff was barred from bringing an action under the provisions of the OGTCA, and the [*Perry*] plaintiff . . . is not."<sup>76</sup>

Unfortunately for other judges, citizens, and the Oklahoma Legislature alike, *Perry* did not help un-muddle the state of sovereign immunity in Oklahoma. According to the Oklahoma Supreme Court, a private right of action for a violation of the Oklahoma Constitution seemed to only be available if no other remedy exists.<sup>77</sup> Indeed, the court referenced *Bosh* again when it noted that "without the excessive force action brought under the Oklahoma Constitution, the *Bosh* plaintiff would have had no avenue for recovery for his injuries whatsoever."<sup>78</sup> Yet this assertion is not technically accurate. The Oklahoma Supreme Court permits suits for prospective injunctive relief against a state actor in their individual capacity for Oklahoma constitutional violations—a remedy available to plaintiffs in all constitutional tort cases, including *Bosh*.<sup>79</sup> Thus, although the *Perry* Court attempted to offer some guidance as to when a private right of action for constitutional torts exists, its reasoning was demonstrably flawed, moving the current jurisprudence from the realm of no rationale, to an

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70. *Id.* ¶ 4, 341 P.3d at 690.

71. *Id.*

72. *Id.* ¶ 5, 341 P.3d at 690.

73. Following *Bosh*, the term "*Bosh* claim" has been used to describe private rights of action for tort damages based on alleged violations of the Oklahoma Constitution. *E.g., id.* ¶ 7, 341 P.3d at 690.

74. *Id.* ¶ 5, 341 P.3d at 690.

75. *Id.* ¶ 1, 341 P.3d at 689.

76. *Id.* ¶ 17, 341 P.3d at 692.

77. *See id.* ¶ 19, 341 P.3d at 693.

78. *Id.* ¶ 18, 341 P.3d at 692–93.

79. *See, e.g., Hunsucker v. Fallin*, 2017 OK 100, ¶ 7, 408 P.3d 599, 603.

erroneous rationale. Moreover, following *Perry*, it remained unclear whether *Bosh* claims arise from the Oklahoma Constitution or the common law.

## 2. Deal v. Brooks

The Oklahoma Supreme Court confronted another constitutional tort case that implicated the OGTCa in 2016—again governed by a pre-amendment version of the OGTCa.<sup>80</sup> This time, the alleged tort was based on the Oklahoma Department of Human Services’ (DHS) violation of a child’s due process rights. In *Deal v. Brooks*, the state placed a child in DHS custody with her biological father, who later murdered her.<sup>81</sup> The child’s maternal grandparents brought several claims on behalf of the child’s estate, including various claims under tort theories of liability against DHS itself and the DHS employees involved.<sup>82</sup>

DHS argued that the OGTCa exempted it from liability since the act proclaims that “[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [a]ny claim based upon an act or omission of an employee in the placement of children.”<sup>83</sup> The Oklahoma Court of Civil Appeals, and later the Oklahoma Supreme Court by approving *Deal* for publication,<sup>84</sup> agreed with DHS, finding that “the plain and ordinary meaning of [§] 155(29) requires that [it] find [that] a cause of action” is unavailable under the OGTCa.<sup>85</sup>

The Oklahoma Court of Civil Appeals continued its analysis by addressing whether a *Bosh* claim was nonetheless available since a remedy for the actions of DHS was unavailable under the OGTCa.<sup>86</sup> The constitutional right at issue was the child’s substantive due process right “to

80. *Deal v. Brooks*, 2016 OK CIV APP 81, 389 P.3d 375 (approved for publication by Oklahoma Supreme Court). In *Deal*, the Oklahoma Court of Civil Appeals, and Oklahoma Supreme Court by its approval, appropriately analyzed the 2013 version of the OGTCa. The alleged constitutional violation occurred in 2013, when the 2013 version of the OGTCa was in effect. The statutory language amendments discussed in Section I.D were not controlling in this case, so the version of the OGTCa in effect for purposes of the *Deal* opinion is not significant.

81. *Id.* ¶ 6, 389 P.3d at 380.

82. *Id.* ¶¶ 6, 8–10, 389 P.3d at 380.

83. *Id.* ¶ 2, 389 P.3d at 379 (quoting 51 OKLA. STAT. §§ 155, 155(29) (Supp. 2013)).

84. Oklahoma Court of Civil Appeals opinions approved for publication in the official reporter by a majority of the Oklahoma Supreme Court are precedential, just like an opinion authored and published by the Oklahoma Supreme Court itself. *See* 20 OKLA. STAT. § 30.5 (2011); Oklahoma Supreme Court Rule 1.200(d).

85. *Deal*, ¶ 24, 389 P.3d at 383.

86. *Id.* ¶ 25, 389 P.3d at 383.

be reasonably safe from harm when placed in the state's custody."<sup>87</sup> The Oklahoma Court of Civil Appeals concluded that the Oklahoma due process clause supersedes the OGTCAs for "placement decisions that are made recklessly in conscious disregard of a known or obvious risk of serious, immediate, and proximate harm to the child."<sup>88</sup> As a result, "the [O]GTCA does not immunize DHS from liability for certain reckless and deliberate acts that deprive a *child* of due process rights while in state custody."<sup>89</sup> Thus, another decision approved by the Oklahoma Supreme Court found the State liable for a constitutional tort even though the terms of the OGTCAs granted the State sovereign immunity.

Up to the time of *Deal*, and into most of 2018, the true origin of *Bosh* claims remained in question: Do they arise from the Oklahoma Constitution directly, or are they merely an exercise of the Oklahoma Supreme Court's common law power? If the former, then any attempt by the Oklahoma Legislature to limit or extinguish liability is futile. If the latter, then the Oklahoma Legislature has every right to limit liability as to these claims.

However, the amendments to the OGTCAs explicitly invoking the State's sovereign immunity as to constitutional torts were not yet in full force and effect when *Perry* and *Deal* were issued. Further, the Oklahoma Supreme Court did not indicate how the 2014 amendments would have impacted these rulings, or how they may impact future rulings. In fact, in *Deal*, the Oklahoma Court of Civil Appeals ducked the issue altogether by acknowledging that even though the 2014 OGTCAs Amendments "may constitute an attempt by the Legislature to diminish or destroy constitutionally-based causes of action against the state or political subdivision,"<sup>90</sup> it did not need to consider injuries and filings from 2013, which occurred prior to the effective date of the 2014 OGTCAs amendments. Consequently, while these cases were issued after the 2014 OGTCAs Amendments, they did nothing to shed light on the origin of *Bosh* claims.

Even though the Oklahoma Supreme Court was not applying the version of the OGTCAs that defined "tort" to include those arising from violations of the Oklahoma Constitution, it still applied versions that were arguably as broad. Thus, the Oklahoma Supreme Court's repeated finding or approval of a private right of action for violations of the Oklahoma Constitution,

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87. *Id.* ¶ 28, 389 P.3d at 384 (quoting *GJA v. Okla. Dep't of Human Servs.*, 2015 OK CIV APP 32, ¶ 37, 347 P.3d 310, 317).

88. *Id.* ¶ 55, 389 P.3d at 391–92.

89. *Id.* ¶ 29, 389 P.3d at 384.

90. *Id.* ¶ 29 n.5, 389 P.3d at 383 n.5.

notwithstanding any version of the OGTC, implies that it viewed *Bosh* claims as arising from the Oklahoma Constitution itself, although neither *Bosh*, *Perry*, nor *Deal* explicitly say as much.

In *Perry*, the only reason that the Oklahoma Supreme Court offered to suggest that a *Bosh* claim was not a recovery option for the plaintiff was because he already had a remedy available under the OGTC.<sup>91</sup> If a remedy were not available under the OGTC, then the court probably would have found that, like the plaintiff in *Bosh*, a private right of action based on the municipality's use of excessive force in violation of the Oklahoma Constitution would have been available.<sup>92</sup> The court's reasoning—flawed as it may be—supports the notion that it viewed *Bosh* claims as arising from the Oklahoma Constitution, because such claims would exist regardless of whether the OGTC existed.

In *Deal*, the Oklahoma Supreme Court approved of the finding that, notwithstanding a provision of the OGTC explicitly immunizing the State from liability in the factual situation presented, the plaintiffs had a private right of action in tort for the violation of the child's due process rights.<sup>93</sup> Again, while *Deal* does not explicitly say that *Bosh* claims arise from the Oklahoma Constitution, it clearly recognizes a private right of action that directly contradicts the Legislature's mandate that the State is immune from tort liability. Although not glaringly apparent, these cases reveal that, at this time, the Oklahoma Supreme Court viewed the Oklahoma Constitution as the source of *Bosh* claims, not common law.

## II. Clarity from the Court: Barrios

For the first time in decades, the Oklahoma Supreme Court provided clarity as to the true nature of *Bosh* claims when it answered a certified question from two federal courts in *Barrios v. Haskell County Public Facilities Authority*<sup>94</sup> and *Foutch v. Turn Key Health*.<sup>95</sup> The Northern and

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91. *Perry v. City of Norman*, 2014 OK 119, ¶ 19, 341 P.3d 689, 693. Again, note that this assertion by the Oklahoma Supreme Court is inaccurate. *See, e.g., Hunsucker v. Fallin*, 2017 OK 100, ¶ 7, 408 P.3d 599, 603 (demonstrating the availability of private rights of action for prospective injunctive relief against a state actor in their individual capacity for Oklahoma constitutional violations). It is nevertheless the reasoning employed by the court.

92. *See Perry*, ¶¶ 18–19, 341 P.3d at 692–93.

93. *Deal*, ¶¶ 55–56, 389 P.3d at 391–92.

94. 2018 OK 90, 432 P.3d 233.

95. *Id.* As the Oklahoma Supreme Court was asked to address the same question from two separate federal district courts, the court made them companion cases and only crafted

Eastern District Courts of Oklahoma asked the Oklahoma Supreme Court to answer the following question:

The Governmental Tort Claims Act renders the State immune from any tort suit arising out of the “[p]rovision, equipping, operation or maintenance of any prison, jail or correctional facility.” Do Sections 7 and 9 of Article II of the Oklahoma Constitution nonetheless allow an inmate to bring a tort claim for denial of medical care?<sup>96</sup>

*Barrios* placed the issue of sovereign immunity for constitutional torts directly before the Oklahoma Supreme Court. The cases underlying *Barrios* involved inmates who died while incarcerated at county prisons.<sup>97</sup> Randall Barrios committed suicide,<sup>98</sup> and Russell Foutch died from respiratory complications.<sup>99</sup> Each of the decedents’ estates brought claims against the respective jails and state actors involved, including “tort claims alleging violations of rights guaranteed by sections 7 and 9 of article II of the Oklahoma Constitution.”<sup>100</sup> The state actors moved to dismiss these claims, arguing that the OGTCa immunized them from liability.<sup>101</sup> No one contested that the alleged constitutional torts fit within section 155 of the OGTCa, in which the Oklahoma Legislature attempted to invoke the State’s sovereign immunity for suits arising out of the “[p]rovision, equipping, operation or maintenance of any prison, jail or correctional facility.”<sup>102</sup> Because these cases turned on whether private rights of action existed for constitutional torts, notwithstanding the OGTCa limits, the federal courts accordingly looked to the Oklahoma Supreme Court for guidance.

*A. The Holding: The Death Knell of Bosh Claims*

The *Barrios* Court found that because the OGTCa invokes the State’s sovereign immunity for constitutional torts arising out of the “[p]rovision,

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one opinion. Both case stylings are listed in the opinion but will be referred to only as *Barrios* for the purpose of this Article.

96. *Id.* ¶ 1, 432 P.3d at 235 (quoting 51 OKLA. STAT. § 155(25) (Supp. 2018)). The federal courts also asked whether such a private right of action could be recognized retrospectively, but this question became moot and was therefore not addressed. *Id.*

97. *Id.* ¶ 3, 432 P.3d at 235.

98. *Id.*

99. *Id.*

100. *Id.* (citing the respective complaints).

101. *Id.* ¶¶ 4–5, 432 P.3d at 235–36.

102. 51 OKLA. STAT. § 155(25) (Supp. 2018).

equipping, operation or maintenance of any prison, jail or correctional facility,”<sup>103</sup> an inmate cannot bring a constitutional tort claim for denial of medical care.<sup>104</sup> In doing so, the Oklahoma Supreme Court put a stop to the expansion of *Bosh* claims by eliminating the private right of action to recover money damages for constitutional torts.

To reach this conclusion, the Oklahoma Supreme Court’s reasoning was twofold. First, the court clarified that the previously approved private rights of action for constitutional torts were products of common law.<sup>105</sup> In its discussion of *Bosh*, the court stated that it “recognized a *common law* tort remedy for claims arising from alleged violations of Article II, Section 30 rights.”<sup>106</sup> To be even clearer, the Oklahoma Supreme Court added that “the cause of action we recognized [in *Bosh*] was not one created by the Oklahoma Constitution, but rather by the [Oklahoma Supreme] Court through its common law power to create a cause of action for the alleged deprivation of a constitutional right.”<sup>107</sup>

Second, the court explained that the Legislature’s amendment of the OGTCa to include constitutional torts “forecloses [the court’s] ability to expand the common law in a manner that would conflict with statutory law.”<sup>108</sup> This legislative action was described as “an exercise of the Legislature’s long-recognized power to define the scope of the State’s sovereign immunity.”<sup>109</sup>

### *B. The SCOTUS Parallel*

The Oklahoma Supreme Court did not stop there. It went on to assert that even if the relevant constitutional tort claims were not barred by the OGTCa, it is unlikely that a private right of action would exist at common

103. *Id.*

104. *Barrios*, ¶ 18, 432 P.3d at 241.

105. *Id.* ¶¶ 13–14, 432 P.3d at 239–40. Again, whether a private right of action can exist for a violation of the Oklahoma Constitution largely depends upon whether the action derives from the Oklahoma Constitution itself (which the Oklahoma Legislature cannot abrogate), or instead from the Oklahoma Supreme Court’s common law power (which the Oklahoma Legislature can abrogate). *See id.* ¶ 8–9, 432 P.3d at 237–38; *see also id.* ¶ 9 n.14, 432 P.3d at 238 n.14 (discussing that “Article II, Section 30 of the Oklahoma Constitution” does not provide a cause of action, but the right was created “through [the court’s] common law power to create a cause of action”).

106. *Id.* ¶ 9, 432 P.3d at 238 (emphasis added).

107. *Id.* ¶ 9 n.14, 432 P.3d at 238 n.14 (citing *Bosh v. Cherokee Cty. Governmental Bldg. Auth.*, 2013 OK 9, ¶ 8, 305 P.3d 994, 997).

108. *Id.* ¶ 12, 432 P.3d at 238 (citing *Fuller v. Odom*, 1987 OK 64, ¶¶ 4–5, 741 P.2d 449, 451–52).

109. *Id.* ¶ 12, 432 P.3d at 238.

law.<sup>110</sup> In support of this assessment, the Oklahoma Supreme Court looked to the Supreme Court of the United States' (SCOTUS) jurisprudence regarding the federal analogue of *Bosh* claims: *Bivens* claims.<sup>111</sup>

In *Bivens*, SCOTUS recognized an implied right of action that allows individuals to sue federal employees for violations of the Fourth Amendment.<sup>112</sup> *Bivens* was decided almost five decades ago, and since that time, SCOTUS has only recognized two more implied rights of action.<sup>113</sup> This evidences SCOTUS's reluctance to extend *Bivens* claims "to any new context or new category of defendants."<sup>114</sup>

In *Barrios*, the Oklahoma Supreme Court took note of a recent SCOTUS case that cast doubt on the continuing viability and expansion of *Bivens* claims, *Ziglar v. Abbasi*.<sup>115</sup> The Oklahoma Supreme Court discussed *Ziglar v. Abbasi*, noting that SCOTUS "declined to recognize a tort claim brought by detainees who alleged they were abused in violation of their Due Process Rights."<sup>116</sup> The Oklahoma Supreme Court further observed that in *Ziglar*, SCOTUS "called the continuing validity of *Carlson*," which provided for an implied damages remedy for an Eighth Amendment violation, "into grave doubt, saying that it might decide the case differently today because 'the arguments for recognizing implied causes of action for damages' had 'los[t] their force.'"<sup>117</sup>

Finally, the Oklahoma Supreme Court noted SCOTUS's contention that "[w]hen a party seeks to assert an implied cause of action under the [United States] Constitution itself, . . . separation-of-powers principles are or should be central to the analysis . . . [and t]he question is 'who should decide' whether to provide for a damages remedy, [the Legislature] or the courts?"<sup>118</sup> The Oklahoma Supreme Court agreed that "[t]he answer most

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110. *Id.* ¶ 13, 432 P.3d at 239.

111. Compare *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), with *Barrios*, ¶¶ 14–17, 432 P.3d at 239–40.

112. *Bivens*, 403 U.S. at 389–90, 395.

113. See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (implied right of action recognized based on Eighth Amendment Due Process clause); *Davis v. Passman*, 442 U.S. 228, 242 (1979) (implied right of action recognized based on Fifth Amendment Cruel and Unusual Punishment clause).

114. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

115. *Id.*

116. *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 14, 432 P.3d 233, 239.

117. *Id.* ¶ 14, 432 P.3d at 239–40 (footnotes omitted) (quoting *Ziglar*, 137 S. Ct. at 1856).

118. *Id.* ¶ 16, 432 P.3d at 240 (footnotes omitted) (quoting *Ziglar*, 137 S. Ct. at 1857).

often will be' the Legislature, because '[w]hen an issue involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'"<sup>119</sup>

### C. What We Know Now

#### 1. How the Oklahoma Supreme Court Views *Washington* and *Bosh*

Any understanding of *Washington* and *Bosh* to allow for private rights of action for constitutional torts is eradicated following *Barrios*. The *Barrios* Court explained that it *did not* hold in *Washington* that a private right of action for an alleged constitutional violation exists.<sup>120</sup> Instead, the Oklahoma Supreme Court "assumed for purposes of [its] decision that Article II, Section 9 creates a cause of action for an inmate to bring a tort claim alleging violations of his or her right to be free from cruel or unusual punishments."<sup>121</sup> But, the court stated that it has never recognized such a claim because the inmate in *Washington* failed to plead it.<sup>122</sup> Thus, *Washington* does not represent the court's approval of a private right of action for constitutional torts.

When it decided *Bosh*, it is clear that the court believed that "[t]he text of the [O]GTCA certainly didn't expressly include tort claims arising from alleged deprivations of constitutional rights."<sup>123</sup> And because "[i]mmunity cannot be read into a legislative text that is silent, doubtful or ambiguous,"<sup>124</sup> the *Bosh* Court "recognized a common law tort remedy for claims arising from alleged violations of Article II, Section 30 rights."<sup>125</sup> Since it was a common law remedy, and the Legislature subsequently amended the OGTCA to specify that it invokes sovereign immunity for constitutional torts, the *Barrios* Court did not find a new *Bosh* claim. *Bosh*, like *Washington*, does not represent the court's approval of a private right of action for constitutional torts.

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119. *Id.* ¶ 17, 432 P.3d at 240 (quoting *Ziglar*, 137 S. Ct. at 1857).

120. *Id.* ¶ 13, 432 P.3d at 239 (citing *Washington v. Barry*, 2002 OK 45, ¶ 18, 55 P.3d 1036, 1041–42).

121. *Id.* (citing *Washington*, ¶ 10, 55 P.3d at 1039).

122. *Id.* (citing *Washington*, ¶ 18, 55 P.3d at 1041–42).

123. *Id.* ¶ 9, 432 P.3d at 237.

124. *Id.* ¶ 9, 432 P.3d at 237 (quoting *Gunn v. Consol. Rural Water & Sewer Dist. No. 1*, 1992 OK 131, ¶ 7, 839 P.2d 1345, 1349).

125. *Id.* ¶ 9, 432 P.3d at 238.

## 2. *The Flip-Flopping Oklahoma Supreme Court?*

The Oklahoma Supreme Court's current view of *Washington* and *Bosh* is plain from *Barrios*. Upon a review of the legislative history of the OGTCA, as well as cases decided following the 2014 OGTCA amendments, however, the Oklahoma Supreme Court appears to be flip-flopping.

The controlling version of the OGTCA in *Bosh*, *Perry*, and *Deal* defined "tort" in the following way:

a legal wrong, independent of contract, involving violation of a duty imposed by general law or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.<sup>126</sup>

It is hard to argue that the Oklahoma Supreme Court could read this definition as anything but all-encompassing. It is even harder to argue that this definition *excludes* constitutional torts. After all, torts arising from violations of the Oklahoma Constitution check all the statutory boxes: legal wrongs, independent of contract, involving a duty imposed by the Oklahoma Constitution. Unfortunately, the lack of rationale on this point contained in *Bosh*, *Perry*, and *Deal* make it difficult to determine whether the Oklahoma Supreme Court is flip-flopping here, or whether it really did read the pre-2014 version of the OGTCA as excluding immunity for constitutional torts.

This argument is even more difficult to make in light of *Perry* and *Deal*, both of which were decided by the Oklahoma Supreme Court after the Legislature enacted the 2014 OGTCA amendments to expressly include constitutional torts. *Perry* implied that the defendant would have had a private right of action for a constitutional tort, notwithstanding the OGTCA version with a broad definition of "tort," if he had no other remedy.<sup>127</sup> Absent from *Perry*, however, is any discussion of the effect that the inclusion of constitutional torts into the OGTCA (per the 2014 OGTCA Amendments) would have on the Oklahoma Supreme Court's analysis. Any such discussion would be dicta, but the Oklahoma Supreme Court did not even signal that it was aware of the 2014 OGTCA Amendments in effect at the time this opinion was issued, nor did the court explain how the amendments would impact future cases. Even so, the most logical explanation for the court's decision in *Perry* is that it viewed *Bosh* claims

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126. 51 OKLA. STAT. § 152(14) (2011) (amended 2014).

127. See *Perry v. City of Norman*, 2014 OK 119, ¶ 11, 341 P.3d 689, 691.

as arising from the Oklahoma Constitution itself—as the broad definition of “tort” was controlling.

This conclusion was reaffirmed with the Oklahoma Supreme Court’s approval of *Deal*, which found that even though the State would enjoy sovereign immunity by the terms of the OGTCAs, the State was still liable for constitutional torts.<sup>128</sup> Again, this was so even though the OGTCAs broadly defined “tort” and specifically invoked sovereign immunity as to the injuries presented.

For the Oklahoma Supreme Court to claim that *Barrios* is simply a response to the 2014 OGTCAs Amendments does not provide a complete picture of its jurisprudence. It decided *Bosh*, *Perry*, and *Deal* by applying versions of the OGTCAs that provided an arguably all-encompassing definition of “tort,” which in all likelihood the Oklahoma Legislature intended to be inclusive of torts arising from violations of the Oklahoma Constitution. In *Deal*, the Oklahoma Supreme Court approved of the holding that “Oklahoma’s due process clause prevails over the [O]GTCAs”<sup>129</sup> even though the OGTCAs precluded recovery against the State. As evidenced by *Bosh*, *Perry*, and *Deal*, the court viewed *Bosh* claims as a product of the Oklahoma Constitution, which was consistent with its holdings that private rights of action exist.

The Oklahoma Legislature adopted the 2014 OGTCAs Amendments to specifically define “tort” as arising from “the Constitution of the State of Oklahoma.”<sup>130</sup> Later, the Oklahoma Supreme Court reconciled its prior holdings in *Barrios* by asserting that “[i]mmunity cannot be read into a legislative text that is silent, doubtful or ambiguous.”<sup>131</sup> Because the OGTCAs’s pre-2014 definition of “tort” was sweepingly broad, it is hard to imagine how its breadth can be construed as “silent, doubtful, or ambiguous.” This is exactly how the Oklahoma Supreme Court in *Barrios* maintains it interpreted the prior version of the statute before the 2014 Amendments became effective. Now, according to the Oklahoma Supreme Court, any silence, doubt, or ambiguity contained in the OGTCAs is supposedly resolved by the 2014 OGTCAs Amendments. That’s the Oklahoma Supreme Court’s story and it’s sticking to it.

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128. See *Deal v. Brooks*, 2016 OK CIV APP 81, ¶ 56, 389 P.3d 375, 392 (approved for publication by Oklahoma Supreme Court).

129. *Id.* ¶ 55, 389 P.3d at 391.

130. 51 OKLA. STAT. § 152(14) (Supp. 2018).

131. *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 9, 432 P.3d 233, 237 (quoting *Gunn v. Consol. Rural Water & Sewer Dist. No. 1*, 1992 OK 131, ¶ 7, 839 P.2d 1345, 1349).

3. *The Death Knell of Bosh Claims (If the Oklahoma Legislature Says So)*

A theme woven throughout the entire *Barrios* opinion is that the Legislature possesses authority to determine the remedy for torts arising from violations of the Oklahoma Constitution. Prior precedent implies that the court viewed private rights of action as deriving from the Oklahoma Constitution, which prevents the Legislature from abrogating them.<sup>132</sup> The *Barrios* Court, however, explicitly held otherwise.<sup>133</sup> As a result, the court's most recent precedent recognizes the Legislature's power to abrogate these "common law" private rights of action.

4. *The Death Knell of Bosh Claims May Ring Even If the Legislature Doesn't Say So*

The Oklahoma Supreme Court took it a step further by expressing reservations about the existence of private rights of action arising from violations of article II, sections 7 and 9, even if the OGTCa did not bar such claims.<sup>134</sup> Although this discussion is dicta, it is clearly indicative of the majority's frame of mind. It calls into question the validity of all *Bosh* claims recognized to date, both because of the 2014 OGTCa Amendments and the fact that courts disfavor awarding implied damages for constitutional violations.<sup>135</sup> Thus, even if the Legislature did not invoke sovereign immunity for constitutional torts, *Barrios* suggests that the Oklahoma Supreme Court likely would not expand *Bosh* claims via its common law power, and may even abstain from permitting those *Bosh* claims it has already recognized.

5. *The Current State of the Law*

After *Barrios*, sovereign immunity's interplay with constitutional torts in Oklahoma is as clear as it has been in decades. The Oklahoma Supreme Court is no longer withholding its rationale or resting on entirely unsound

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132. See, e.g., *Deal*, ¶ 55, 389 P.3d at 391–92 (“Oklahoma’s due process clause prevails over the [O]GTCA . . . .”); *Perry v. City of Norman*, 2014 OK 119, ¶ 20, 341 P.3d 689, 693 (“The OGTCa cannot be construed as immunizing the state completely from all liability for violations of the constitutional rights of its citizens.”).

133. *Barrios*, ¶ 17, 432 P.3d at 240 (“[W]e conclude that the [O]GTCA’s specific prohibition against tort suits [alleging violations of constitutional rights] . . . is a legislative determination to which we must now defer.”).

134. *Id.* ¶ 13, 432 P.3d at 239.

135. *Id.* ¶ 16, 432 P.3d at 240; see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

reasoning. The unanswered questions that left courts, citizens, and the Oklahoma Legislature guessing can now be answered:

- Do private rights of action exist for violations of *every* Oklahoma constitutional provision? *No.*
- If not, how will courts decide which Oklahoma constitutional violations create private rights of action? *The Oklahoma Supreme Court is unlikely to expand Bosh claims because the Oklahoma Legislature has clearly addressed sovereign immunity for constitutional torts.*
- Do these private rights of action arise from the Oklahoma Constitution, or are they the product of common law? *These private rights of action are the product of common law.*
- Can the Oklahoma Legislature abrogate *Bosh* to extend the State's sovereign immunity, or is it insulated due to the Oklahoma constitutional rights involved? *Yes, the Oklahoma Legislature can abrogate the Bosh holding and extend the State's sovereign immunity. It validly did so in the 2014 OGTC Amendments.*

### *III. Is This the Right Result? Technically, Yes. Realistically, No*

#### *A. Technically the Right Result*

Until *Barrios* was decided, it was difficult to discern whether a private right of action existed for constitutional torts. Now it is clear that constitutional torts create no right of action because of the Oklahoma Legislature's pronouncement of sovereign immunity within the OGTC. This was the right result for four reasons: (1) it is consistent with the Supremacy Clause; (2) it is consistent with the policy concerns underlying the OGTC; (3) it is consistent with the Oklahoma Legislature's role in determining the State's fiscal policy; and (4) it is consistent with the Oklahoma Constitution.

#### *1. The Supremacy Clause*

The doctrine of sovereign immunity, and the Oklahoma Legislature's enactment of it via the OGTC, does not offend the Supremacy Clause. Critics of sovereign immunity argue that allowing sovereigns to only be

sued with their consent is inconsistent with the United States Constitution, including the Supremacy Clause.<sup>136</sup> Article VI, however, reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>137</sup>

Critics assert that sovereign immunity offends the Supremacy Clause by allowing a common law doctrine to trump the Constitution.<sup>138</sup> Their sole supporting argument that constitutional rights are frustrated and without remedy due to sovereign immunity<sup>139</sup> is, however, without merit.

Federal and state constitutional rights can be vindicated via recognized and established remedies notwithstanding the doctrine of sovereign immunity. When federal constitutional rights are violated, 42 U.S.C. § 1983 and *Ex parte Young* actions provide relief. Section 1983 provides citizens a private right of action for the deprivation of their federal constitutional rights by a state actor.<sup>140</sup> Similar to § 1983 claims, *Ex parte Young* actions also provide citizens a private right of action for the deprivation of their federal constitutional rights by a state actor and may give rise to prospective injunctive relief.<sup>141</sup> When state constitutional rights are violated, both § 1983 and *Ex parte Young* actions can provide relief if the relevant state constitutional provision tracks a federal constitutional provision in text and interpretation. In addition, Oklahoma courts recognize suits for prospective injunctive relief against state actors in their individual capacities to prevent ongoing violations of the Oklahoma Constitution.<sup>142</sup>

While the doctrine of sovereign immunity could offend the United States and Oklahoma Constitutions if it resulted in a laundry list of rights without

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136. See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1211–12 (2001).

137. U.S. CONST. art. VI.

138. See Chemerinsky, *supra* note 136, at 1211.

139. *Id.* at 1211–12.

140. 42 U.S.C. § 1983 (2012); see *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir. 1996) (“The obvious purpose of . . . § 1983 was to provide a remedy to parties deprived of constitutional rights by a state official’s abuse of his position while acting under color of state law.”) (quoting *D.T. ex rel. M.T. v. Indep. Sch. Dist. No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990)).

141. See *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

142. See, e.g., *Hunsucker v. Fallin*, 2017 OK 100, ¶¶ 3–7, 408 P.3d 599, 601–03.

remedies,<sup>143</sup> this is not the case. Under the current state of sovereign immunity, constitutional rights can still be vindicated because the doctrine only works to shape the remedy available for a violation of these rights. Therefore, the doctrine of sovereign immunity does not offend the Supremacy Clause.

### 2. *OGTCA Policy Concerns*

The *Barrios* holding is consistent with the policy concerns underlying the Oklahoma Legislature's enactment of the OGTCA. Sovereign immunity is not something the State has to forgo, as it has long been recognized as an inherent power. The Oklahoma Legislature created the OGTCA and the waivers of sovereign immunity therein in an effort to level the playing field between state and private actors.<sup>144</sup> In doing so, the Legislature sought to ensure that the State could be sued to the same extent that a private party could be sued for certain torts. To illustrate, if a person gets rear-ended on the highway, shouldn't they be able to recover in tort from the driver, regardless of whether the driver is a private citizen or government employee? It clashes with one's internal sense of fairness to say that the government does not have to compensate an injured person for damages caused by one of its employees when a right of action against a private citizen would otherwise exist.

But when it comes to constitutional torts, there is no such thing as a right of action against a private citizen. Even if a private citizen inflicted what would amount to cruel or unusual punishment under article 2, section 9 of the Oklahoma Constitution, the Oklahoma Constitution would not be violated. This is because constitutional rights only limit government action. There is therefore no playing field to level, and no resulting inequity in disallowing suits for money damages against the State.

### 3. *Fiscal Policy*

This outcome is also consistent with the Oklahoma "Legislature's exclusive power to [declare] the State's fiscal policy."<sup>145</sup> "A decision as to whether to allow tort suits is . . . a decision as to whether the People's tax dollars should be used to pay money damages to those who successfully sue the state . . . ."<sup>146</sup> Thus, invoking sovereign immunity as to some torts,

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143. See *Perry v. City of Norman*, 2014 OK 119, ¶ 20, 341 P.3d 689, 693.

144. See *Vanderpool v. State*, 1983 OK 82, ¶¶ 8–14, 672 P.2d 1153, 1154–55.

145. *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 7, 432 P.3d 233, 237.

146. *Id.*; see also *id.* ¶ 7 n.9, 432 P.3d at 237 n.9 ("As a matter of fundamental law, the fiscal policy of this state is determined by the legislative department of government.")

while waiving it for others, is functionally a fiscal decision within understood powers of the Oklahoma Legislature.

*4. Sovereign Immunity Via the OGTC Is Not Trumped by the Oklahoma Constitution*

The Oklahoma Supreme Court has long recognized that “[t]he [Oklahoma] Constitution is the bulwark to which all [State] statutes must yield.”<sup>147</sup> Thus, if the doctrine of sovereign immunity conflicts with the Oklahoma Constitution, then any legislative action that invokes sovereign immunity is without force. As the Oklahoma Supreme Court recognized in *Barrios*, the doctrine does not conflict with the Oklahoma Constitution for two reasons.

First, the drafters left the remedies for Oklahoma constitutional violations to be determined by the Oklahoma Legislature. The Oklahoma Constitution outlines various rights guaranteed to Oklahomans in article II: the Oklahoma Bill of Rights. It also guarantees that a “speedy and certain remedy [shall be] afforded for every wrong and for every injury to person, property, or reputation.”<sup>148</sup> While it is unquestionable that a violation of an article II right constitutes a wrong or injury,<sup>149</sup> the Oklahoma Constitution is silent as to remedy available for a violation of these rights. The Oklahoma Constitution is clear, however, about the power vested in the Oklahoma Legislature. It extends to all “rightful subjects of legislation,” which cannot be restricted, limited, or excluded by a constitutional grant of

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(quoting *In re Application of Okla. Capital Improvement Auth.*, 1998 OK 25, ¶ 5, 958 P.2d 759, 762); *Calvey v. Daxon*, 2000 OK 17, ¶ 21, 997 P.2d 164, 171–72 (“Except where it encounters a specific constitutional prohibition, the Legislature has the right and the responsibility to declare the fiscal policy of Oklahoma. This Court has no authority to consider the desirability, wisdom, or practicability of fiscal legislation. . . . Whether an act is wise or unwise, whether it is based on sound economic theory or whether it is the best means to achieve the desired result are matters for legislative determination.”) (footnote omitted).

147. *EOG Res. Mktg., Inc. v. Okla. State Bd. Of Equalization*, 2008 OK 95, ¶ 16, 196 P.3d 511, 520 (citing *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth.*, 2008 OK 4, ¶ 11, 176 P.3d 1217, 1220; *In re Assessments for Year 2005 of Certain Real Prop. Owned by Askins Props., L.L.C.*, 2007 OK 25, ¶ 12, 161 P.3d 303, 311; *Okla. Elec. Co-op., Inc. v. Okla. Gas & Elec. Co.*, 1999 OK 35, ¶ 7, 982 P.2d 512, 514; *Reherman v. Okla. Water Res. Bd.*, 1984 OK 12, ¶ 22, 679 P.2d 1296, 1302).

148. OKLA. CONST. art. II, § 6; *see also Nash v. Baker*, 1974 OK CIV APP 19, ¶ 8, 522 P.2d 1335, 1338 (“This section does not promise a remedy to every complainant, not even to every complainant who suffers financial loss or disadvantage or disappointment, but only to such as have suffered a ‘legal wrong.’”).

149. OKLA. CONST. art. II, § 6.

authority.<sup>150</sup> Oklahoma courts have commented on this grant of power, observing “the legislature of the state of Oklahoma is constitutionally vested with the power and authority to pass legislation on any subject not withheld by the Constitution of this State or the Federal Constitution.”<sup>151</sup> As a result, courts “[do] not examine the Constitution to decide whether the Legislature is permitted to act. Instead, [courts] examine the Constitution to determine whether the Legislature is prohibited from acting.”<sup>152</sup>

A remedy is required to right a constitutional wrong. The Oklahoma Constitution does not prohibit the Oklahoma Legislature from determining remedies for violations of the Oklahoma Constitution. Therefore, the silent Oklahoma Constitution cannot override the Oklahoma Legislature’s enactment of sovereign immunity for constitutional torts, so long as another remedy is available.

Second, nowhere in the Oklahoma Constitution are monetary damages mandated for constitutional violations. Accordingly, sovereign immunity as to certain constitutional torts does not conflict with the Oklahoma Constitution. The remedy required for a legal wrong, like a constitutional tort, need not be monetary. Instead, the constitutionally required remedy for constitutional torts can be satisfied in one of two ways: (1) suits for prospective injunctive relief against a state actor in their individual capacity,<sup>153</sup> or (2) *Ex parte Young*<sup>154</sup> claims available under federal law.

#### *B. Realistically the Wrong Result*

While the aforementioned remedies exist, they do not necessarily deter the State from continuously violating constitutional rights, nor do they equate to a specific remedy to address a specific wrong in all scenarios. The limited remedies available for violations of the Oklahoma Constitution

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150. *Id.* art. V, § 36.

151. *State ex rel. Okla. Tax Comm’n v. Daxon*, 1980 OK 28, ¶ 16, 607 P.2d 683, 687 (citing *Spearman v. Williams*, 1966 OK 33, 415 P.2d 597; *Dobbs v. Bd. of Cty. Comm’rs of Okla. Cty.*, 1953 OK 159, 257 P.2d 514; *Wentz v. Thomas*, 1932 OK 636, 15 P.2d 65).

152. *Ky. Fried Chicken of McAlester v. Snell*, 2014 OK 35, ¶ 13, 345 P.3d 351, 355 (citations omitted).

153. *See, e.g., Hunsucker v. Fallin*, 2017 OK 100, ¶¶ 3–7, 408 P.3d 599, 601–03.

154. 209 U.S. 123 (1908). *Ex parte Young* actions are available as a remedy if the relevant Oklahoma constitutional violation tracks a federal constitutional violation, both in text and interpretation. Similar to § 1983 claims, these also provide citizens a private cause of action for the deprivation of their federal constitutional rights by a state actor and may give rise to prospective injunctive relief. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

arguably conflict with the centuries-old idea that a right without a remedy is no right at all.<sup>155</sup>

*Ex parte Young* claims are not always available, and even when they are, the remedy for these claims is not directly against the state itself. *Ex parte Young* claims are only available if a violation of the Oklahoma Constitution is identical to a violation of the United States Constitution, both in text and interpretation.<sup>156</sup> And even if it is, technically this right of action can only vindicate federal constitutional violations.<sup>157</sup> Furthermore, certain provisions of the Oklahoma Constitution are not identical to any provision of the United States Constitution, so a violation of the Oklahoma Constitution does not necessarily give rise to an *Ex parte Young* claim.<sup>158</sup>

This leaves suits for prospective injunctive relief against a state actor in their individual capacity as the only remedy for particular violations of the Oklahoma Constitution. Though this is a remedy, it is not directly against the State itself. Thus, a claim barred by the OGTCA can result in a remedy being ineffective against the State altogether.

The remedy of prospective injunctive relief also lacks any deterrent effect. In *Perry*, the Oklahoma Supreme Court implied that a private right of action should lie where a constitutional tort lacks any remedy.<sup>159</sup> While it is technically true that a remedy exists for violations of every Oklahoma constitutional provision in the form of prospective injunctive relief, this does nothing to right constitutional violations of the past.<sup>160</sup> While these past violations may factor into a court's assessment of whether prospective injunctive relief is justified,<sup>161</sup> the granting of prospective injunctive relief

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155. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

156. *See Young*, 209 U.S. at 156.

157. *Id.*

158. *See, e.g.*, OKLA. CONST. art. XXIII, § 7 (protecting a cause of action to recover damages for injuries resulting in death).

159. *See Perry v. City of Norman*, 2014 OK 119, ¶ 20, 341 P.3d 689, 693.

160. *See Post v. Kingdom Hall of Jehovah's Witnesses*, 1955 OK 127, ¶ 3, 283 P.2d 528, 529 (“A court will not entertain an action to enjoin a party from doing that which he has already done.”) (quoting *Christensen v. Quality Oil Co.*, 1951 OK 259, ¶ 3, 236 P.2d 673, 673); *Walcott v. Dennes*, 1911 OK 285, 116 P. 784, 786 (“Under our procedure, the exclusive function of a writ of injunction is to afford only preventive relief; it is powerless to correct wrongs or injuries already committed.”) (quoting *City of Alma v. Loehr*, 22 P. 424, 424 (Kan. 1889) (syllabus)).

161. *See, e.g.*, *Dowell v. Pletcher*, 2013 OK 50, ¶¶ 7–8, 304 P.3d 457, 460 (noting the defendant's past actions in an assessment of whether injunctive relief is appropriate).

simply prevents further constitutional violations and offers no remedy for previously violated constitutional rights.

Imagine that the State of Oklahoma takes a person's private property in violation of article II, section 23 of the Oklahoma Constitution<sup>162</sup> for one year. During that time, not only is that person deprived of the use and enjoyment of their private property, but the State also does significant damage to their private property before returning it. Since no federal constitutional provision mirrors article II, section 23, the person's Oklahoma constitutional right cannot be vindicated with a § 1983 or *Ex parte Young* action.<sup>163</sup> Instead, their only remedy available is to seek prospective injunctive relief against the state actor who took their private property. But what good would this do? The private property has already been returned, and what that person really wants is compensation for the loss of use of their property and the damage caused by the State. In this scenario, this "remedy" is no remedy at all—at least not effectively. Because the only option available to redress this violation of the Oklahoma Constitution—prospective injunctive relief—likely cannot be obtained, nor do any good, and the harm actually caused by the violation is left completely unaddressed.<sup>164</sup> Equally concerning is the failure of this remedial structure to encourage strict compliance with the Oklahoma

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162. OKLA. CONST. art. II, § 23. The section states:

No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

*Id.*

163. Note that if a § 1983 or *Ex parte Young* action were available because a federal constitutional right mirrored an Oklahoma constitutional right, then technically only the federal constitutional right would be vindicated via a successful § 1983 or *Ex parte Young* claim. *See supra* note 154 and accompanying text.

164. As another example, consider article II, section 13 of the Oklahoma Constitution, which prohibits imprisonment for a debt, "except for the non-payment of fines and penalties imposed for the violation of law." OKLA. CONST. art. II, § 13. Suppose the State of Oklahoma throws a person in prison for nonpayment of a debt in violation of section 13, and that person is eventually released a few months later. Since no federal constitutional provision exists that mirrors section 13, the person's Oklahoma constitutional right cannot be vindicated with a § 1983 or *Ex parte Young* action. Instead, their only remedy available is to seek prospective injunctive relief against the state actor that unconstitutionally imprisoned them for a debt. But, the person has already been released from prison, and what they really need to be whole again is compensation for their loss of liberty for the months they were unconstitutionally held in prison. The person's only option to redress this violation of the Oklahoma Constitution is prospective injunctive relief, which does nothing to address the harm caused by the state actor's violation of their section 13 Oklahoma constitutional right.

Constitution. Why would a state actor change their conduct if they face no consequences?

Rights without remedies may be acceptable in the federal context; indeed, neither the United States Constitution nor any federal statute mandates that every right enjoy a corresponding remedy.<sup>165</sup> This is why scholars have construed Chief Justice Marshall's insistence that all rights must have corresponding remedies as a "principle, not an ironclad rule."<sup>166</sup> This may also be why federal courts are content with prospective injunctive relief as the only remedy for many constitutional violations. The Oklahoma Constitution, however, is different. It requires a "certain remedy" for every wrong and for every injury.<sup>167</sup> It explicitly rejects any right-remedy gap. Although the Oklahoma Supreme Court has knocked the legs out from under any meaningful enforcement of this provision,<sup>168</sup> the plain language of this constitutional provision directs otherwise, and rights without remedies generally should violate the Oklahoma Constitution.<sup>169</sup>

Moreover, bereft of a legitimate, forceful, and deterrent remedy, a constitutional right is feeble; it is at risk of being consumed and effectively eliminated. The State's claim of sovereign immunity as to constitutional torts (and the Oklahoma Supreme Court's approval of this act) leaves many Oklahoma constitutional rights feeble, without a true remedy. While the

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165. *Cf.* OKLA. CONST. art. II, § 6 (providing a mandate for rights with corresponding remedies).

166. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991).

167. OKLA. CONST. art. II, § 6.

168. The court has explained that article II, section 6 is a mandate to the judiciary, not the legislature, and is in no way "intended to deprive the Legislature of the power to abolish remedies for future accruing causes of action . . . or to create new remedies for other wrongs as in its wisdom it might determine." *Adams v. Iten Biscuit Co.*, 1917 OK 47, ¶ 6, 162 P. 938, 942; *see* *Neal v. Donahue*, 1980 OK 82, ¶ 15, 611 P.2d 1125, 1129 ("[T]he doctrine of sovereign immunity is not violative of Article II, Section 6, of the Oklahoma Constitution."); *Nash v. Baker*, 1974 OK CIV APP 19, ¶ 8, 522 P.2d 1335, 1338 ("This section does not promise a remedy to every complainant, not even to every complainant who suffers financial loss or disadvantage or disappointment, but only to such as have suffered a 'legal wrong'. It does not prevent the Legislature from creating new legal rights (hence, new legal wrongs) or from increasing or reducing or changing the scope of such a right or the remedy for its violation.").

169. *See* OKLA. CONST. art. II, § 6; *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 18, 12 P.3d 452, 457–58 ("The constitutional guarantee mandates that courts should be open and afford a remedy for those wrongs that are recognized by the law of the land."); *see also* 3 ROBERT S. PECK & NED MILTENBERG, *LITIGATING TORT CASES* § 29:15 (Sept. 2019 update) (explaining that most state courts with right to remedy guarantees misinterpret the original intent of such clauses and read them out of their respective constitutions).

*Barrios* Court technically reached the right result, it functionally reached the wrong result, by leaving those Oklahoma constitutional rights that may only be vindicated with prospective injunctive relief as rights without remedies.

#### *IV. Conclusion*

Keeping with the federal trend, the Oklahoma Supreme Court significantly reigned in *Bosh* claims in *Barrios* by declining to extend these claims to violations of article II, sections 7 and 9, and clarifying that *Bosh* claims are a creation of common law, not the Oklahoma Constitution. In doing so, the court eliminated the possibility that a private right of action exists for violations of all other provisions of the Oklahoma Constitution. Additionally, it signaled the death knell of *Bosh* claims by calling into question the validity of all previously recognized *Bosh* claims, now potentially prevented by the 2014 OGTCAs Amendments.

What remains to be seen, however, is how the Oklahoma Supreme Court will treat constitutional torts that lack a remedy under federal law and those that only allow prospective injunctive relief under state law. The court did not address this situation in *Barrios* at all. Yet in *Perry*, the court implied that a private right of action should lie where a constitutional tort lacks any remedy.<sup>170</sup> Moreover, the Oklahoma Constitution mandates that all wrongs be afforded a remedy.<sup>171</sup> While technically a remedy exists for violations of every Oklahoma constitutional provision—prospective injunctive relief—this only prevents future harm, and does nothing to right the constitutional violation of the past. The sufficiency of this solely forward-looking “remedy” is suspect, and it has little to no deterrent effect on state actors. While, in form, a remedy exists for constitutional violations in these scenarios, in function, this can be viewed as a right without a remedy. If the Oklahoma Supreme Court ever considers such a case, it will be forced to confront a constitutional provision and precedents it may not have realized were in conflict: (1) article II, section 6’s requirement that all rights have a remedy, as well as its holding in *Perry* that implied all constitutional torts require a remedy,<sup>172</sup> and (2) its holding in *Barrios* that validated the Legislature’s adoption of the State’s sovereign immunity for all constitutional torts, even where the only available “remedy” is prospective

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170. See *Perry v. City of Norman*, 2014 OK 119, ¶ 20, 341 P.3d 689, 693.

171. OKLA. CONST. art. II, § 6.

172. See *Perry*, ¶ 20, 341 P.3d at 693.

injunctive relief.<sup>173</sup> If it has the opportunity, the Oklahoma Supreme Court should directly address whether prospective injunctive relief actually remedies previously violated constitutional rights.

The Oklahoma Supreme Court will likely continue to face tough questions in this area of law. It has been clear, however, that the future of monetary remedies for constitutional tort damages rests in the hands of Oklahomans through their power to elect the Legislature. The OGTC's bar of monetary remedies for certain constitutional torts may not technically conflict with the Oklahoma Constitution. A remedy for all legal wrongs—including constitutional torts—is required, and remedies—however insufficient or ineffective—do exist.

The Oklahoma Constitution leaves the determination of remedies for constitutional torts to the Oklahoma Legislature. If the Legislature's determination is not satisfactory to the People, the Oklahoma Constitution could be amended to require a monetary remedy for constitutional violations, or the OGTC could be amended to eliminate sovereign immunity for constitutional torts. Thanks to *Barrios*, the jurisprudence of sovereign immunity and constitutional torts has been un-muddled enough for the people to decide for themselves whether their Oklahoma constitutional rights are without the remedies demanded by their constitution.

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173. *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶¶ 13 n.21, 18, 432 P.3d 233, 239 n.21, 241.