NOTE

MALICIOUS PROSECUTION CLAIMS IN SECTION 1983 LAWSUITS

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INTRODUCTION

THE United States Constitution imposes a number of limits on government power. Some examples include fundamental rights that receive special protection, such as the right of free speech,[1] while others include substantive and procedural rules that must be followed when the government criminally prosecutes one of its citizens.[2] When a government official violates an individual's explicitly guaranteed constitutional rights, that case requires little effort to resolve. If the government official is a state or local officer, the individual can sue the officer under 42 U.S.C. § 1983 to get relief.[3] The same is generally true even if the officer is a federal agent.[4] However, as is so often the case in law, not many cases are that easy. Some involve official conduct that appears to violate personal interests of constitutional magnitude, but that cannot be evaluated against clear constitutional rights. The line between constitutional and non-constitutional violations has become increasingly blurred, as more and more litigants are attempting to frame their injuries from official conduct as constitutional violations. This has often forced federal courts to decide whether a claim raises a genuine constitutional injury, or whether the litigant's only recourse is to sue under ordinary principles

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[1] U.S. Const. amend. I.

[2] U.S. Const. amend. IV, V, VI.

[3] 42 U.S.C. § 1983 (2006).

[4] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971).

of tort law. These questions involve the application of constitutional torts.[5]

One scholar has noted that the most difficult cases are the "boundary cases—that is, cases close to the border between constitutional and common law tort."[6] This Note addresses one of the more fertile boundary cases of late: malicious prosecution claims in Section 1983 lawsuits. The tort of malicious prosecution has a rich legal history, and one that has been informed by the need to provide redress to those who have been victims of overzealous and groundless prosecutions. Plaintiffs have filed, and continue to file, Section 1983 lawsuits against state or local officials alleging malicious prosecution. The questions surrounding how these two legal mechanisms work together were sufficiently important to merit Supreme Court review.[7] While the Court provided something of an answer in *Albright v. Oliver*,[8] the lack of a majority opinion from the Court failed to provide meaningful guidance. Providing answers, though, remains critical. The Courts of Appeals continue to be deeply divided on this issue, but divergent application of Section 1983 claims based merely on geography is contrary to the need for a uniform interpretation of federal law.[9] Moreover, civil rights lawsuits comprise a large part of the federal docket. In 2011, more than 37,000 civil rights claims were filed in U.S. district courts.[10] While there is no information specifically on the number of claims that alleged malicious prosecution,

[5] There is a large volume of scholarly commentary on the subject of constitutional torts. See, e.g., John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 Yale L.J. 259 (2000); James E. Pfander, Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages, 111 Colum. L. Rev. 1601 (2011); Perry M. Rosen, The *Bivens* Constitutional Tort: An Unfulfilled Promise, 67 N.C. L. Rev. 337 (1989); Joel Flaxman, Note, Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial, 105 Mich. L. Rev. 1551 (2007).

[6] Michael Wells, Constitutional Torts, Common Law Torts, and Due Process of Law, 72 Chi.-Kent L. Rev. 617, 620 (1997).

[7] See Jacques L. Schillaci, Note & Comment, Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine, 97 Nw. U. L. Rev. 439, 460 n.172 (2002) ("The constitutional tort of malicious prosecution was significant enough to arouse the concern of the Supreme Court in *Albright*. Indeed, the justices evidently found it sufficiently divisive that they were unable to reach any consensus on the matter.").

[8] 510 U.S. 266, 269–75 (1994).

[9] See infra text accompanying notes 77–91.

[10] Admin. Office of the U.S. Courts, Judicial Business of the United States Courts, tbl.C-2A, at 129 (2011), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

the overall number of civil rights claims underscores the point that this is an immensely important area of the law.

This Note will clarify the relationship between malicious prosecution and Section 1983. Part I begins by tracing the historical evolution of the tort of malicious prosecution. It notes that the tort has traditionally focused on the use of judicial proceedings, and that it is related to two other judicial process torts that have similar objectives. It then reviews the history and purposes of Section 1983. After this, it analyzes the Supreme Court's holding in *Albright v. Oliver*, which tried to settle how claims of malicious prosecution should be handled in Section 1983 actions. It then concludes by describing the split among the Courts of Appeals that has persisted after *Albright*.

Part II begins by explaining why the Fourth Amendment is not the best vehicle to use for incorporating malicious prosecution claims into Section 1983 lawsuits. The main reason for this is that the elements of malicious prosecution cannot be squared with the Fourth Amendment's text. It then describes why the Fifth Amendment's Grand Jury Clause and the Fourteenth Amendment's Due Process Clause are better suited for this task. Afterward, this Part transitions into a discussion of the implications of using different amendments to incorporate malicious prosecution, and explains why the consequences of using the Fourth Amendment further suggest it is not the best fit. It also considers the implications of adjudicating malicious prosecution claims in both federal and state courts.

Then, in Part III, this Note addresses two particular arguments that have appeared in the scholarly literature on this subject. The first argument is that the common law elements of malicious prosecution have no place in a Section 1983 lawsuit. The second argument is that the legal treatment of arrest warrants is similar to malicious prosecution, which justifies the juxtaposition of malicious prosecution and the Fourth Amendment. This Note argues that, upon careful review, both of these claims have critical flaws.

I. BACKGROUND

Both Section 1983 and malicious prosecution have impressive historical pedigrees. This helps explain why there is such a vast body of law that wrestles with the multitudinous applications of each of these legal doctrines. Determining how Section 1983 should best incorporate the tort of malicious prosecution thus cannot be done on a blank slate. Any

satisfactory answer must take account of the historical purpose of both vehicles, especially because there is much history that informs how we use Section 1983 and malicious prosecution in our legal system. This Part first traces the history of malicious prosecution and Section 1983. It then explains the Supreme Court's decision in *Albright v. Oliver*, which attempted to answer whether malicious prosecution was actionable in a Section 1983 lawsuit. It concludes by highlighting the remaining split among the Courts of Appeals, and argues that the continuing confusion in this area of law is due to the Court's puzzling opinion in *Albright*.

A. The History of Malicious Prosecution

The tort of malicious prosecution has deep roots in English legal history, as English courts were concerned with the improper use of judicial proceedings as early as the tenth century.[11] The tort developed through the ages as a mechanism to provide those who were wronged by an abuse of the criminal process with a remedy against the abuser. Today, while the specific elements of malicious prosecution slightly differ from state to state, there are four core elements to the claim. The plaintiff must show (1) that the defendant initiated or procured a criminal proceeding against the plaintiff; (2) that the proceeding terminated in the plaintiff's favor; (3) that there was no probable cause to support the defendant's charges; and (4) that the proceeding was instituted primarily for a purpose other than to bring an offender to justice.[12] All of these elements illustrate that malicious prosecution is focused on the character of the proceeding. This can be gleaned from the substantial overlap among the different elements, as the need for favorable termination, lack of probable cause, and requirement of an improper motive all coalesce around examining whether the charges brought by the defendant were sufficiently unsubstantiated. This focus on proceedings means that malicious prosecution is not concerned with how the police obtain evidence during a criminal investigation, but rather the process by which criminal charges are formally brought.

To make matters slightly more complex, malicious prosecution is probably best understood as one tort in a family of torts that work to ensure the proper use of judicial proceedings. In addition to malicious

[11] John T. Ryan, Jr., Note, Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?, 64 Geo. Wash. L. Rev. 776, 778 (1996).

[12] See Restatement (Second) of Torts § 653 (1977).

prosecution—which applies to criminal proceedings[13]—there is a separate tort that applies to civil proceedings, and its somewhat unimaginative title is the wrongful use of civil proceedings.[14] The elements for this tort track the elements for malicious prosecution. The plaintiff must show that (1) the defendant initiated or procured civil proceedings against the plaintiff; (2) that the defendant acted without probable cause; (3) that the proceedings were initiated primarily for a purpose other than to secure the proper adjudication of a claim; and (4) that except in *ex parte* proceedings, the matter terminated in the plaintiff's favor.[15] Additionally, there is another tort which serves as a catch-all for remaining claims that cannot be squeezed into either formula. This tort is known simply as abuse of process.[16] One is liable under this tort when one "uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed."[17] The drafters of the Restatement noted that the "gravamen" of the abuse of process tort "is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish."[18] One can view this tort as a safety net, intended to catch individuals who have misused proceedings but done so in a way that prevents the application of either malicious prosecution or the wrongful use of civil proceedings.

The upshot of this is that all three of these process torts are concerned with the use of judicial proceedings. Malicious prosecution applies in the criminal context; the wrongful use of civil proceedings applies to civil claims; and the abuse of process tort collects any remaining instances where judicial processes were misused. Plaintiffs cannot use these torts if their only objection is to how the police acted during a criminal investigation.

B. The Development of Section 1983

Section 1983 is a federal law that provides individuals with a cause of action against state and local officials who have violated their federal rights.[19] The text of Section 1983 states that "[e]very person who, under

[13] Id. §§ 653, 654.
[14] Id. § 674.
[15] Id.
[16] Id. § 682.
[17] Id.
[18] Id. § 682 cmt. a.
[19] 42 U.S.C. § 1983 (2006).

color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable" to the injured party.[20] The Supreme Court has held that the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights."[21] But it has also held that "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"[22] Thus, to succeed in a Section 1983 action, a plaintiff must be able to show that federal law protects the alleged right that state or local officials violated.

Unsurprisingly, there has been an extraordinary amount of litigation over which type of official action is cognizable in Section 1983 claims. The statute's text only provides a cause of action to redress violations of rights secured by the federal Constitution and laws. If an individual alleges a violation of an explicit constitutional right, then there is no question that federal law protects the right at issue. However, the tort of malicious prosecution is not found in the Constitution's explicit text. Consequently, it is unclear whether malicious prosecution should be read as a gloss on one of the first ten amendments, protected through the Due Process Clause of the Fourteenth Amendment, or perhaps not protected by federal law at all. The Supreme Court attempted to provide an answer to this question in *Albright v. Oliver*.[23]

C. Albright v. Oliver

The story of *Albright* began when local authorities in Illinois issued a warrant for the arrest of Kevin Albright.[24] Upon learning of the warrant, Albright surrendered himself to the police but denied any wrongdoing.[25] The criminal charges against Albright were eventually dismissed because they failed to "state an offense under Illinois law."[26] Once the criminal proceedings were terminated, Albright filed a Section 1983 action against both the detective involved in the case and the city, alleging

[20] See id.
[21] Mitchum v. Foster, 407 U.S. 225, 242 (1972).
[22] *Albright*, 510 U.S. at 271 (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).
[23] Id. at 266.
[24] Id. at 268.
[25] Id.
[26] Id. at 269.

a deprivation of his Fourteenth Amendment right to be "free from criminal prosecution except upon probable cause."[27] Thus, the Court was squarely presented with the question of whether the Fourteenth Amendment's Due Process Clause protected the right to be free from malicious prosecution.

The plurality opinion began its analysis by discussing the Court's Fourteenth Amendment jurisprudence. It explained that expanding the number of rights under substantive due process is disfavored "'because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'"[28] The domain of substantive due process has generally been limited to issues of "marriage, family, procreation, and the right to bodily integrity," none of which are related to malicious prosecution.[29] This meant that substantive due process was not the proper vehicle for incorporating malicious prosecution claims into Section 1983 actions. The plurality opinion reinforced this point by holding that where an amendment provides an explicit textual guarantee of a constitutional right, that amendment, and not substantive due process, must "be the guide for analyzing these claims."[30]

At this point, the plurality made a critical doctrinal leap. It decided that the Fourth Amendment was most analogous to malicious prosecution and therefore the appropriate vehicle by which to incorporate it into federal law.[31] The support for this claim, however, consists of one short paragraph. The plurality simply stated that "the Fourth Amendment's relevance to . . . deprivations of liberty . . . go hand in hand with criminal prosecutions."[32] The opinion then abruptly concluded by holding that it expressed no view on whether Albright's claim would succeed under the Fourth Amendment, but emphasized that substantive due process was not the proper vehicle by which to analyze a claim of malicious prosecution in a Section 1983 lawsuit.[33]

Justice Scalia authored a short concurrence for only himself. He explained the relationship between the Fourteenth Amendment's Due Process Clause and the Fourth Amendment, but did so in a cryptic manner

[27] Id.
[28] Id. at 272 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).
[29] Id.
[30] Id. at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).
[31] Id. at 274.
[32] Id.
[33] Id. at 275.

that is difficult to unpack.[34] He then proceeded to remind readers that he is opposed to using substantive due process to "guarantee[] certain (unspecified) liberties, rather than merely guarantee[ing] certain procedures as a prerequisite to deprivation of liberty."[35] The result under Justice Scalia's theory, which is similar to the result in the plurality opinion, is that substantive due process cannot be used to impose additional requirements on state criminal procedures when those requirements are already addressed in the Bill of Rights.[36]

Justice Ginsburg also authored a concurrence for only herself. She began by arguing that the Fourth Amendment was the appropriate vehicle because the term "seizure" had an expansive meaning.[37] A seizure was not just a physical restraint, but continued throughout the pendency of the defendant's obligation to appear in court, whether or not he remained in police custody.[38] In addition, she stated that common sense supports this understanding, as one who is released on personal recognizance before trial is "still 'seized' in the constitutionally relevant sense."[39] But the remainder of her concurrence did not analyze the tort of malicious prosecution or how it related to the Fourth Amendment; the broad common law definition of seizure was sufficient on its own.

Justice Kennedy authored a concurring opinion and was joined by Justice Thomas. He first argued that neither the Fifth nor the Sixth Amendment contains a probable cause standard for the initiation of criminal prosecutions.[40] Of course, a criminal rule that does not violate an explicit constitutional amendment "may nonetheless violate the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[41] But Justice Kennedy thought that there is no additional due process protection for the initiation of criminal proceedings because "the specific guarantees contained in the Bill of Rights mirror the traditional requirements of the criminal process."[42] He also stated that because there is a constitutional speedy trial right, any standard governing the initia-

[34] See id. at 275 (Scalia, J., concurring).
[35] Id.
[36] Id. at 276.
[37] Id. at 277–78 (Ginsburg, J., concurring).
[38] Id.
[39] Id. at 279.
[40] Id. at 282 (Kennedy, J., concurring).
[41] Id. (quoting Medina v. California, 505 U.S. 437, 445 (1992)).
[42] Id.

tion of criminal proceedings "would be superfluous."[43] However, malicious prosecution was designed to provide a civil remedy after the criminal process ended, while the Sixth Amendment's Speedy Trial Clause operates to ensure that cases are swiftly disposed of while the criminal process is still ongoing.[44] Equating the two, as Justice Kennedy did, makes little sense.

Perhaps sensing this inconsistency, Justice Kennedy said that the due process inquiry was not over. He assumed arguendo that "some of the interests granted historical protection by the common law of torts (such as . . . malicious prosecution) are protected by the Due Process Clause."[45] But even if this is so, the claim in *Albright* would be preempted by *Parratt v. Taylor*.[46] The central teaching of *Parratt* is that "a state actor's random and unauthorized deprivation of [a right under the Due Process Clause] cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate postdeprivation remedy."[47] This rule is based on preserving the proper relationship between state and federal courts, as well as ensuring that the Fourteenth Amendment does not become "a font of tort law" superimposed on the states.[48] In *Albright*, Justice Kennedy believed that *Parratt* controlled the outcome: the official action was random and unauthorized, and Illinois provided a postdeprivation remedy in the form of a state cause of action for malicious prosecution.[49]

Justice Souter wrote the next concurrence for only himself. He began by noting that the Fourteenth Amendment's Due Process Clause should not "be reduced to the mere duplication of protections adequately addressed by other constitutional provisions."[50] Because the Fourth Amendment protected the interests at stake in *Albright*, an additional right under the rubric of substantive due process was unnecessary.[51] Moreover, while Albright alleged a number of injuries that were a result of his seizure, he could not identify any that stemmed solely from the in-

[43] Id. at 283.
[44] Barker v. Wingo, 407 U.S. 514, 519–20 (1972).
[45] *Albright*, 510 U.S. at 283–84 (Kennedy, J., concurring).
[46] 451 U.S. 527 (1981).
[47] *Albright*, 510 U.S. at 284 (Kennedy, J., concurring).
[48] *Parratt*, 451 U.S. at 544.
[49] *Albright*, 510 U.S. at 285–86 (Kennedy, J., concurring).
[50] Id. at 287 (Souter, J., concurring).
[51] Id. at 288–89.

itiation of the prosecution.[52] Justice Souter thought that this would normally be the case: Barring extraordinary circumstances, any injury generated by the filing of a baseless criminal prosecution would likely be protected under the Fourth Amendment.[53]

Justice Stevens wrote the final opinion in *Albright*, which was a lengthy, nine-part dissent joined by Justice Blackmun. He first outlined the lack of evidence the state had against Albright when it decided to indict him. The only evidence of criminal activity was "from a paid informant who established her unreliability on more than 50 occasions, when her false accusations led to aborted and dismissed prosecutions."[54] The informant's track record did not improve in Albright's case, as the alleged drug she saw turned out to be baking soda.[55] Justice Stevens then cited to the Seventh Circuit's statement below that "the commencement of a serious criminal proceeding on such 'scanty grounds' was nothing short of 'shocking.'"[56]

With these facts in mind, the dissent went on to demonstrate that the liberty interest protected by the Fourteenth Amendment was not so narrow as to encompass only freedom from physical restraint.[57] Though the initiation of a criminal prosecution without probable cause will not always result in a physical seizure, it is "quintessentially [the] type of state action" that the Fourteenth Amendment protects.[58] Every prosecution, whether it involves a seizure or not, may disrupt the defendant's "'employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'"[59] Thus, the right to be free from malicious prosecution is exactly the type of right that should be protected by the Fourteenth Amendment. The common law even recognized this, as it has historically been required that criminal prosecutions not begin unless there is probable cause.[60] Illinois also had such a requirement in place at the time of Albright's prosecution.[61]

[52] Id. at 289.
[53] Id. at 290–91.
[54] Id. at 292 (Stevens, J., dissenting).
[55] Id. at 293.
[56] Id. (quoting Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992)).
[57] Id. at 294.
[58] Id. at 295.
[59] Id. at 296 (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).
[60] Id. at 296–97.
[61] Id. at 297–98 (citing Ill. Rev. Stat., Ch. 38, §§ 111-2(a), 109-3 (1987)).

Justice Stevens then took aim at the main holding of the case, namely, that the tort of malicious prosecution in a Section 1983 lawsuit should be incorporated through the Fourth Amendment rather than the Fourteenth Amendment. He argued that there were two flaws in this holding. The first is that malicious prosecution is actually more analogous to the Fifth Amendment's Grand Jury Clause than the Fourth Amendment.[62] Though the Grand Jury Clause has not been incorporated against the states, it "by no means follows that the underlying liberty interest is unworthy of Fourteenth Amendment protection."[63] The second flaw in the plurality's reasoning is that it advocates a cramped reading of the Fourteenth Amendment which is inconsistent with Supreme Court precedent.[64] A majority of the Court in *Adamson v. California* rejected the argument that the Fourteenth Amendment's Due Process Clause merely tracks the specific guarantees in the Bill of Rights and nothing more.[65] Instead, the Due Process Clause protects rights that have "no counterparts" in constitutional text.[66] Thus, it is the plurality, according to the dissent, that seeks to unseat settled principles of constitutional interpretation.[67]

Justice Stevens then proceeded to comment on Justice Ginsburg's concurrence. Her opinion, like the plurality, argued that there is no due process protection for the initiation of a baseless criminal proceeding "unless an unreasonable seizure occurs."[68] For the reasons stated above, Justice Stevens disagreed vehemently with this proposition. He again noted that the harm from the initiation of a criminal complaint is "analytically, and often temporally, distinct from the arrest"; sometimes much time passes between when a complaint is filed and when a seizure occurs.[69] Justice Souter's concurrence suffered from similar problems. Justice Souter wrote much about the need to avoid recognizing this so-called "novel due process right."[70] But this claim could not be squared with the historical record affirming a fundamental liberty interest in the right to be free from criminal prosecution not based on probable cause.

[62] Id. at 302.
[63] Id. at 302–03.
[64] Id. at 303.
[65] Id. at 303–04 (citing Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring)).
[66] Id. at 304.
[67] Id. at 306–07.
[68] Id. at 308.
[69] Id. at 308–09.
[70] Id. at 288 (Souter, J., concurring).

It also could not be squared with the near unanimous holding among the Courts of Appeals that malicious prosecution claims were incorporated through the Fourteenth Amendment in Section 1983 lawsuits.[71]

The dissent concluded by analyzing whether *Parratt* affected the resolution of Albright's claims. Justice Stevens argued that it did not. If the right at issue is characterized as substantive, *Parratt* does not apply.[72] And if the right is instead characterized as procedural, *Parratt* is still inapplicable because the initiation of a baseless criminal prosecution is not random state action.[73] Criminal complaints are "effectuated through established state procedures under which government agents, such as respondent Oliver, are authorized to act."[74] The state's failure to provide "reasoned predeprivation determination" is thus never constitutionally acceptable, and it is irrelevant whether Illinois provides a cause of action for malicious prosecution after the fact.[75]

Ultimately, though the nine Justices said much in *Albright*, one cannot escape the fact that the decision produced six different opinions, none of which commanded a majority. The plurality, which spoke for four Justices, spent the least amount of time wrestling with the history of malicious prosecution and the text of the Fourth Amendment. Though its terse reasoning suggests a lack of effort was needed to reach this seemingly obvious conclusion, the Court's opinion did nothing to provide lower federal judges with adequate guidance. The Courts of Appeals are just as confused post-*Albright* as they were before the Court weighed in.[76]

D. The State of the Law After Albright

The split among the Courts of Appeals on how to apply *Albright* stems from a particular uncertainty. Lower courts are unsure whether the common law tort elements of malicious prosecution should dominate the analysis, or whether the question should be framed exclusively in light of Fourth Amendment jurisprudence. A minority of courts including the

[71] Id. at 311 (Stevens, J., dissenting).
[72] Id. at 313 (citing Zinermon v. Burch, 494 U.S. 113, 125 (1990)).
[73] Id. at 313–15.
[74] Id. at 314.
[75] Id.
[76] See, e.g., Awabdy v. City of Adelanto, 368 F.3d 1062, 1070 n.4 (9th Cir. 2004); Gallo v. City of Phila., 161 F.3d 217, 222 (3d Cir. 1998); Uboh v. Reno, 141 F.3d 1000, 1002 (11th Cir. 1998); Taylor v. Meacham, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996).

Second,[77] Fifth,[78] Seventh,[79] and Ninth[80] Circuits have opted for the common law approach. The rationale for this framework, however, has not been clearly articulated. The Seventh Circuit noted that "[a]fter *Albright*, one might have thought that our [prior] analysis . . . would not have survived," but opinions from that circuit continue to rely on its pre-*Albright* decisions which employ the common law elements.[81] The Second Circuit has likewise tolerated inconsistency among its precedents, noting its temptation to try "to clarify the law in this area in the wake of the many questions left unanswered by the Supreme Court's fragmented ruling in *Albright*."[82] The result is that it remains unclear in these circuits how adjudicating malicious prosecution claims based on the common law elements is analytically consistent with *Albright*.

In contrast, a majority of the Courts of Appeals including the First,[83] Third,[84] Fourth,[85] Sixth,[86] Tenth,[87] and Eleventh[88] Circuits have argued for an exclusive focus on Fourth Amendment jurisprudence. The First Circuit, for example, has held that "[t]he crux of the inquiry is whether a 'seizure' occurred, for as we have stated before, 'the essential elements of actionable Section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort.'"[89] The Sixth Circuit has used similar language, stating that "establishing a § 1983 cause of action requires a constitutional violation and cannot differ depending on the tort law of a particular state."[90] And the Eleventh Circuit has held that "[w]here the right said to be violated is

[77] Singer v. Fulton Cnty. Sheriff, 63 F.3d 110, 116–18 (2d Cir. 1995) (discussing common law elements).
[78] Kerr v. Lyford, 171 F.3d 330, 340 (5th Cir. 1999).
[79] Reed v. City of Chi., 77 F.3d 1049, 1051–52 (7th Cir. 1996).
[80] Haupt v. Dillard, 17 F.3d 285, 290 (9th Cir. 1994).
[81] *Reed*, 77 F.3d at 1052–53.
[82] Pinaud v. Cnty. of Suffolk, 52 F.3d 1139, 1154 (2d Cir. 1995).
[83] Britton v. Maloney, 196 F.3d 24, 29–30 (1st Cir. 1999).
[84] *Gallo*, 161 F.3d at 222.
[85] Lambert v. Williams, 223 F.3d 257, 262 (4th Cir. 2000).
[86] Frantz v. Vill. of Bradford, 245 F.3d 869, 875 (6th Cir. 2001).
[87] *Taylor*, 82 F.3d at 1561.
[88] Whiting v. Traylor, 85 F.3d 581, 586 (11th Cir. 1996).
[89] *Britton*, 196 F.3d at 28–29 (quoting Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995)).
[90] *Frantz*, 245 F.3d at 875.

the Fourth Amendment, the plaintiff must establish a concrete violation of that right."[91]

It is unlikely that the Supreme Court wanted this as the equilibrium among the federal courts. But it has only itself to blame. The Courts of Appeals would not likely be so divided had the Court not been plagued by such haste and division in *Albright*. But the difference in approaches adopted by the lower courts has reached the point where they are unlikely to resolve a split this deep on their own, which means that the stage is set yet again for the Supreme Court to step in. If it does consider this question again, it would be ideal for the Court to return to first principles and examine whether *Albright*'s rationale for stuffing malicious prosecution claims into the Fourth Amendment was really correct. If the Court gives this question the attention that it deserves, it will see that it was not.

II. WHY *ALBRIGHT* WAS WRONG

One would imagine that *Albright*'s holding would have generated some critical commentary. The division on the Court, the powerful dissent by Justice Stevens, and the split among the Courts of Appeals following the decision indicate that there is much to question about the decision. But nearly all of the scholarly commentary on this subject has eieither summarized the current state of the law or sought to justify the Court's use of the Fourth Amendment.[92] This Part fills the void and argues that *Albright* was wrongly decided. It begins by highlighting the textual inconsistency between malicious prosecution and the Fourth Amendment, and then looks at two amendments that could supply a better fit: the Fifth and Fourteenth Amendments. A careful review of these constitutional provisions illuminates how they trace onto the elements of malicious prosecution much more closely than the Fourth Amendment's seizure provision. This Part then concludes by examining the implications of using the different amendments as constitutional vehicles for malicious prosecution claims.

[91] *Whiting*, 85 F.3d at 586.

[92] See, e.g., Kristin J. Brandon, Case Note, Taking the Tort Out of Constitutional Law: The "Constitutional Tort" of Malicious Prosecution, *Albright v. Oliver*, 114 S. Ct. 807 (1994), 63 U. Cin. L. Rev. 1447 (1995); Jacob P. Goldstein, Note, From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions, 106 Colum. L. Rev. 643 (2006); Ryan, supra note 11; Schillaci, supra note 7; Esther M. Schonfeld, Note, Malicious Prosecution as a Constitutional Tort: Continued Confusion and Uncertainty, 15 Touro L. Rev. 1681 (1999).

A. Inconsistency Between the Fourth Amendment and Malicious Prosecution

The central holding in *Albright* was that the Fourth Amendment was a natural home for the tort of malicious prosecution. But one of the most obvious problems with this holding is that the text of the Fourth Amendment and the elements of malicious prosecution are not related. One of the only statements the Court made as to this relationship was that "the Fourth Amendment's relevance to . . . deprivations of liberty . . . go[es] hand in hand with criminal prosecutions."[93] The Fourth Amendment, however, is not a catch-all provision that encompasses all literal and symbolic deprivations of liberty. Instead, it focuses on three specific things. The first two, searches and seizures, are highlighted in the Amendment's first clause, which reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[94] The second clause in the Fourth Amendment prescribes the procedures to be used when issuing warrants.[95] Importantly, all three of these specific things occur *before* criminal proceedings are initiated. Indeed, they have little to do with judicial proceedings at all.[96] In recognition of this, the Fourth Amendment has been interpreted as regulating law enforcement's task of collecting evidence and arresting suspects, an interpretation which is consistent with its focus on searches, seizures, and warrants.[97]

In contrast, the tort of malicious prosecution has historically been concerned with the use of judicial proceedings, not the collection of evidence or the investigation of crimes.[98] Both malicious prosecution and its sister tort, the wrongful use of civil proceedings, contain elements that focus exclusively on the character of the judicial proceedings that

[93] *Albright*, 510 U.S. at 274.

[94] U.S. Const. amend. IV.

[95] Id.

[96] Gauger v. Hendle, 349 F.3d 354, 363 (7th Cir. 2003) ("[T]he Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions.").

[97] Sherry F. Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 120 (2002) (noting that one of the Supreme Court's seminal decisions on Fourth Amendment searches "continues to regulate the extent of lawful government investigations").

[98] See supra text accompanying notes 11–12; see also Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 Yale L.J. 1218, 1229 (1979) (noting that the "tort of malicious prosecution in England is part of a comprehensive system for *dealing with wrongful litigation*," not searches or seizures (emphasis added)).

were initiated. Moreover, the abuse of process tort, whose title unmistakably indicates its focus on proceedings, is likewise not concerned with searches or seizures.[99] This point is perhaps best illustrated by noting that the common law evolved to create other torts that are likely to arise in the search and seizure context. One who is unlawfully seized by the police would likely have a claim at common law for false imprisonment.[100] That individual might also be able to prevail on an assault and battery claim[101] or on an invasion of privacy claim.[102] In addition, if the officers unlawfully entered the individual's home, they may be liable for trespass.[103] And if they tampered with or stole the individual's personal property during a search, the officers could be liable for conversion[104] or trespass to chattels.[105] The upshot of all of this is that the common law anticipated the injuries related to searches and seizures and created torts which could adequately supply the appropriate remedies.[106] This is all the more reason to think that malicious prosecution was never intended to cure the harm that is a product of police searches and seizures.[107] As should be clear, malicious prosecution was designed to creep into the picture only when the judicial machinery began to turn.

Of course, one does not even need to engage in a detailed legal analysis to see how the act of seizing something and the tort of malicious prosecution are linguistically dissimilar. Black's Law Dictionary defines "seize" as the act of "forcibly tak[ing] possession (of a person or property)."[108] In contrast, it defines "malicious prosecution" as "[t]he institution of a criminal or civil proceeding for an improper purpose and without probable cause."[109] One term fits naturally in the evidence-gathering phase when the police engage in searches and seizures in order to solve

[99] See supra text accompanying notes 16–18.
[100] See Restatement (Second) of Torts § 35 (1965).
[101] Id. §§ 13, 21.
[102] Restatement (Second) of Torts § 652B (1977).
[103] Restatement (Second) of Torts § 158 (1965).
[104] Id. § 222A.
[105] Id. § 217.
[106] Richard A. Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 51 (noting that violations of Fourth Amendment interests have been "traditionally protected by tort actions for assault, battery, false arrest, [and] false imprisonment").
[107] One Court of Appeals has noted that "the Fourth Amendment does not speak of unreasonable 'prosecutions,' and instead refers only to unreasonable 'searches and seizures.'" Britton v. Maloney, 196 F.3d 24, 28 (1st Cir. 1999).
[108] Black's Law Dictionary 1480 (9th ed. 2009).
[109] Id. at 1044.

crimes. The other term focuses on the character of the judicial proceedings initiated against an individual, which no longer concerns evidence-gathering, but instead relates to the prosecution of the case. The linguistic disparity between these two concepts highlights the impropriety of incorporating malicious prosecution claims through the Fourth Amendment.

While there is little in common with the definitions of these words, courts have not shied away from equating the two. A recent example comes from the Fourth Circuit, in an appeal that grew out of the controversy surrounding Duke lacrosse players and rape allegations.[110] The plaintiffs in that case—the lacrosse players—filed a Section 1983 lawsuit against various local officials, and one of the claims was for malicious prosecution.[111] In analyzing the facts of the case, the court noted that no one argued that the "plaintiffs have failed to allege illegal seizures (that is, the indictments)."[112] This statement speaks volumes of *Albright*'s inertia in that federal courts can equate indictments with seizures without so much as a second thought. In reality, the indictment itself is nothing more than a piece of paper that alleges certain crimes the defendant(s) committed. The piece of paper itself does not amount to a seizure, as many people who are indicted were either free from official custody at the time the indictment was filed or were never arrested at all.[113] But this does not mean that an indictment has no effect on an individual's broader liberty interests; Justice Stevens in *Albright* correctly pointed out that a criminal complaint or indictment can seriously diminish one's fundamental liberty interests without effectuating a physical seizure.[114] All of this suggests that to fully capture the interests protected by malicious prosecution, one must incorporate it through an amendment that is not focused on physical seizures.

The ultimate irony in all of this is that the Court in *Albright* created this textual incongruence between the Fourth Amendment and malicious prosecution in the name of textualism. As the Court stated, its holding in *Albright* was guided by *Graham v. Connor*,[115] a decision which sought

[110] Evans v. Chalmers, 703 F.3d 636 (4th Cir. 2012).
[111] Id. at 646–47.
[112] Id. at 647.
[113] See *Albright*, 510 U.S. at 308–09 (Stevens, J., dissenting) (distinguishing between the accusation or indictment and a "seizure").
[114] Id. at 296.
[115] 490 U.S. 386 (1989).

to limit the judicial excesses associated with substantive due process by locating ambiguous constitutional rights in the explicit text of one of the first ten amendments.[116] But *Albright* stands as a clear reminder that unrestrained adherence to squeezing anything and everything into one of the first ten amendments actually undermines the interpretive goal which animated the Court in *Graham*.

B. The Fifth Amendment and Malicious Prosecution

While the Fourth Amendment is not a good fit for malicious prosecution claims, one does not have to immediately jump to substantive due process; the Fifth Amendment can also provide a natural home for malicious prosecution.[117] Contained within the Fifth Amendment is the Grand Jury Clause, which states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[118] In his dissent in *Albright*, Justice Stevens argued that the Grand Jury Clause provides an explicit textual reference for malicious prosecution, likely because its focus on the initiation of criminal proceedings is quite closely aligned with the elements of malicious prosecution.[119] Specifically, the Grand Jury Clause outlines the conditions to be met and the procedures to be used when indicting individuals for certain crimes. Malicious prosecution is similarly concerned with whether the charges brought against a particular defendant were both procedurally proper and sufficiently substantiated. Thus, both

[116] *Albright*, 510 U.S. at 273. Scholars have also noted the Rehnquist Court's unfriendly attitude toward substantive due process. See, e.g., Rosalie B. Levinson, Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process, 16 U. Dayton L. Rev. 313, 316 n.18 (1991) (collecting cases); Wells, supra note 6, at 623 (arguing that the Rehnquist Court's focus on squeezing constitutional torts into one of the first ten amendments has had "grave consequences for constitutional tort rights").

[117] U.S. Const. amend. V. The Fifth Amendment also contains a Due Process Clause, which states that no person shall "be deprived of life, liberty, or property, without due process of law." Id. One might conclude that this provision could also serve as a textual home for malicious prosecution, given its focus on proceedings. This analysis, though, is unnecessary. The Fifth Amendment only applies to the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833). Section 1983, on the other hand, only provides a cause of action against state and local officials. 42 U.S.C. § 1983 (2006). If due process were the appropriate vehicle for incorporating malicious prosecution claims in § 1983 actions, it would be the Fourteenth Amendment's Due Process Clause doing the work, which explicitly applies to the states. U.S. Const. amend. XIV.

[118] U.S. Const. amend. V.

[119] *Albright*, 510 U.S. at 302–03 (Stevens, J., dissenting).

mechanisms share the fundamental characteristic of scrutinizing the initiation of criminal proceedings.

Justice Kennedy challenged this argument in his concurrence in *Albright*. He claimed that there was no standard for the initiation of a criminal proceeding built into the Fifth Amendment.[120] There are, however, two responses to this argument. First, even assuming arguendo that Justice Kennedy is right, the Fifth Amendment is still more textually analogous to malicious prosecution than the Fourth Amendment's seizure provision. The procedure in the Grand Jury Clause that must be followed for initiating criminal proceedings is very similar to the elements of malicious prosecution.[121] This is not a perfect fit though, as we assume that the Fifth Amendment does not supply a standard for initiating criminal proceedings (while malicious prosecution does). But it is a mistake to think that because this is less than a perfect fit, the Court should instead opt for incorporating malicious prosecution through the Fourth Amendment, which hardly provides any fit at all.

The second, and more important, response is that Justice Kennedy is wrong to say that the Fifth Amendment does not supply a standard for the initiation of criminal proceedings. He cited two cases to support this proposition in his concurrence in *Albright*. The first case, *Gerstein v. Pugh*,[122] held that "a judicial hearing is not prerequisite to prosecution."[123] This statement, however, does not say that there is no standard for the initiation of a criminal prosecution; whether there needs to be a judicial hearing and whether a criminal complaint must be based on probable cause are two different things. Moreover, Justice Kennedy's reliance on *Gerstein* cannot be squared with explicit language from a key part of that opinion. The Court in *Gerstein* also held that "[t]he standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt."[124] Thus, the case cited by Justice Kennedy in support of his argument actually contains language that undermines his claim.[125]

[120] Id. at 282 (Kennedy, J., concurring).
[121] See supra text accompanying notes 11–12.
[122] 420 U.S. 103 (1975).
[123] Id. at 119.
[124] Id.
[125] *Gerstein* contained some language in a footnote, which further muddies the water. It stated that "[b]ecause the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein*, 420 U.S. at 125 n.26. There are

The second case he relied on was *Costello v. United States*, which held that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information [sic] drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."[126] This quote was included in a parenthetical in Justice Kennedy's concurrence. But curiously, the phrase "if valid on its face" was edited out.[127] One can easily see that this had little to do with economizing on space—the full quote is thirty-five words, and the ellipses only eliminated five. Justice Kennedy likely edited the quote as he did because the phrase "if valid on its face" indicates that there is some threshold—such as probable cause—that an indictment must overcome to be legitimate. But this is exactly what he was arguing the Fifth Amendment does not require. Thus, Justice Kennedy's support for the claim that the Fifth Amendment does not contain a standard for the initiation of criminal proceedings rested on two cases that were contradicted by language from those very opinions.

Aside from the inability of *Costello* and *Gerstein* to support Justice Kennedy's claim, there are numerous cases in which the Supreme Court has said that prosecutions may be initiated only on probable cause under the Fifth Amendment. In *Bordenkircher v. Hayes*, the Court held that "[i]n our system, so long as the prosecutor *has probable cause* to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion."[128] In *United States v. Lovasco*, the Court held that "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause."[129] And in *United States v. Calandra*, the Court went so far as to say that one of the grand jury's "historic functions" was to de-

three reasons, though, why this still does not support Justice Kennedy's argument. First, this language was dicta and buried in a footnote. If this language were truly a critical pronouncement interpreting the Fifth Amendment's Grand Jury Clause, it would have appeared as a holding in the body of the opinion. Second, *Gerstein* offers no reason why probable cause is the charging standard only for those who "suffer restraints on liberty other than the condition that they appear for trial." Id. There is no textual or historical evidence offered to indicate that the Fifth Amendment drew the line in such an arbitrary manner, and Justice Kennedy in *Albright* cited no authority for this two-tiered interpretation. Finally, even if this language is a holding and is legally correct, it still means that *Gerstein*, at best, is internally inconsistent. See id. at 119 (making a contrary statement).

[126] 350 U.S. 359, 363 (1956).

[127] *Albright*, 510 U.S. at 282.

[128] 434 U.S. 357, 364 (1978) (emphasis added).

[129] 431 U.S. 783, 791 (1977).

termine "whether there is probable cause to believe a crime has been committed."[130] All of these decisions consistently reinforce the notion that prosecutions cannot begin on less than probable cause. The result is that, contrary to Justice Kennedy's *Albright* concurrence, there is ample Supreme Court authority for the argument that the Fifth Amendment's Grand Jury Clause does supply some threshold for the initiation of criminal proceedings, which makes it even more analogous to malicious prosecution.

Additionally, one need not look only to case law to see that the Fifth Amendment should be read to supply just such a threshold. This can also be gleaned by reading the Fifth Amendment in conjunction with basic understandings of the common law. Given the tort of malicious prosecution's well-known legal history, it is part and parcel of the common law.[131] Incorporated within this tort, as explained above, is the requirement that the plaintiff show that the prosecution was initiated without probable cause.[132] This stems from the fact that probable cause was the standard for initiating criminal proceedings at common law, as an indictment which was based on probable cause could hardly have been said to be malicious. Justice Stevens in *Albright* made this very argument, as he noted that it "has been the historical practice" to require that a criminal prosecution start on nothing less than probable cause, and that this "is reflected in the common-law tort of malicious prosecution."[133] This common law requirement of probable cause, embedded in an element of malicious prosecution, should provide content to the Fifth Amendment's Grand Jury Clause.

If the Court were inclined to reconsider incorporating malicious prosecution through the Grand Jury Clause, it would have to overrule *Hurtado v. California*.[134] In *Hurtado*, the Court held that the Grand Jury Clause did not apply to the states through the Fourteenth Amendment.[135] Thus, an individual could never sue state or local officials under Section 1983 for violating the Grand Jury Clause because that provision does not apply to state or local actors. However, there is good reason to overrule

[130] 414 U.S. 338, 343 (1974).

[131] See supra text accompanying notes 11–12.

[132] See supra text accompanying notes 11–12.

[133] *Albright*, 510 U.S. at 296–97 (Stevens, J., dissenting) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 119, at 876–82 (5th ed. 1984)).

[134] 110 U.S. 516 (1884).

[135] Id. at 538.

Hurtado. First, the case was decided in 1884, well before the fever of Fourteenth Amendment incorporation swept the Court.[136] This point was noted by the plurality in *Albright*, when it said that "[i]n the more than 100 years which have elapsed since *Hurtado* . . . the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth Amendment."[137] *Hurtado* made sense in an era where the Fourteenth Amendment did little work on the incorporation front. But in the century that has elapsed since, the constitutional default rule has shifted to nearly automatic Fourteenth Amendment incorporation. Second, the Fifth Amendment's Grand Jury Clause has the requisite fundamental character to merit incorporation.[138] The provision has connection to traditional common law ideals,[139] and the Court's previous pronouncement on the grand jury's historic function indicates that the Court itself should have little trouble conceding the clause's fundamental nature.[140] All of this is to say that if the Court were to use the Fifth Amendment for malicious prosecution claims, *Hurtado* should not stand in its way.[141]

C. Malicious Prosecution and Substantive Due Process

The previous Section illustrates that there is a good argument for incorporating malicious prosecution through the Fifth Amendment's Grand Jury Clause. In addition to this provision, malicious prosecution also naturally fits into the amendment that the Court in *Albright* said it could not. That provision is the Fourteenth Amendment's Due Process Clause. The Supreme Court has made a number of statements throughout its history that have attempted to elucidate what exactly it is that the Fourteenth Amendment's Due Process Clause protects. It has said that state action which does not violate one of the first ten amendments may

[136] See *Albright*, 510 U.S. at 272–73.

[137] Id. at 272.

[138] Palko v. Connecticut, 302 U.S. 319, 325 (1937) (noting that the Fourteenth Amendment only incorporates those rights which are "found to be implicit in the concept of ordered liberty").

[139] See supra notes 131–33.

[140] See supra note 131.

[141] If the Court held that the Fifth Amendment's Grand Jury Clause is the appropriate vehicle for incorporating malicious prosecution claims, plaintiffs would need to ensure that they do not sue the prosecutor who filed the charges, as he would generally have absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 421–24 (1976). Plaintiffs could instead devise a theory that implicated police officers, who only have qualified immunity.

still be unconstitutional under the Due Process Clause if it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[142] It has elsewhere said that state action which "shocks the conscience" is a violation of the Due Process Clause.[143] And at bottom, the Court has held that the fundamental purpose of substantive due process is to "secure the individual from the arbitrary exercise of the powers of government."[144]

There is ample evidence that malicious prosecution is sufficiently fundamental to be incorporated through substantive due process. The tort has been a focus of courts for nearly one thousand years,[145] and in acknowledging this deep historical legacy, nearly every state has recognized a cause of action for malicious prosecution, as well as Puerto Rico and the District of Columbia.[146] Indeed, the Court itself is aware of the tort's ancient character: It recognized that a claim for malicious prosecution would lie when a prosecution was initiated without probable cause as early as 1851.[147] The Court has likewise held that the need to show probable cause before a prosecution begins is a "long-prevailing standard[]."[148] Thus, the Court has been perfectly willing in the past to discuss malicious prosecution and its built-in probable cause element as a common law tort that is steeped in our legal tradition. A tort with such historical depth and widespread acknowledgment among the fifty states should easily satisfy the Supreme Court's criteria for substantive due process protection.

Aside from its fit into the Court's criteria for fundamental rights, malicious prosecution naturally gels with the phrase "due process." Due process is, at the very least, a check on procedure. Its primary concern is whether life, liberty, or property is deprived without following constitutionally adequate procedures.[149] This component of due process does not scrutinize the substance or correctness of the deprivation at hand, but on-

[142] Medina v. California, 505 U.S. 437, 445 (1992) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

[143] Rochin v. California, 342 U.S. 165, 172 (1952).

[144] *Hurtado*, 110 U.S. at 527 (1884); see Peter J. Rubin, Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights, 103 Colum. L. Rev. 833, 841–42 (2003).

[145] See supra text accompanying note 11.

[146] Megan K. Dorritie, Cause of Action for the Malicious Prosecution of Civil Actions, *in* 32 Causes of Action 2d 131 (Clark Kimball & Cecily Fuhr eds., 2006).

[147] Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 402 (1851).

[148] Brinegar v. United States, 338 U.S. 160, 176 (1949).

[149] Baker v. McCollan, 443 U.S. 137, 145 (1979).

ly whether the decision to deprive was reached by following constitutionally sufficient procedures.[150] This focus on procedure directly ties into the elements of malicious prosecution, as it is fundamentally a tort that is designed to remedy a misuse of judicial proceedings. One might also argue that a prosecution begun without probable cause and with malicious intent is hardly process that is due. This textual and historical similarity between malicious prosecution and due process thus creates a strong case for using substantive due process as the constitutional vehicle in Section 1983 lawsuits.

Admittedly, the Due Process Clause has been used to protect certain rights that have little textual relationship to process. Abortion rights are one example.[151] This was no doubt a key contributor to the Court's aversion in *Albright* to using substantive due process as the constitutional gateway. But incorporating malicious prosecution through the Fourteenth Amendment does not require interpretive gymnastics. To the extent one is concerned that substantive due process will give judges license to unjustifiably modify malicious prosecution, that concern is didiminished because malicious prosecution is so strongly anchored to its common law roots.[152] Those roots shaped the tort in the past, and will continue to supply it with content in the future. Moreover, given the tort's operation in the states for so long, and the lack of evidence that courts have taken excessive liberties with its elements, this fear should not be a reason to avoid using the Fourteenth Amendment. Indeed, it is difficult to imagine a more snug fit than the one between malicious prosecution and due process.

D. The Implications of Different Amendments and the State-Federal Divide

The argument thus far has revolved around determining the best constitutional amendment to use for malicious prosecution claims in Section 1983 lawsuits. But lurking in the background of this discussion is what the implications of this question are. One can envision two parts to this analysis. First, does it matter whether malicious prosecution is incorpo-

[150] Id. Due process has also been supplemented with another layer of protection, which stands for the proposition that some state action can be so egregious or arbitrary that no amount of due process will save it from constitutional invalidity. See Daniels v. Williams, 474 U.S. 327, 331 (1986).

[151] See Roe v. Wade, 410 U.S. 113 (1973).

[152] For an extensive summary of malicious prosecution's history, see Note, supra note 98.

rated through the Fourth, Fifth, or Fourteenth Amendment? And second, does it matter if malicious prosecution is not even incorporated at all into the Section 1983 regime, and instead relegated solely to state courts? The implications of the first question are clear because the contours of each amendment will significantly affect how malicious prosecution operates in the federal system. The implications of the second question are less certain, mainly because it depends on the perceived costs and benefits associated with the state and federal judiciaries.

The first concern looks at the consequences of using the different amendments. As to the Fourth Amendment, there are two serious implications. First, using the Fourth Amendment functionally eliminates the common law elements of malicious prosecution. After *Albright*, a majority of the Courts of Appeals have indicated that malicious prosecution claims must be evaluated based on Fourth Amendment jurisprudence.[153] Under this theory, a plaintiff needs to show a Fourth Amendment violation (a seizure) to prevail on his malicious prosecution claim.[154] But if the plaintiff can show a Fourth Amendment violation by state or local officers acting under color of law, *that alone is enough* to secure a remedy in a Section 1983 action. Thus, no one will get to the elements of malicious prosecution because the primary violation—the Fourth Amendment claim—is sufficient on its own to generate relief.[155] The result is that malicious prosecution loses its common law flair entirely and is merely duplicative of the Fourth Amendment analysis that is the primary consideration.

The second implication of using the Fourth Amendment is that it forecloses the use of malicious prosecution's sister torts—the wrongful use of civil proceedings and abuse of process.[156] The Fourth Amendment's search and seizure provisions regulate the use of law enforcement in collecting evidence and arresting suspects pursuant to criminal

[153] See supra text accompanying notes 83–91.

[154] Gallo v. City of Phila., 161 F.3d 217, 222 (3d Cir. 1998) (noting that "*Albright* implies that prosecution without probable cause is not, in and of itself, a constitutional tort," and that instead, "the constitutional violation is the deprivation of liberty accompanying the prosecution").

[155] Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001) ("[I]f a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'"); Lambert v. Williams, 223 F.3d 257, 260 (4th Cir. 2000) ("What is conventionally referred to as a '§ 1983 malicious prosecution' action is nothing more than a § 1983 claim arising from a Fourth Amendment violation.").

[156] See supra text accompanying notes 13–18.

allegations. The culmination of this work is almost always a criminal indictment. This criminal context means that there will never be an abuse of civil proceedings because civil proceedings are usually never initiated. What is more, the prerequisite of an underlying Fourth Amendment violation is inconsistent with the flexible design of the abuse of process tort. Abuse of process was supposed to be a catch-all for the misuse of proceedings, but *Albright*'s holding removed much of its bite by first requiring a specific constitutional violation. Part of the reason the Court did not foresee this is because it never really wrestled with the history of malicious prosecution or its sister torts.

Textually speaking, the Fifth Amendment is a more natural fit for malicious prosecution than the Fourth Amendment.[157] But it could, however, suffer from the same duplicity concerns that are present in the Fourth Amendment. If the Court were to hold that malicious prosecution is only actionable if there is an underlying Fifth Amendment violation, then no Section 1983 plaintiff needs the common law elements of malicious prosecution because the Fifth Amendment on its own provides relief. Perhaps the Court could temper this and hold that the Fifth Amendment's Grand Jury Clause is merely a vehicle, and that a plaintiff who can prove all of the common law elements of malicious prosecution can get relief irrespective of a Fifth Amendment violation. While this would be better, it still does not address the fact that the Fifth Amendment only applies to criminal proceedings. This fact would weed out the wrongful use of civil proceedings and diminish the flexibility inherent in the abuse of process tort by restricting its operation to the criminal context.

This brings us to the Fourteenth Amendment's Due Process Clause. None of the potential issues associated with the Fourth or Fifth Amendment would arise in this context. There would be no duplicity concerns because the Due Process Clause is somewhat akin to an empty vessel. Its content generally comes from the common law and the specific guarantees in the federal Constitution.[158] In other words, there is no risk that an independent constitutional amendment would make malicious prosecution duplicitous because the Due Process Clause does not truly have any independent content. Moreover, there is no reason to assume that this would crowd out malicious prosecution's sister torts. The wrongful use

[157] See supra text accompanying notes 117–41.

[158] See Rubin, supra note 144, at 843 ("[T]he incorporation of Bill of Rights provisions provides some content to fundamental rights analysis under the Fourteenth Amendment's Due Process Clause . . . .").

of civil proceedings could still be used because the Due Process Clause continues to bind the government in civil proceedings. And the open-ended nature of due process itself would adequately accommodate the fluid character of the abuse of process tort. Framed in this light, it is ideal for malicious prosecution to be incorporated through the Fourteenth Amendment's Due Process Clause.[159]

The second level of implications that is worth examining is whether it matters if malicious prosecution claims are heard by federal courts in Section 1983 actions or by state courts in common law actions. There are a number of potential reasons one might desire a federal forum for constitutional torts. Federal courts might have different procedures, more competent judges, less bias toward outsiders, or might simply be more sensitive to protecting federal rights.[160] As one scholar has noted, the growth in Section 1983 litigation in federal courts is "based upon the premise that state courts cannot be fully trusted to enforce federal rights."[161] However, the need for federal oversight is not without controversy, as some believe that the differences between state and federal courts that necessitated legal mechanisms like diversity jurisdiction no longer exist.[162]

Fortunately, this controversial debate does not need to be resolved to adequately answer the narrower question of whether federal courts can more ably adjudicate claims of malicious prosecution than state courts. There are few obvious reasons to suppose that they can. Issues of judicial competence are unlikely to arise because the evaluation of a claim for malicious prosecution does not require complex analysis. State judges are not, for example, asked to rummage through constitutional text, history, and structure and decide the meaning of hopelessly ambiguous language when adjudicating claims of malicious prosecution. Instead, the elements of the tort are well-established. All state judges have to do

[159] To be clear, it is important to emphasize that the Fifth Amendment is still a much better option for incorporating malicious prosecution into § 1983 actions than the Fourth Amendment. See supra text accompanying notes 118–43. Though the Fourteenth Amendment would be the ideal vehicle, the Court is unlikely to warm up to substantive due process in the near future. Thus, the likely choice would be between the Fourth and Fifth Amendments, and the Court should opt for the latter.

[160] See Thomas B. Marvell, The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation, 1984 Wis. L. Rev. 1315, 1330–36.

[161] Victor E. Flango, Litigant Choice Between State and Federal Courts, 46 S.C. L. Rev. 961, 962 (1995).

[162] James M. Underwood, The Late, Great Diversity Jurisdiction, 57 Case W. Res. L. Rev. 179, 196–201 (2006).

is apply the facts—which speak to the motivation for initiating the lawsuit and whether there was probable cause—to settled law. Factual inquiries such as these confront state judges all of the time, and there is no evidence to suggest that they cannot correctly resolve them. What is more, there is little reason to think that state judges will not be sufficiently vigorous in enforcing these rights.[163] State courts have been adjudicating malicious prosecution claims for centuries, and no court or scholar has advanced any evidence that state courts regularly downplay or ignore malicious prosecution claims.

What we are left with, at this point, is some tension regarding the implications of the question this Note addresses. On the one hand, there is good reason to think that it does matter which amendment is used to incorporate malicious prosecution claims into Section 1983. On the other hand, there is far less reason to think that federal courts are more capable of adjudicating these claims than state courts. There is a chance that the Supreme Court could hold in the future that malicious prosecution is, in fact, not a constitutional tort, and thus not actionable in a Section 1983 lawsuit. But it at least hinted in *Albright* that this would not happen because it instructed lower federal courts to use the Fourth Amendment in evaluating these claims.[164] Consequently, it seems unlikely that we will be confronted with a situation where malicious prosecution claims cannot be heard in federal court. The remaining issue, then, is which amendment is the appropriate vehicle, and it certainly does matter which one the Court chooses.

III. MALICIOUS PROSECUTION, THE COMMON LAW, AND ARREST WARRANTS

The preceding Part laid out a positive argument for incorporating malicious prosecution through either the Fifth or Fourteenth Amendment. This Part adopts a reactive stance and responds to two particular arguments made by commentators who have written in this area. The first argument is that the common law elements of malicious prosecution should not be used in a Section 1983 lawsuit. The second argument is that the Fourth Amendment can sensibly incorporate malicious prosecu-

[163] See also William B. Rubenstein, The Myth of Superiority, 16 Const. Comment. 599, 612–21 (1999) (arguing that state courts are more receptive to the claims of gay-rights plaintiffs than federal courts).

[164] *Albright*, 510 U.S. at 274.

tion claims under a framework that ties them to arrest warrants. After a review of these commentators' arguments, this Note argues that neither of these claims is persuasive.

A. Malicious Prosecution and the Common Law

One commentator has argued that malicious prosecution claims should be judged based on uniform principles of federal constitutional law, rather than common law tort elements.[165] This author's argument rests on three claims. First, both Supreme Court precedent and the statutory text of Section 1983 indicate that federal law should control how Section 1983 actions are resolved.[166] This is based on the Court's doctrinal approach to giving content to Section 1983, as well as the unique history of the 1871 Civil Rights Act, which spawned the modern Section 1983 statute.[167] The second claim is that the tort of malicious prosecution and Section 1983 protect very different interests.[168] This argument emphasizes the fact that the tort has developed as part of a delicate compromise throughout history, while Section 1983 "has not been the subject of the[se] tradeoffs."[169] The final peg in this commentator's argument is that using the common law elements of Section 1983 would make it too difficult for civil rights plaintiffs to prove their claims.[170] Many Fourth Amendment violations could occur based only on negligent conduct, but this does not satisfy the intent element necessary to establish malicious prosecution.[171]

Each one of these arguments has a number of flaws. The first claim errs by assuming that *Albright* is correct on the merits. Specifically, the author begins with the premise that "[d]evelopments since *Albright* have pointed to the Fourth Amendment as the substantive right that forms the basis of a" malicious prosecution claim.[172] The remaining argument is therefore wholly dependent on whether this initial premise is correct. As

[165] Schillaci, supra note 7, at 442. Another scholar has made a similar claim. See Charissa A. Eckhout, Note, Section 1983 and the Tort of Malicious Prosecution: A Tenth Circuit Historical Analysis, 82 Denv. U. L. Rev. 499, 514–17 (2005). This Note, however, responds to the points raised only in the Schillaci note.

[166] Schillaci, supra note 7, at 462–66.

[167] Id. at 462–66, 468.

[168] Id. at 467–69.

[169] Id. at 469.

[170] Id.

[171] Id.

[172] Id. at 462.

explained above, there is reason to think that it is not.[173] Moreover, if a Section 1983 claim for malicious prosecution is supposed to be incorporated using Fourth Amendment doctrine, the author does not address the duplicity argument—why would anyone need malicious prosecution when the underlying Fourth Amendment violation provides relief on its own? Of course, the common law elements of malicious prosecution would be used if the tort were incorporated through the Fourteenth Amendment, but this argument receives no attention because "[a]fter *Albright*, the possibility of premising a claim similar to malicious prosecution on substantive due process is very doubtful."[174] Again, the scope and tenor of the argument is premised on the belief that *Albright* was correct.

The author also seeks to buttress his first point by relying on the Supreme Court's opinion in *Baker v. McCollan*.[175] The author alleges that *Baker* "criticize[d] the Fifth Circuit's use of the common-law tort elements of false imprisonment to define the scope of the § 1983 action."[176] The Court, however, never did such a thing. What it did do is note that the lower court opinion defined the cause of action "exclusively in terms of traditional tort-law concepts," but held that the court erred by not "specifically identify[ing] the constitutional right allegedly infringed in this case."[177] The failure to identify the constitutional right is not the same as erring by using the common law elements of false imprisonment. The common law elements could have been relevant if the lower court specified it was incorporating false imprisonment through the Fourteenth Amendment's Due Process Clause. But the Court in *Baker* would have likely displayed the same animosity toward substantive due process that it did in *Albright*. To the extent this would have made the common law analysis improper, it is only so because the Court insists on avoiding substantive due process at all costs, a choice that is not without controversy.[178] What is more, even if we put this to one side and give

[173] See supra text accompanying notes 93–116.
[174] Schillaci, supra note 7, at 463.
[175] 443 U.S. 137 (1979).
[176] Schillaci, supra note 7, at 463.
[177] *Baker*, 443 U.S. at 142.
[178] The author ends this section by making a curious argument. He notes that the subjective intent of police officers is generally not relevant in Fourth Amendment law, but that malicious prosecution requires some showing of subjective malice. Taken together, this means that the common law elements should not control the outcome. Schillaci, supra note 7, at 465–66. This, though, is all the more reason to think that the Fourth Amendment and mali-

Baker the generous reading the author does, it cannot be squared with other Supreme Court cases that embrace traditional tort law concepts in Section 1983 actions. The Court has "'repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability,'"[179] and has held that it is proper to interpret Section 1983 "in light of the 'background of tort liability.'"[180]

The second argument made by the author is that the interests protected by the Fourth Amendment and those protected by malicious prosecution are different.[181] But on close examination, one can say that all of this analysis actually hurts the author's claim. Much of the discussion goes to great lengths to distinguish malicious prosecution claims from Fourth Amendment doctrine.[182] Based on this disparity, the reader is left with the impression that there is no sound basis to argue that *Albright* was actually correct. This, however, undercuts the author's central premise. It is thus difficult to determine how much mileage the author actually gets from explaining the numerous differences between malicious prosecution and the Fourth Amendment.

The author's final argument is that employing the common law elements of malicious prosecution would make it too hard for Section 1983 plaintiffs to obtain relief. The author's point is crystallized when he says that "[t]o leave these plaintiffs without redress because they cannot prove malicious intent pokes a hole in the § 1983 regime."[183] This argument, though, simply begs the question whether one should be entitled to relief if one cannot prove all of the elements of the claim. Simply stating that proving malicious intent is hard for litigants does not address, from a normative standpoint, why a particular element should not be re-

cious prosecution are not related, which undermines the author's basic premise that *Albright* was correct.

[179] Heck v. Humphrey, 512 U.S. 477, 483 (1994) (quoting Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)).

[180] City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 709 (1999) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

[181] Schillaci, supra note 7, at 466–69.

[182] At one point, the author notes that "the scope of the policy interests protected by the malicious prosecution is much broader than that of the Fourth Amendment," highlighting that while "the Fourth Amendment is generally understood to protect only pre-arraignment interests in bodily integrity . . . the bodily integrity interests protected by malicious prosecution extend from the time of arrest up until the acquittal of the plaintiff." Id. at 437.

[183] Id. at 469.

quired.[184] Indeed, one could lodge this objection against any multifactor test and claim that a particular factor makes it harder to obtain relief by imposing an additional hurdle. But this argument is unlikely to be persuasive in any context; instead, it should be shown why it is normatively undesirable to have that factor in the first place. Furthermore, the author's claim that "search and seizure" plaintiffs will be disadvantaged ignores the fact that if there is an independent search or seizure violation, the plaintiff will be able to secure relief under Section 1983 regardless of whether he can meet the elements of malicious prosecution.[185] The author's confusion on this point is best encapsulated when he says that "[t]he difference between simply showing a constitutional deprivation and showing a constitutional deprivation plus some common-law tort elements is significant."[186] He fails to grasp that there is no need to show common law tort elements when there is already a constitutional violation independent of a malicious prosecution claim.[187]

B. The Dissimilarity Between Malicious Prosecution and Arrest Warrants

In an effort to justify the holding in *Albright*, another commentator has argued that malicious prosecution can be incorporated through the Fourth Amendment because of its similarity to arrest warrants.[188] The heart of the argument is captured in the claim that "[t]he exclusionary rule cases sparked by *Franks v. Delaware* present a viable analogue to the malicious prosecution tort remedy."[189] The *Franks* case dealt with a criminal defendant's ability to challenge a search warrant which con-

[184] Given the traditional requirement in malicious prosecution claims of malicious intent, it would be difficult to justify eliminating this element from the tort.

[185] Schillaci, supra note 7, at 469.

[186] Id. at 471.

[187] The author also includes a discussion on how the malicious intent requirement would affect police incentives. He claims that § 1983 should create strong incentives for police to conform their conduct to the Constitution, and states that "[i]mposing an intent requirement on § 1983 search-and-seizure plaintiffs undermines such an incentive." Schillaci, supra note 7, at 470. But once again, even if one cannot prove malicious intent on the part of the police, an unreasonable search or seizure will still give rise to § 1983 liability on its own, assuming the police officer would not have qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that law enforcement officers are only liable for their violation of "clearly established statutory or constitutional rights of which a reasonable person would have known").

[188] See Goldstein, supra note 92, at 657.

[189] Id. at 659.

tained a materially false statement, and that without the information in that statement, lacked probable cause.[190] According to the author, there are three similarities between malicious prosecution and *Franks* claims. First, a remedy is available in both cases for conduct relating to the initiation of a prosecution.[191] Second, a remedy is available only upon a lack of probable cause.[192] And third, the "mere absence of probable cause" cannot generate relief on its own.[193]

The next part of the author's argument examines two distinctions: the distinction between malicious prosecution and the Fifth Amendment's Grand Jury Clause, and the distinction between malicious prosecution and the tort of false arrest.[194] The author notes that while malicious prosecution has an intent element, the Fifth Amendment's Grand Jury Clause does not, making it an imperfect fit for malicious prosecution.[195] But the intent element may serve the same purpose as qualified immunity, and since qualified immunity is always available in the realm of constitutional torts, malicious prosecution could theoretically be actionable without the intent element.[196] The author then describes the differences between the tort of false arrest and malicious prosecution.[197]

The final section of the author's argument is devoted to responding to three possible objections. First, the author claims that the scope of the Fourth Amendment is broad enough to incorporate malicious prosecution, and looks to Justice Ginsburg's continuing seizure theory in *Albright* for support.[198] Second, the author examines whether the Fourth Amendment claim is really just substantive due process "dressed up" in the language of seizures.[199] While he does not reach a clear answer, he believes that the answer is "theoretically inconsequential."[200] Lastly, he discusses whether

[190] Franks v. Delaware, 438 U.S. 154, 155–56 (1978); see also Goldstein, supra note 92, at 659–60.
[191] Goldstein, supra note 92, at 661.
[192] Id. at 661.
[193] Id. at 662.
[194] Id. at 663–67.
[195] Id. at 663–64.
[196] Id. at 664–65.
[197] Id. at 666–67.
[198] Id. at 668–70.
[199] Id. at 670.
[200] Id. at 671.

a claim for malicious prosecution would be barred by *Parratt v. Taylor*,[201] and concludes that it would not be.[202]

The central claim in the author's argument is that *Franks* provides an appropriate constitutional analogy to malicious prosecution. One of the first issues with this argument is that *Franks* does not mention malicious prosecution. It does not draw an analogy to malicious prosecution when it outlines the Fourth Amendment right to be free from defective warrants, and it does not suggest that an arrest warrant procured before judicial proceedings have been initiated is similar to a defective indictment that begins those very proceedings. Moreover, even discussing the analogy to an arrest warrant is a red herring. Both the Court in *Albright* and the lower courts since have located malicious prosecution in the Fourth Amendment's seizure provision.[203] Not a single court has linked a Section 1983 claim for malicious prosecution to an arrest warrant.

Beyond these initial hurdles, the author's claim that there are three similarities between malicious prosecution and the *Franks* line of reasoning does not stand up to scrutiny. Though these similarities exist, they are not exclusive to only malicious prosecution and *Franks*. For example, while both claims require an absence of probable cause, this is also needed for a violation of the search and seizure provisions in the Fourth Amendment and the Grand Jury Clause in the Fifth Amendment, among others. Likewise, both malicious prosecution and *Franks* require some level of culpability beyond mere negligence (such as malicious intent), but this element is also present in libel actions, for example.[204] What is more, one might argue that the author cherry-picked these similarities and ignored the differences between the claims. While a plaintiff in a malicious prosecution action must show that the proceeding terminated in his favor, he does not need to prove that in a *Franks* claim.[205] And while malicious prosecution is supplemented by related torts which

[201] 451 U.S. 527 (1981).

[202] Goldstein, supra note 92, at 672–77. The analysis of this question by the author is quite good, and this Note agrees with its conclusion.

[203] *Albright*, 510 U.S. at 274 (noting that the Fourth Amendment link was that Albright had "submitted himself to arrest," or in other words, submitted to the seizure); Evans v. Chalmers, 703 F.3d 636, 647 (4th Cir. 2012); Britton v. Maloney, 196 F.3d 24, 28–29 (1st Cir. 1999); Gallo v. City of Phila., 161 F.3d 217, 222 (3d Cir. 1998); Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996); Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996).

[204] The author notes this similarity to libel law himself. Goldstein, supra note 92, at 662.

[205] See supra text accompanying note 12.

apply in the civil context, the same is not true for actions under *Franks*.[206]

The author next argues that malicious prosecution can serve a useful role by providing Section 1983 plaintiffs with relief, as the exclusionary rule—the sole remedy for *Franks* violations—provides plaintiffs with no compensation.[207] However, the fact that a malicious prosecution claim can patch up some holes in the exclusionary rule does not also mean that the tort needs to be incorporated through the Fourth Amendment. A claim for malicious prosecution can still provide compensation for victims of Fourth Amendment violations if it is incorporated through either the Fifth or Fourteenth Amendment. Thus, this claim gets us no closer to actually understanding why the text and history of the Fourth Amendment make it similar to the elements of malicious prosecution.

The next part of the author's argument discusses two legal mechanisms that are distinct from malicious prosecution. The first is the Fifth Amendment's Grand Jury Clause.[208] The author concedes that the Fifth Amendment might be a better home for malicious prosecution than the Fourth Amendment, as he states that this "more extensive right to be free from prosecution without probable cause suffices for the goal of locating a textual home for . . . malicious prosecution."[209] But he notes that this is not a perfect fit because the Fifth Amendment's Grand Jury Clause does not require a showing of malicious intent.[210] This, though, suffers from the same flaw as Justice Kennedy's concurrence in *Albright*.[211] Just because the Fifth Amendment is not a perfect fit does not mean that malicious prosecution should be incorporated through the Fourth Amendment, which has even less in common with malicious prosecution. Moreover, the author hurts his argument by noting that the "Restatement views lack of probable cause as evidence that the accuser acted with an improper purpose."[212] He thus builds the case that even without an explicit requirement of malicious intent, the Fifth Amendment's prohibition on prosecution without probable cause can implicitly track malicious prosecution's intent element. But, according to the au-

[206] See supra text accompanying notes 13–18.
[207] Goldstein, supra note 92, at 662–63.
[208] Id. at 663.
[209] Id.
[210] Id. at 664.
[211] See supra text accompanying notes 120–21.
[212] Goldstein, supra note 92, at 664.

thor, the malice element might not even be necessary because qualified immunity serves the same function.[213] Yet if we ignore the common law requirement of malicious intent and rely solely on the Fourth or Fifth Amendment's text plus qualified immunity, why are we even talking about malicious prosecution? Violations of those amendments themselves will trigger liability under Section 1983, assuming official immunity does not apply. The author's theory thus eliminates any need for malicious prosecution as a constitutional tort and suffers from the same duplicity concerns mentioned above.[214]

The author then proceeds to distinguish malicious prosecution from the tort of false arrest.[215] The relevance of this discussion, though, is not immediately apparent. The common law tort of false arrest could not incorporate malicious prosecution into the constitutional framework because it is not a constitutional amendment. While certain common law torts might be constitutionally protected if they can be located in the text of an amendment, a common law tort cannot be constitutionally incorporated through another common law tort.[216] To the extent the author views a false arrest claim as a Fourth Amendment violation, then this is nothing more than arguing that malicious prosecution should be incorporated through the Fourth Amendment, which is subject to the same criticisms as the plurality opinion in *Albright*.[217]

The last section in the author's note responds to two lingering issues surrounding the incorporation of malicious prosecution into Section 1983 claims. First, the author states that the scope of the Fourth Amendment can accommodate malicious prosecution, even though there is uncertainty over where the outer boundary of the Fourth Amendment lies.[218] This, though, assumes that the Fourth Amendment is the proper vehicle for incorporating malicious prosecution. Thus, if one does not believe that the link between *Franks* and malicious prosecution is that tight, this argument carries less weight. In the second part, the author argues that there are similarities between the Fourth Amendment and substantive due process, but that the choice of incorporating malicious pros-

[213] Id. at 664–65.

[214] See supra text accompanying notes 153–56.

[215] Goldstein, supra note 92, at 665–67.

[216] Section 1983 only creates a cause of action for violations of federal rights, such as rights in the federal Constitution or federal statutes. These do not include generic common law torts. 42 U.S.C. § 1983 (2006).

[217] See supra text accompanying notes 94–116.

[218] Goldstein, supra note 92, at 668–70.

ecution through either of these amendments does not matter.[219] But as outlined above, there are two implications of using the Fourth Amendment that would not arise if malicious prosecution were incorporated through the Fourteenth Amendment.[220] These implications, unnoticed by the author, are all the more reason to resist incorporating malicious prosecution through the Fourth Amendment.

CONCLUSION

This Note sought to provide some clarity and guidance to the minefield of conflict and confusion that is the jurisprudence of Section 1983 and malicious prosecution. In Part I, this Note examined the rich history of malicious prosecution, the law of Section 1983, the Supreme Court's opinion in *Albright v. Oliver*, and the subsequent circuit split that has persisted among the lower courts. In Part II, it outlined an argument not only for rejecting the Court's attempt to force malicious prosecution into the Fourth Amendment's text, but also for using either substantive due process or the Fifth Amendment's Grand Jury Clause as the constitutional vehicle. This Part also examined the implications of incorporating malicious prosecution claims through different amendments, and whether it was necessary to have a federal forum for the resolution of these questions. Finally, Part III addressed two arguments in the literature that generally rested on the assumption that *Albright* was correct, and explained why neither of those arguments was persuasive.

Aside from clarifying this rather narrow issue of law, perhaps it is worth reflecting on what created this situation in the first place. One could easily say that it was the Supreme Court's ideological opposition to the use of substantive due process. Admittedly, questions such as whether substantive due process is normatively desirable, a valid mechanism of constitutional interpretation, or merely a tool of activist judges are questions of profound importance, and beyond the scope of this Note. But this foray into malicious prosecution and Section 1983 illustrates the unintended consequences that can arise when the language of due process is avoided at all costs. Perhaps these unintended consequences will convince some that the Court's frame of mind in constitutional tort cases is worth revisiting.

[219] Id. at 670–71.

[220] See supra text accompanying notes 158–59.