

4-1-2011

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### Recommended Citation

Brian Shea, *The Parent Trap: Constitutional Violations and the Federal Tort Claims Act's Discretionary Function Exception*, 52 B.C.L. Rev. E. Supp. 57 (2011), <http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/6>

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# THE PARENT TRAP: CONSTITUTIONAL VIOLATIONS AND THE FEDERAL TORT CLAIMS ACT'S DISCRETIONARY FUNCTION EXCEPTION

**Abstract:** On June 2, 2010, the U.S. Court of Appeals for the Fifth Circuit sitting en banc in *Castro v. United States* held that the discretionary function exception to the Federal Tort Claims Act (FTCA) does not subject the United States to liability when a government employee, acting within his discretion, commits a constitutional violation, even if that violation is coupled with a state tort claim. The dissent asserted that such constitutional violations should not be understood to be within the discretion of a government employee to commit. This Comment argues that the majority approach is correct, as it is the most consistent with Supreme Court precedent and the purposes of the FTCA.

## INTRODUCTION

In 2003, Monica Castro, an American citizen, saw her American infant Rosa removed from the country by the U.S. border patrol as part of the deportation proceedings of the child's father.<sup>1</sup> The border patrol was not forthcoming as to where Rosa was sent, and Ms. Castro would not see Rosa again for three years, at which point Rosa did not recognize her own mother.<sup>2</sup> In 2006, Ms. Castro sued the United States under the Federal Tort Claims Act (FTCA) for violations of her daughter's Fourth and Fifth Amendment rights; she also sued for violations of state tort law, including unlawful detention and unlawful removal of her daughter from the country by the border patrol.<sup>3</sup>

The United States moved to dismiss, arguing that sovereign immunity barred the suit under the "discretionary function" exception to the FTCA.<sup>4</sup> The FTCA is a limited waiver of the government's sovereign immunity, and the discretionary function exception specifically excludes

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<sup>1</sup> Adam Liptak, *A Family Fight, a Federal Raid, a Baby Deported*, N.Y. TIMES, Sept. 21, 2010, at A17.

<sup>2</sup> *Id.*

<sup>3</sup> *Castro v. United States (Castro I)*, No. C-06-61, 2007 WL 471095, at \*3 (S.D. Tex. Feb. 9, 2007), *rev'd*, (*Castro II*), 560 F.3d 381 (5th Cir. 2009), *aff'd en banc*, (*Castro III*), 608 F.3d 266 (5th Cir. 2010) (per curiam).

<sup>4</sup> *Castro I*, 2007 WL 471095, at \*4; *see* 28 U.S.C. § 2680(a) (2006).

from this waiver any action by government employees that involves individual judgment based on considerations of public policy.<sup>5</sup> Ms. Castro argued that violating her daughter's constitutional rights cannot be understood as within the discretion of the border patrol.<sup>6</sup> The district court rejected her argument, concluding instead that the border patrol agents' actions fell within the discretionary function exception to the FTCA because they met the discretionary function test enunciated by the U.S. Supreme Court in 1991 in *United States v. Gaubert*.<sup>7</sup>

On appeal to the Fifth Circuit, a three-judge panel reversed, concluding that the discretionary function exception could not cover constitutional violations when coupled with state tort claims by government employees.<sup>8</sup> The court then remanded the case to the district court to determine if the border patrol had violated the constitutional rights of the child.<sup>9</sup> On rehearing to the Fifth Circuit sitting en banc, however, the court found that the border patrol's actions satisfied the *Gaubert* test and thus fell within the discretionary function exception.<sup>10</sup> Interestingly, Judge Dennis, in his concurrence, agreed that dismissal was appropriate but noted that the *Gaubert* test must be read to exclude constitutional violations from the discretionary function exception.<sup>11</sup>

Part I of this Comment introduces the different approaches espoused by the en banc majority, by concurring Judge James L. Dennis, and by dissenting Judge Carl E. Stewart.<sup>12</sup> Part II then examines the history of the FTCA and Supreme Court precedent regarding the discretionary function exception, and tests the three approaches' fidelity to this precedent.<sup>13</sup> Finally, Part III argues that the majority's view is the strongest because it coherently incorporates Supreme Court precedent and, consistently with the FTCA, limits the government's liability if a constitutional violation was not obvious to the government actor.<sup>14</sup>

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<sup>5</sup> See *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

<sup>6</sup> *Castro I*, 2007 WL 471095, at \*9.

<sup>7</sup> *Id.* (citing *Gaubert*, 499 U.S. at 322).

<sup>8</sup> *Castro II*, 560 F.3d at 390.

<sup>9</sup> *Id.* at 392.

<sup>10</sup> *Castro III*, 608 F.3d at 268.

<sup>11</sup> *Id.* at 270 (Dennis, J., concurring).

<sup>12</sup> See *infra* notes 15–53 and accompanying text.

<sup>13</sup> See *infra* notes 54–80 and accompany text.

<sup>14</sup> See *infra* notes 81–104 and accompanying text.

## I. BABY DEPORTED

Ms. Castro, a U.S. citizen, had her daughter, Rosa, in 2002 with an undocumented Mexican immigrant, Omar Gallardo.<sup>15</sup> Ms. Castro and Mr. Gallardo lived together in Texas at the time.<sup>16</sup> Ms. Castro alleged that her relationship with Mr. Gallardo was abusive, although the abuse never extended to their infant daughter, and in November 2003, she left their home without her daughter after an argument with Mr. Gallardo.<sup>17</sup> Ms. Castro regretted her decision and tried to get her daughter back by going to the police and Texas Child Protective Services, but she was told that without a custody order, Mr. Gallardo had as much of a right to the child as she did.<sup>18</sup> Ultimately, Ms. Castro decided to alert the U.S. Border Patrol to her husband's status as an undocumented immigrant.<sup>19</sup> A border patrol agent told Ms. Castro that they would apprehend Mr. Gallardo and asked her to be present when this occurred so they could turn the child to her; Ms. Castro declined to do so out of fear.<sup>20</sup> As a result, when the border patrol detained Mr. Gallardo, the child was taken along with him and detained at the border patrol station.<sup>21</sup> Ms. Castro then went to the border patrol station, demanded her daughter, but the border patrol decided not to interfere with the custody situation after consulting with Child Protective Services.<sup>22</sup> The border patrol prepared to deport Mr. Gallardo and Rosa in the event no custody order was obtained before Mr. Gallardo was to be deported.<sup>23</sup> Ms. Castro tried to get the custody order before her husband was deported, but she was unsuccessful and her daughter was sent to Mexico.<sup>24</sup> When Mr. Gallardo was again detained on an attempt to re-enter the United States illegally in 2006, Ms. Castro worked out a deal with him to regain custody of her daughter, and she saw her child for the first time in three years.<sup>25</sup>

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<sup>15</sup> *Castro v. United States (Castro I)*, No. C-06-61, 2007 WL 471095, at \*1 (S.D. Tex. Feb. 9, 2007), *rev'd*, (*Castro II*), 560 F.3d 381 (5th Cir. 2009), *aff'd en banc*, (*Castro III*), 608 F.3d 266 (5th Cir. 2010).

<sup>16</sup> *Castro I*, 2007 WL 471095, at \*1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*2–3.

<sup>20</sup> *Id.* at \*3.

<sup>21</sup> *Id.* at \*2.

<sup>22</sup> *Castro I*, 2007 WL 471095, at \*3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

In response to Ms. Castro's suit against the U.S. government, the United States claimed that the actions of the border patrol fell within the discretionary function exception to the FTCA, and therefore the court lacked subject matter jurisdiction to hear the claim.<sup>26</sup> Generally, the United States is immune from suit under the principle of sovereign immunity unless it has consented to be sued.<sup>27</sup> The FTCA stands as the federal government's consent to be sued for damages to property or for personal injury from negligent or wrongful acts by government employees acting within the scope of their employment.<sup>28</sup> But the FTCA has exceptions designed to limit its reach.<sup>29</sup> One such clause is the discretionary function exception, which excludes the decisions of policy makers exercising their discretion from the FTCA's waiver of immunity regardless of whether that discretion has been abused.<sup>30</sup>

The government asserted that the border patrol's decision to allow Mr. Gallardo to take his daughter with him to Mexico was within the agency's discretion under the test announced by the U.S. Supreme Court in 1991 in *United States v. Gaubert*, and therefore the discretionary function exception applied.<sup>31</sup> In order for actions to be within the discretionary function exception under *Gaubert*, two prongs must be satisfied: (1) the government employee's actions cannot be mandated by statute, regulation, or policy, and (2) the government employee's actions must be rooted in public policy.<sup>32</sup> When an employee's conduct is mandated by an applicable statute or regulation, the employee does not make a judgment or use discretion, and thus the exception cannot apply.<sup>33</sup> Conversely, when an employee's decision is not rooted in public policy, it is not the sort of choice that the discretionary function exception is designed to protect.<sup>34</sup> An example of such a decision is when a government employee crashes a vehicle into another vehicle; though such an action involves discretion, it involves no weighing of policy interests.<sup>35</sup>

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<sup>26</sup> Defendant's Answer at 1, *Castro I*, 2007 WL 471095 (No. C-06-61).

<sup>27</sup> *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

<sup>28</sup> 28 U.S.C. § 1346(b)(1) (2006).

<sup>29</sup> *Id.* § 2680(a) (2006).

<sup>30</sup> *Id.*

<sup>31</sup> Defendant's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction & Motion for Summary Judgment at 8–9, *Castro I*, 2007 WL 471095 (No. C-06-61); *see United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

<sup>32</sup> *Gaubert*, 499 U.S. at 322–23.

<sup>33</sup> *See id.* at 324.

<sup>34</sup> *See id.*; *see also Berkovitz v. United States*, 486 U.S. 531, 542–43 (1988).

<sup>35</sup> *Gaubert*, 499 U.S. at 325 n.7.

Ms. Castro argued that by deporting her daughter, a U.S. citizen, the border patrol acted outside its statutory authority and therefore the exception could not apply.<sup>36</sup> Further, she argued that the border patrol made a custody decision by allowing her daughter to remain with Mr. Gallardo, and that such a decision was also beyond the border patrol's statutory authority.<sup>37</sup>

The district court rejected Ms. Castro's arguments, reasoning that the border patrol had not deported Ms. Castro's daughter or made a de facto custody decision, but instead had allowed a minor to accompany her father who was being deported when there was no custody order in place.<sup>38</sup> The district court also found no statute or regulation that the border patrol was required to follow in this case.<sup>39</sup> Moreover, as the decision of what to do with the child had policy implications, *Gaubert* was satisfied.<sup>40</sup>

On appeal, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit reasoned that the U.S. Constitution can require particular conduct of government employees in the same way a statute or regulation can, and that thus, under *Gaubert*, a government employee violating the Constitution would not be acting within his or her discretion.<sup>41</sup> Judge Stewart wrote in the majority opinion that though the government did not consent to be sued for mere constitutional violations through the FTCA, a constitutional violation occurring simultaneously with a state tort is not within a government employee's discretion to commit (the "Stewart approach").<sup>42</sup> The basis for this logic was rooted not only in precedent from the Fifth Circuit, but also in case law from the First, Third, Fourth, Eighth, and Ninth Circuits.<sup>43</sup> The court

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<sup>36</sup> See Plaintiff's Response to Defendant's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction & Motion for Summary Judgment, *Castro I*, 2007 WL 471095 (No. C-06-61).

<sup>37</sup> *Id.*

<sup>38</sup> *Castro I*, 2007 WL 471095, at \*7 n. 12.

<sup>39</sup> *Id.* at \*8.

<sup>40</sup> See *id.*; *Gaubert*, 499 U.S. at 323.

<sup>41</sup> *Castro II*, 560 F.3d at 389.

<sup>42</sup> *Id.* at 390 (citing *Meyer*, 510 U.S. at 475).

<sup>43</sup> *Id.* at 389; see, e.g., *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Thames Shipyard & R.R. Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Prisco v. Talty*, 993 F.2d 21, 26 n.14 (3d Cir. 1993); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987). Note, however, that two of those decisions stand for the Stewart approach only in dicta. See *Thames*, 350 F.3d at 258 n.9; *Medina*, 259 F.3d at 225. Although these decisions stated that the violation of constitutional rights ought to make the discretionary function exception inapplicable, these decisions found no constitutional violations. See *Thames*, 350 F.3d at 258 n.9; *Medina*, 259 F.3d at 225.

also concluded that the border patrol had acted outside the scope of its authority because it did not have the statutory authority to detain or deport U.S. citizens.<sup>44</sup> The court conflated the two concepts of scope of authority and constitutional violations toward the end of its opinion, stating that although the border patrol has broad power to deport undocumented immigrants, it does not have the authority to breach constitutional protections.<sup>45</sup> The court went on to note that there was a plausible argument that the border patrol had violated the child's constitutional rights and acted outside its statutory authority, and therefore remanded the case to the district court.<sup>46</sup>

The dissenting judge argued that the majority's opinion would make the government liable for far more than originally envisioned by the FTCA, noting the ease with which one can characterize a state tort committed by a government employee as a constitutional violation.<sup>47</sup> In the dissent's view, no constitutional violations had in fact occurred because the child was with her father, who could waive her constitutional rights.<sup>48</sup> Thus, the dissent understood the majority opinion to be flawed in its application of its own test.<sup>49</sup>

The Fifth Circuit sitting en banc disagreed with the three-judge panel and dismissed the suit, concluding that the district court had properly applied the *Gaubert* test (the "majority approach").<sup>50</sup> Judge Dennis concurred in the judgment, but disagreed that violations of the Constitution are covered by the discretionary function exception (the "Dennis approach").<sup>51</sup> Judge Dennis agreed with the Stewart approach but noted that, in this case, there was no constitutional or statutory violation committed by the border patrol.<sup>52</sup> In dissent, Judge Stewart's reasserted the conclusion reached by the three-judge panel.<sup>53</sup>

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<sup>44</sup> *Castro II*, 560 F.3d at 390–91.

<sup>45</sup> *See id.* at 391.

<sup>46</sup> *Id.* at 392.

<sup>47</sup> *Id.* at 394 (Smith, J., dissenting).

<sup>48</sup> *Id.* at 395.

<sup>49</sup> *See id.*

<sup>50</sup> *Castro III*, 608 F.3d at 268.

<sup>51</sup> *Id.* at 269–70 (Dennis, J., concurring).

<sup>52</sup> *Id.* at 270.

<sup>53</sup> *See id.* at 273 (Stewart, J., dissenting). Judge DeMoss also dissented; he agreed with Judge Stewart's reasoning but added that because several state tort claims were allowed through one proviso in the FTCA, the discretionary function exception was immaterial at least as to those claims. *Id.* at 274 (DeMoss, J., dissenting).

## II. WEIGHING THE COMPETING APPROACHES

The disagreement between the majority approach and the Stewart approach appears simple: either the discretionary function exception covers a government employee's actions even when they violate a citizen's constitutional rights, or it does not.<sup>54</sup> The U.S. Supreme Court has already held that constitutional tort claims are not allowed under the FTCA when standing alone: in 1994, in *FDIC v. Meyer*, the Court found that the FTCA did not represent the government's consent to be sued for such claims.<sup>55</sup> But it remains an open question as to whether a violation of constitutional rights when coupled with state law torts should open the government to liability under the FTCA.<sup>56</sup>

The legislative history of the discretionary function exception is limited: in its early decisions, the Supreme Court cited to testimony from an assistant attorney general and to a few congressional hearings to explain what Congress intended the exception to mean.<sup>57</sup> Assistant Attorney General Francis Shea testified in 1942 that the exception was supposed to prevent plaintiffs from questioning the constitutionality of laws or regulations in the context of an ordinary tort suit seeking damages.<sup>58</sup> Shea also said that the purpose of the exception was to shield the government from liability related to the administration of federal programs.<sup>59</sup> From this testimony, the Supreme Court has concluded that Congress did not intend the FTCA to extend liability for actions by government actors that are political or open to policy analysis.<sup>60</sup>

Given the Supreme Court's understanding of the congressional intent behind the discretionary function exception, the Fifth Circuit's en banc majority approach is a sound one, both from a case law standpoint and a logical one: phrasing a tort claim as a violation of constitutional

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<sup>54</sup> Compare *Castro v. United States (Castro III)*, 608 F.3d 266, 268 (5th Cir. 2010) (en banc) (per curiam), *with id.* at 273 (Stewart, J., dissenting).

<sup>55</sup> 510 U.S. 471, 478 (1994).

<sup>56</sup> Compare *Castro III*, 608 F.3d at 268 (holding that constitutional violations joined with state tort claims fall within the discretionary function exception), *with* *Thames Shipyard & R.R. Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (holding that the discretionary function exception does not extend to unconstitutional or unauthorized acts).

<sup>57</sup> See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809–10 (1984); *Dalehite v. United States*, 346 U.S. 15, 26–27 (1953); see also Barry R. Goldman, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837, 842 (1992); Mark C. Niles, "Nothing But Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1302 (2002).

<sup>58</sup> See *Dalehite*, 346 U.S. at 27; Niles, *supra* note 57, at 1302.

<sup>59</sup> *Dalehite*, 346 U.S. at 27.

<sup>60</sup> *Id.* at 27–28.

rights is easily achieved in many cases and could make the discretionary function exception practically useless.<sup>61</sup> The Fifth Circuit has already said as much in a 2006 case, *Santos v. United States*, where a prisoner sued the U.S. government for failing to enforce its nonsmoking regulations within a federal prison's walls.<sup>62</sup> Despite the prisoner joining his intentional infliction of emotional distress and negligence claims with a purported violation of his Eighth Amendment rights, the court found that this was not enough to waive the discretionary function exception, citing *FDIC v. Meyer*.<sup>63</sup> The claims in *Castro* parallel those in *Santos*.<sup>64</sup>

Additionally, the violation of constitutional rights is not always easy to perceive,<sup>65</sup> and judicial review of potential violations could open the government to more liability than it ever intended under the FTCA.<sup>66</sup> In *Castro*, the border patrol was in a decidedly difficult situation: they had an undocumented immigrant who was unwilling to relinquish his child on the one hand, and they faced the prospect of taking an American citizen out of the country on the other.<sup>67</sup> Although Judge Stewart found a plausible argument that the border patrol had committed constitutional violations by citing to Fourth and Fifth Amendment cases, these analogies do not particularly apply in the *Castro* case.<sup>68</sup> Whether or not the border patrol's actions amounted to a violation of constitutional rights, it is at least clear that the agents did not engage in activity that could easily be characterized as unconstitutional infringement of

<sup>61</sup> *Castro v. United States (Castro II)*, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting) ("The majority's two-step rubric would go like this: First, allege a constitutional violation, thereby avoiding the discretionary function exception. Second, plead a state cause of action that overlaps with that constitutional violation, then seek damages under that state cause of action. *Voilà!* No more sovereign immunity.").

<sup>62</sup> See No. 05-60237, 2006 WL 1050512, \*1, \*3 (5th Cir. Apr. 21, 2006).

<sup>63</sup> *Id.* at \*3 (citing *FDIC v. Meyer*, 510 U.S. 471, 478 (1994)).

<sup>64</sup> See *Castro II*, 560 F.3d at 397; *Santos*, 2006 WL 1050512, at \*1.

<sup>65</sup> Compare, e.g., *Castro III*, 608 F.3d at 270 (Dennis, J., concurring) (finding no constitutional violation), with *id.* at 273 (Stewart, J., dissenting) (finding a constitutional violation).

<sup>66</sup> See *Varig Airlines*, 467 U.S. at 809–10; *Dalehite*, 346 U.S. at 27–28; Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV 1091, 1094–96.

<sup>67</sup> *Castro v. United States (Castro I)*, No. C-06-61, 2007 WL 471095, at \*7 (S.D. Tex. Feb. 9, 2007).

<sup>68</sup> See *Castro III*, 608 F.3d at 273 (Stewart, J., dissenting) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *Hernandez v. Cremer*, 913 F.2d 230, 237 (5th Cir. 1990)). Both of the cases cited by Judge Stewart involved issues unrelated to *Castro*, namely that one cannot be stopped and questioned about citizenship without reasonable suspicion, in *United States v. Brignoni-Ponce*, and that an American citizen cannot be refused reentry to the United States without due process, in *Hernandez v. Cremer*. See *Brignoni-Ponce*, 422 U.S. at 884; *Hernandez*, 913 F.2d at 237.

the child's rights.<sup>69</sup> Indeed, the Dennis approach pointed to the fact that "there was no constitutional or statutory violation" committed by the border patrol as the major flaw of the Stewart approach.<sup>70</sup>

Nevertheless, working in the Stewart approach's favor is the natural repulsion to the idea that a government employee may violate a constitutional right with impunity.<sup>71</sup> Just as the government would likely be exposed to many new areas of liability under the Stewart approach, other potentially viable claims may be foreclosed under the majority's approach.<sup>72</sup> For example, in 2003, in *Raz v. United States*, the U.S. Court of Appeals for the Eighth Circuit held the government liable in a case involving a former Israeli citizen who alleged abuse by the FBI, such as wiretapping, stalking, and an illegal search.<sup>73</sup> Although the U.S. District Court for the Western District of Arkansas had dismissed the case for failure to state a claim, the Eighth Circuit in reinstating the case noted that the FTCA's discretionary function exception could not shield the FBI's alleged activity because the activity violated the citizen's constitutional rights and therefore was not discretionary.<sup>74</sup> Whereas the FBI's actions in *Raz* clearly implicated the First and Fourth Amendments,<sup>75</sup> it is less obvious what constitutional rights were implicated by the border patrol's actions in *Castro*: the child was with her father, who could waive the child's rights, and it is unclear what due process could have been afforded.<sup>76</sup>

The Stewart approach also incorporates the idea that the border patrol lacked the statutory authority to take the child out of the country in the custody of her father.<sup>77</sup> It can be implied from *Gaubert* that any such overstepping of statutory authority would fail the first prong; if the border patrol were to, for instance, deport a twenty-five year old U.S. citizen, it would not be following a statute that only authorizes such a procedure for aliens.<sup>78</sup> Thus, Judge Stewart's arguments emphasizing the lack of statutory authorization likely stem from disagreement

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<sup>69</sup> See *Castro III*, 608 F.3d at 270 (Dennis, J., concurring).

<sup>70</sup> *Id.* at 270.

<sup>71</sup> See *id.* at 273 (Stewart, J., dissenting).

<sup>72</sup> See *Raz v. United States*, 343 F.3d 945, 947 (2003).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 947–48.

<sup>75</sup> *Id.* at 948.

<sup>76</sup> See *Castro III*, 608 F.3d at 270 (Dennis, J., concurring).

<sup>77</sup> *Id.* at 271–72 (Stewart, J., dissenting).

<sup>78</sup> See 8 U.S.C. § 1103(a)(1) (2006) (giving the Secretary of Homeland Security authority to discharge laws "relating to the immigration and naturalization of aliens," with no mention of U.S. citizens); *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

with the majority's application of the *Gaubert* test rather than the prongs of the test itself.<sup>79</sup> But this argument is unavailing; as Judge Dennis's concurrence observes, the border patrol did not deport a U.S. citizen but instead allowed a child to remain with her father when there was no custody order in place.<sup>80</sup>

### III. THE MAJORITY APPROACH'S COHERENCE WITH PRECEDENT

Some may find the Dennis approach attractive insofar as it holds the government liable for constitutional violations but finds no such violation in *Castro* itself.<sup>81</sup> The flaw in both the Dennis and Stewart approach, however, is that there is no logical way to skirt Supreme Court precedent definitively stating that the United States has not consented with the FTCA to be sued for constitutional violations.<sup>82</sup> The *Gaubert* test itself shows that constitutional violations do not fall within the discretionary function exception: the first prong states that actions mandated by statute, regulation, or policy are not discretionary, but does not mention actions mandated by the Constitution;<sup>83</sup> the second prong states that actions must be rooted in public policy, which would hardly seem to be true of blatant constitutional violations.<sup>84</sup> Unlike the Dennis or Stewart approach, the majority approach adheres to this binding Supreme Court precedent.<sup>85</sup>

The U.S. Supreme Court has held that suits against federal officers for constitutional torts are not permitted by the FTCA.<sup>86</sup> In the *Castro* case, this holding means that if Ms. Castro had sued the government through the FTCA only for violations of Rosa's constitutional rights, the case would have been dismissed.<sup>87</sup> The reason it was not dismissed is that Ms. Castro alleged state tort claims in addition to constitutional vio-

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<sup>79</sup> See *Castro III*, 608 F.3d at 271–72 (Stewart, J., dissenting).

<sup>80</sup> *Id.* at 270 (Dennis, J., concurring).

<sup>81</sup> See *Castro v. United States (Castro III)*, 608 F.3d 266, 270 (5th Cir. 2010) (en banc) (per curiam) (Dennis, J., concurring).

<sup>82</sup> See *FDIC v. Meyer*, 510 U.S. 471, 478 (1994).

<sup>83</sup> *Castro v. United States (Castro II)*, 560 F.3d 381, 393 (5th Cir. 2009) (Smith, J., dissenting) (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991)).

<sup>84</sup> See *Morales v. United States*, 961 F. Supp. 33, 636 (S.D.N.Y. 1997) (holding that the legal arrest of an individual was not grounded in public policy); *Patel v. United States*, 806 F. Supp. 73, 878 (N.D. Cal. 1992) (holding that a search by government agents that resulted in the burning down of the target's house was not grounded in public policy).

<sup>85</sup> See *Meyer*, 510 U.S. at 478; *Gaubert*, 499 U.S. at 322.

<sup>86</sup> *Meyer*, 510 U.S. at 477–78.

<sup>87</sup> See *id.* *Castro v. United States (Castro I)*, No. C-06-61, 2007 WL 471095, at \*3 (S.D. Tex. Feb. 9, 2007).

lations.<sup>88</sup> Because the FTCA only gives permission for the government to be sued under state law, and constitutional torts come from federal law, a constitutional tort claim cannot be made under the FTCA.<sup>89</sup> Even when a state tort claim is coupled with a constitutional claim, it seems clear that, under *FDIC v. Meyer*, the constitutional claim would be barred by the FTCA.<sup>90</sup> As a result, Ms. Castro's argument that the discretionary function exception of the FTCA should not apply because her daughter's constitutional rights were violated does not work because at its root the FTCA does not allow such suits.<sup>91</sup>

The language of *Gaubert* also supports this position: whereas "federal statute, regulation, [and] policy" are included in *Gaubert's* first prong, there is no mention of the Constitution—an omission that suggests that the Supreme Court did not believe the Constitution should be considered when evaluating whether government employees' actions fall into the discretionary function exception.<sup>92</sup> Judge Stewart might respond that the Constitution stands as the rubric to guide all of the government's statutes, regulations, and policies; any violation of the Constitution by a government employee should thus be regarded as outside her discretion.<sup>93</sup> For this point to be correct, however, *Meyer* would have had to be decided differently, as it is simply impossible to conform *Meyer's* holding that constitutional violations are not to be considered in an FTCA context with the Stewart approach.<sup>94</sup>

To answer the Stewart approach's concern about egregious constitutional violations, the majority can point to the second prong of *Gaubert* as a safeguard against such violations.<sup>95</sup> In cases where a particularly obvious constitutional violation has occurred, a court can find that there was no consideration of policy issues in the context of the violation, and therefore the government employee's actions fail *Gaubert's* second prong.<sup>96</sup> The U.S. Court of Appeals for the Ninth in 2000, however, in *Nurse v. United States*, considered a case where government employees were alleged to have developed unconstitutional policies that discriminated on the basis of race.<sup>97</sup> Because these em-

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<sup>88</sup> See *Meyer*, 510 U.S. at 474; *Castro I*, 2007 WL 471095, at \*3.

<sup>89</sup> *Meyer*, 510 U.S. at 478.

<sup>90</sup> See *id.*

<sup>91</sup> See *Castro II*, 560 F.3d at 393–94 (Smith, J., dissenting).

<sup>92</sup> See *Castro II*, 560 F.3d at 393; see also *Gaubert*, 499 U.S. at 322.

<sup>93</sup> See *Castro III*, 608 F.3d at 271–72 (Stewart, J., dissenting).

<sup>94</sup> See *Meyer*, 510 U.S. at 478.

<sup>95</sup> See *Gaubert*, 499 U.S. at 323.

<sup>96</sup> See *Morales*, 961 F. Supp. at 636; *Patel*, 806 F. Supp. at 878.

<sup>97</sup> 226 F.3d 996, 1002 (9th Cir. 2000).

ployees were formulating regulations as to who gets searched at airports, it is clear that they were weighing policy matters and thus would pass the second prong of *Gaubert*.<sup>98</sup> The court nonetheless found that discriminatory policies that are unconstitutional would not fall within the FTCA's discretionary function exception.<sup>99</sup> The *Castro* majority approach would have to formulate a response to this concern by pointing to the first prong of *Gaubert* and looking to see if a statute, regulation, or policy had been violated in crafting the regulatory scheme.<sup>100</sup>

The *Castro* majority approach is simply more in line with the precedent set by *Gaubert*; the border patrol's actions were not governed by a statute, policy, or regulation, and in deciding whom to remove from the country the border patrol engaged in a policy analysis.<sup>101</sup> Furthermore, *Castro* demonstrates why *Gaubert* is good precedent, and why its test furthers the aims of the FTCA: Congress, in passing the discretionary function exception, wanted to shield the government from liability based upon the decisions its employees make within their discretion.<sup>102</sup> The border patrol was fulfilling its duty of deporting illegal aliens, as is allowed under the statute, and removing Ms. Castro's daughter from the country was incidental to that action.<sup>103</sup> Were Ms. Castro to have prevailed, the government would have been rendered liable for all sorts of similar incidental actions that occur when agencies act within their statutory authority; such open-ended liability is far beyond the limited waiver of sovereign immunity that is contemplated by the FTCA.<sup>104</sup>

## CONCLUSION

The border patrol in *Castro* was put in the difficult situation of having to either make a custody decision or deport an American child; neither option was attractive. Given that the discretionary function exception was drafted to shield the government from liability when its officials make exactly these types of difficult policy decisions, the majority reached the right decision. The majority's argument rests on a literal interpretation of the *Gaubert* prongs, which excludes the Constitution from its sources of mandatory guidance. This stands in contrast to the Dennis and Stewart approaches, which attempt to circumvent the Su-

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<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *Gaubert*, 499 U.S. at 322.

<sup>101</sup> See *Castro III*, 608 F.3d at 268; see also *Gaubert*, 499 U.S. at 322–23.

<sup>102</sup> See *Dalehite v. United States*, 346 U.S. 15, 27–28 (1953).

<sup>103</sup> See *Castro III*, 608 F.3d at 270 (Dennis, J., concurring).

<sup>104</sup> See *Dalehite*, 346 U.S. at 27–28.

preme Court's holding in *FDIC v. Meyer* while making the government liable essentially for being trapped in a situation with no perfect options. The majority approach stayed truer to Supreme Court precedent in applying the discretionary function exception because it was more faithful to the exception's purpose of shielding decision-makers from liability based on subjective judgments of government policy.

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**Preferred citation:** Brian Shea, Comment, *The Parent Trap: Constitutional Violations and the Federal Tort Claims Act's Discretionary Function Exception*, 52 B.C. L. REV. E. SUPP. 57 (2011), [http://www.bc.edu/bclr/esupp\\_2011/05\\_shea.pdf](http://www.bc.edu/bclr/esupp_2011/05_shea.pdf).

