

— CHAPTER FOUR —

CONSTITUTIONAL TORTS IN THE MODERN ERA

I. Introduction

Most prominent scholarly assessments of the Warren and Burger Courts' constitutional legacies stress continuities rather than reversals.¹ They emphasize the substantive constitutional doctrines – like the right to privacy, and gender-based equal protection – supporting claims that the movement from the Warren Court to the Burger Court sometimes led to more expansive protections, rather than retrenchment.² This focus has produced distorted assessments. When scholars focus primarily on the practice of judicial review, or the cases concerning the proper scope of a constitutional provision, they slight and often ignore the Court's rulings that shape the *enforcement* of the Constitution. If more attention is given instead to the procedural doctrines concerning jurisdiction, immunities, and remedies, then the differences between the Warren and Burger years become far more pronounced.³

¹ (Schwartz 1990: 413 (“[T]he Burger Court’s main significance was in its consolidation and continuation of the Warren heritage.”); (Blasi 1983: 199, 201)(referring to the Burger Court’s “preservation of the activist landmark cases of the Warren Era”).

² (Schwartz ed. 1998: Chs. 5-6).

³ As the arguments in this Chapter will indicate, I reject Vincent Blasi’s claim that “the total product of the Burger Court regarding jurisdiction and remedies cannot be said to have reduced significantly the role of the federal courts in the American system of government.” (Blasi 1983: 208) When he writes that “the Burger Court has occasionally displayed a penchant for doctrinal innovation and the expansion of federal court authority,” Blasi is referring to the Burger Court’s school desegregation rulings, municipal liability under § 1983, and the *Bivens* cases. *Id.* at 208. I agree that the school desegregation cases placed extraordinary pressure on the Court, and I describe in more detail below how that pressure forced the Burger Court grudgingly to accept municipal liability. The Court, however, introduced a “policy or custom” requirement to make municipal liability very difficult to establish in other contexts. In addition, Blasi’s assessment of *Bivens*’ impact is too generous. The Court almost immediately began strengthening the immunity defenses available to official defendants, and did so to such an extent that it became nearly impossible for plaintiffs to receive compensatory damages. Moreover, as I will explain in more detail below, holding individual officers rather than their employers liable, and offering those officers such strong immunity defenses, made it far less likely that future violations would be deterred. In short, I will attempt to demonstrate in this Chapter that, on balance, the Burger Court cases reduced access to the federal courts rather than expanded it.

Many of the most important doctrinal developments during the Burger Court revolved around its persistent efforts to hide the keys of the federal courthouse doors from citizen plaintiffs. This aspect of the states' rights revival of the 1970s is all too often downplayed or ignored in the scholarly assessments of the Burger Court years. With few exceptions,⁴ much of the scholarship addressing the rise of a "new federalism" has simply offered assessments of the Court's doctrines concerning the scope of the Commerce Clause and the 10th Amendment. Much less attention⁵ has been directed towards an analysis of the justification for and impact of the Burger Court's *judicial* federalism – a group of doctrines that had a combined effect of sending increasing numbers of plaintiffs to the state courts.⁶

⁴ Sue Davis is one exception among political scientists. (Davis 1989) Davis' study of Rehnquist's jurisprudence during his service as an Associate Justice incorporates analyses of Rehnquist's important cases concerning federal jurisdiction and remedies. *See also* (Morrison 1977: 841) (discussing the Burger Court's "systematic efforts to close the doors of the federal courts"); (Cox 1978: 2-3) ("The era of the Warren Court . . . brought a marked easing of access to the federal courts for the protection of constitutional rights. . . . The Burger Court has reversed its predecessor's approach. The strongest and most consistent theme in the decisions of the past eight years is a policy of limiting federal power – especially federal *judicial* power – to intrude into the activities of local governments, whether municipal, county, or state."); (Blasi 1983: 206) ("Only with respect to its interpretation of the technical doctrines and statutes that demarcate the jurisdiction of the federal courts can the Burger Court plausibly be said to have abided by the canons of judicial restraint."); (Bendor 1983-4: 649) (criticizing the Blasi collection for failing to provide "separate focused consideration . . . upon the numerous Burger Court decisions that have foreclosed access to federal courts for large and important classes of individual rights claimants" and observing that many observers "have considered this group of door-closing decisions one of the most dramatic of all Burger Court developments").

⁵ Federal jurisdiction scholars, judges, and litigators of course often address these issues. Generally speaking, of those outside of the small universe of law professors teaching and writing about both constitutional law and federal jurisdiction, most political scientists and constitutional theorists ignore these aspects of the Court's jurisprudence when producing retrospective evaluations of a Chief Justice's tenure and legacy. For recent notable examples of such omissions, *see, e.g.*, (Schwartz 1990) (using available private papers and conference memos to describe the Court's deliberations in landmark constitutional law cases); (Kahn 1994) (rejecting the "no counterrevolution" interpretation of the Burger Court, but also neglecting the important "polity principle" of judicial federalism); (Powe 2000) (offering a political interpretation of the Warren Court's constitutional jurisprudence); (Maltz ed. 2003) (providing chapter-length overviews of the constitutional jurisprudence of each current member of the Rehnquist Court).

⁶ By "judicial federalism," I mean to refer to the Burger Court's abstention and due process doctrines that required plaintiffs presenting *federal* constitutional claims to seek a remedy in state courts. *See, e.g.*, (Weinberg 1976-7: 1193) ("[A] new judicial federalism seems to be emerging, requiring deference to state administration and state adjudication that only yesterday were thought to be unnecessary or unwise."). The phrase "New Judicial Federalism" is now more commonly used to describe a different phenomenon: tailoring plaintiffs' complaints to focus on violations of state constitutions and seeking remedies in state

If the Burger Court's judicial federalism is given its due, however, it is possible to portray the scope and importance of the Court's retrenchment from its initial and fleeting embrace of § 1983. The Warren Court's incorporation decisions were setting the stage for a new era for enforcing the Constitution. Nearly one hundred years after the passage of the Ku Klux Klan Act, the Court was finally prepared to put into effect the civil enforcement scheme the Radical Republicans had championed. This Chapter begins by evaluating the debates surrounding the first Warren Court case to authorize an award of damages for a "constitutional tort," *Monroe v. Pape*.⁷ It then turns to the Burger Court's reception of *Monroe* and its creation of the modern doctrinal framework for constitutional torts litigation. During the so-called Burger Court era, it was Rehnquist, not Burger, who was the true leader in the establishment of the modern constitutional torts doctrine. In cases affecting civil rights plaintiffs, the conservative wing of the Court usually prevailed, because Justice Powell, one of the key swing voters, sided firmly with Rehnquist in his efforts to close the federal courthouse doors. In these cases, Rehnquist led the Burger Court in a counterrevolution that did, indeed, succeed.⁸ Promoting judicial federalism, limiting the scope of open-ended rights, protecting state sovereignty - almost all of the key commitments that Rehnquist would later become identified with once he began presiding as Chief Justice -- can be located in these early civil rights cases.

courts. Justice Brennan and other liberal scholars defended this alternative litigation strategy because many state constitutions could be interpreted so as to offer more expansive protections than the federal Constitution. (Brennan 1977); (Brennan 1986); *see also* (Cox 1978: 13).

⁷ *Monroe v. Pape*, 365 U.S. 167 (1961).

⁸ *Cf.* (Blasi 1983: Ch. 10)(describing the Burger Court as "the counterrevolution that wasn't" and offering a dismissive portrayal of Rehnquist's tenure as an Associate Justice).

II. The Modern Doctrinal Landscape

A. Novelty and Significance of *Monroe*: Local Officer Liability

In *Monroe v. Pape*,⁹ the Court upheld a claim for monetary damages under § 1983, to remedy unconstitutional actions, committed by police officers, that was also unauthorized by state law and police guidelines.¹⁰ Douglas began by emphasizing that the Court had long ago acknowledged, in *Ex Parte Virginia*¹¹ and *Home Tel. & Tel. Co. v. Los Angeles*,¹² that Congress could enforce the protections of the 14th Amendment against officials who carried the badge of authority of a state and then misused it.¹³ The question presented in *Monroe* was whether Congress, in enacting § 1983, intended to give a remedy to plaintiffs deprived of rights by an officers' abuse of their position. In other words, does the "under color of law" language in § 1983 sweep as broadly as the state action requirement of the 14th Amendment to include both unauthorized and authorized official conduct? After the Court's opinions in *Classic*¹⁴ and *Screws*,¹⁵ which

⁹ *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (“[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color’ of state law.”) The opinions by Douglas and Frankfurter provide a sobering review of the plaintiffs’ complaint. According to the *Monroe* complaint, at 5:45 am on October 29, 1958, thirteen Chicago police officers broke into the *Monroe* apartment, despite having neither a search or arrest warrant. 365 U.S. at 169. The officers forced the parents from their beds to stand in the living room naked, where their six children were soon taken. The children watched Deputy Chief of Detectives Pape strike their father several times with his flashlight, while calling him “nigger” and “black boy.” Other officers pushed their mother, and hit, kicked, and pushed the children to the floor. The police ransacked every room, throwing clothes on the floor, dumping drawers, and ripping mattress covers open. The father was then taken to the police station, where he was detained for over ten hours, without being advised of his procedural rights, the charges against him, or given access to a magistrate or a lawyer. 365 U.S. at 203) (Frankfurter, J., dissenting). The family sued each of the thirteen officers individually, and also the City of Chicago, alleging that it was the custom of the police department to round suspects up and hold them incommunicado for long periods, in order to interrogate them and investigate their activities. *Id.* at 204.

¹⁰ (Whitman 1997: 661, n. 17) (“Using suits for injunctive relief against state officials as a means of raising constitutional challenges for government policies had been the primary affirmative remedy since *Ex Parte Young* . . .”).

¹¹ 100 U.S. 339 (1879).

¹² 227 U.S. 278, 287-96 (1913).

¹³ *Monroe*, 365 U.S. at 171-2.

¹⁴ 313 U.S. 299 (1941).

interpreted the phrase “under color of law” in the criminal enforcement provision, 18 U.S.C. § 242,¹⁶ to include “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,”¹⁷ Douglas apparently saw little difficulty in extending that interpretation of “under color of law” to § 1983.¹⁸ By interpreting the “under color of law” requirement to include actions taken by officials *in excess of their authority*, the *Monroe* holding resuscitated the dormant § 1983 clause, by allowing it to govern a far broader category of fact-situations.¹⁹ As the Warren Court continued to incorporate key provisions of the Bill of Rights, *Monroe*’s impact on the federal courts docket would be “explosive.”²⁰

This interpretation of “under color of law” was not without its detractors. In a lengthy dissenting opinion, Justice Frankfurter argued that the legislative history suggested that § 1983 should apply only to unconstitutional state laws – not unconstitutional actions that were taken by officials without any authorization from the state. Frankfurter rejected the holding that § 1983 swept as broadly as the 14th Amendment itself. Rather than assume, as does Justice Douglas in his majority opinion, that such a result follows simply from the holdings in *Ex parte Virginia*, *Home Telephone*

¹⁵ 325 U.S. 91 (1945).

¹⁶ This criminal enforcement provision is derived from § 2 of the Civil Rights Act of 1866. Recall that, when introducing the Ku Klux Klan Act, Shellabarger emphasized that the § 1 liability provisions were modeled on this earlier civil rights bill. There was, therefore support in the legislative history for linking interpretation of the parallel phrases in these statutes.

¹⁷ *Classic*, 313 U.S. at 326.

¹⁸ *Monroe*, 365 U.S. at 183-5.

¹⁹ In early § 1983 cases, the unconstitutional conduct was officially authorized by the state or locality. In *Hague v. C.I.O.*, 307 U.S. 496 (1939), for example, the harassment leading to the labor organizers’ complaint was authorized by local ordinance. Similarly, in the white primary cases, the plaintiffs were challenging behavior that was explicitly authorized or permitted by constitutional provisions or state statutes. *See, e.g., Nixon v. Herndon*, 273 U.S. 536 (1927) (Texas statute authorizing all-white Democratic primaries); *Lane v. Wilson*, 307 U.S. 268 (1939) (Oklahoma grandfather clause).

²⁰(Shapo 1965: 324); (Weinberg 1991: 744-5, 747)(arguing that “too much attention has been paid . . . to *Monroe*’s holding on the ‘color of law’ issue” and that scholars should also emphasize the “pivotal development” of the incorporation of the Bill of Rights).

and Telegraph, and *Classic* to define both state action and “under color of law” to include unauthorized action, Frankfurter argued in a lengthy dissenting opinion that a fresh review of the legislative history was in order.²¹ Did the Radical Republicans in the 42nd Congress intend only to allow challenges to unconstitutional state laws? This debate over the scope of § 1983 is important, because Frankfurter’s more general concerns that § 1983 would be used to displace a large portion of state tort laws²² would be later emphasized in many of Rehnquist’s opinions in § 1983 cases.²³

Frankfurter’s analysis has been criticized for being result-driven. The most significant charge is that Frankfurter’s interpretation of the phrase “under color of law” failed to acknowledge its pervasive presence in other cases involving federal jurisdiction,²⁴ an omission that can hardly be explained by Frankfurter’s unfamiliarity with this area of the law, since it is widely acknowledged that he was the founder of the

²¹ 365 U.S. at 211-2 (Frankfurter, J., dissenting).

²² *Id.* at 221-2 (describing such concerns as matters of “extreme urgency” because they address “a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration”); *id.* at 242 (arguing that defining “under color of law” to include all unauthorized conduct “makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country”). *But see id.* at 193 (Harlan, J., concurring) (“One can agree . . . that Congress had no intention of taking over the whole field of ordinary state torts and crimes without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary tort, and therefore as a matter of federal concern.”).

²³ Although I consider Rehnquist to be the heir of Frankfurter, because of Rehnquist’s leadership in attempting to shore up the boundary between § 1983 claims and state common law torts, in fact it is two other members of the current Court – Scalia and Thomas – who have written to express their opposition to the Court’s holding in *Monroe* and endorsement of the Frankfurter-Zagrans interpretation of “under color of law.” *See Crawford-El v. Britton*, 523 U.S. 574 (1998) (Scalia, J., dissenting & Thomas, J., joining). Rehnquist may have decided to defer to *Monroe*’s “under color of law” interpretation on *stare decisis* grounds. He dissented in *Monell*, 436 U.S. 658 (1978), when the Court first endorsed municipal liability; he even took the opportunity in his dissenting opinion to call upon Congress to overturn the Court’s interpretation of § 1983. But in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), Rehnquist chided the Stevens for suggesting in his dissenting opinion that the Court should overturn *Monell*. Rehnquist argued that a proper concern for *stare decisis* should lead the Court to try to provide more stable set of expectations for municipalities, especially when interpretations of § 1983 are subject to correction by Congress. *Id.* at 818, n. 5.

²⁴ (Winter 1992: 346-360)(discussing 19th century removal cases, as well as surety cases, and the common understanding that “under color of law” included at least some forms of unauthorized conduct).

academic field of federal jurisdiction.²⁵ Indeed, the phrase “under color of law” has a much longer lineage, going back to at least the 13th century in England; even then it was commonly interpreted as referring to unauthorized conduct.²⁶ Early American cases employed a similar usage. For example, Chief Justice Marshall used the phrase “under color of office” in *Marbury v. Madison* to refer to unauthorized action made possible by an officer’s authority.²⁷

Yet in his *Monroe* dissent Frankfurter ignored evidence of the common understanding of the phrase and instead focused narrowly on the statutory provisions in question.²⁸ He claimed that for the first seventy years following the passage of the Reconstruction civil rights statutes, both the criminal and civil enforcement provisions were invoked only in cases involving “action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws.”²⁹ It was only with the Supreme Court’s “revolutionary turnabout” in *United States v. Classic*³⁰ that “under color of law” was interpreted by the

²⁵ See, e.g. (Frankfurter & Landis 1927); (Winter 1992: 362, 382-384).

²⁶ (Winter 1992: 325-6) (quoting Coke’s annotation of the English statute as defining the phrase *colore officii* to include unauthorized action).

²⁷ *Id.* at 326.

²⁸ Winter reviewed Frankfurter’s conference notes, memos and other papers, and concludes that Frankfurter initially had focused his efforts on reviving the Court’s ruling in *Barney v. City of New York*, 193 U.S. 430 (1904), which had excluded from the category of “state action” conduct that was explicitly forbidden by state law. When, in *Snowden v. Hughes*, 321 U.S. 1(1944), Frankfurter failed to convince a majority of the Court to do so, he turned to a more narrow strategy of focusing on the statutory construction of “under color of law” in the two civil rights statutes, § 242 and § 1983. (Winter 1992: 366-369)(“Frankfurter did not give up after *Snowden*; he simply shifted the focus of his concerns from the constitutional question of what constitutes state action to the statutory question of what constitutes action ‘under color of’ state law.”) Winter’s account helps explain why Frankfurter had acquiesced in *Classic* and then began to focus on the meaning of “under color of law” in *Screws*. Once he realized his efforts on the state action front in *Snowden* would not succeed, he then turned to other possible avenues to achieve a similar result. (Winter 1992: 373-376).

²⁹ 365 U.S. at 212-14.

³⁰ 313 U.S. 299 (1941).

Supreme Court to include unauthorized conduct.³¹ Frankfurter noted that Justice Stone's opinion in *Classic* referred to cases interpreting the meaning of "state action" rather than "the very different question of the 'under color' clause."³² Similarly, in *Screws* the Court "merely invoked *Classic* and stare decisis and did not reconsider the meaning which that case had uncritically assumed was to be attached to the language, 'under color' of state authority."³³

Frankfurter prefaced his review of the legislative history by observing that the sponsors of § 1983 explicitly linked the liability provision to the criminal provisions in § 2 of the 1866 Civil Rights Act.³⁴ In order to examine the understanding of the meaning of the "under color of law" language by supporters of the 1866 Act, Frankfurter first quoted from President Johnson's veto message to explain that the contemporary understanding was that § 2 would apply to deprivations of rights by the state legislatures or judiciary.³⁵ Next Frankfurter provided quotes from Senator Trumbull, who had argued in favor of overriding Johnson's veto by stressing that the Act would not apply when state laws afforded the "same protection" and offered "adequate remedies," but rather only when persons are discriminated against "under color of State law."³⁶ This quote suggested to Frankfurter that § 2 was meant to focus only on discriminatory state legislation. He then cited from the debates preceding the reenactment of § 2 in the Civil

³¹ 365 U.S. at 217. In his review of the pre-1941 lower court opinions, Frankfurter located only one district court opinion describing police misconduct as action taken "under color of law." *United States v. Sutherland*, 37 F. Supp.344 (D.C.N.Ga. 1940). In addition, he notes that the Attorney General's brief in *Classic* cited an unreported 1940 district court opinion from the Eastern District of Louisiana, *United States v. Cowan*. *Id.* at 215, n. 22.

³² *Id.* at 217. Frankfurter also writes, of his participation in *Classic*: "I joined in this opinion without having made an independent evaluation of the legislative history of the relevant legislation or of the authorities drawn upon for the *Classic* construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study." *Id.* at 218.

³³ *Id.* at 218 (citing *Screws v. United States*, 325 U.S. 91 (1946)).

³⁴ *Id.* at 225-6.

³⁵ *Id.* at 226.

³⁶ *Id.* at 226 (quoting Cong. Globe, 39th Cong., 1st Sess. 1758 (remarks of Sen. Trumbull)).

Rights Act of 1870, quoting from Senator Sherman, who argued that “this bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions.”³⁷ According to Frankfurter, Sherman’s use of the phrase implied that only unconstitutional legislation, or state constitutional provisions in conflict with the federal Constitution, would be targeted.

Turning to the debates in the 42nd Congress addressing § 1 of the Ku Klux Klan Act, Frankfurter asserted that it was understood that state courts would be given the primary responsibility to deal with unauthorized conduct. To support this claim, Frankfurter quoted from the speeches of Senator Edmunds, who argued that executive nonfeasance or malfeasance would trigger federal protection “unless the criminal who shall commit the offenses is punished and the person who suffers receives that redress which the principles and spirit of the laws entitles him to have.”³⁸ For Frankfurter, the fact that §1 of the Ku Klux Klan Act was so uncontroversial is telling. There were no protests that the liability provisions proposed to give federal courts concurrent authority to deal with violations of state laws. Indeed, the only specific applications opponents objected to concerned the unfairness of imposing liability upon judges, legislators, and administrative officials who were acting in full obedience to state law.³⁹ According to Frankfurter, there was no explicit claim in these debates that unauthorized actions would also be presumed to be actions taken “under color of law.” If Frankfurter’s review of the debates seems cursory, there are other variations of this argument defending a narrow view of the scope of “under color of law.” In a widely-cited and influential law review article, Eric Zagrans attempted to undertake a more thorough study of the debates in the

³⁷ *Id.* at 227 (quoting Cong. Globe, 41st Cong., 2d Sess. 3663 (remarks of Sen. Sherman)).

³⁸ *Id.* at 228 (quoting Cong. Globe, 42nd Cong., 1st Sess. 697 (remarks of Sen. Edmunds)).

³⁹ *Id.* at 231-2.

42nd Congress, to support the Frankfurter thesis limiting “under color of law” to authorized state actions.⁴⁰

As a matter of legislative history, the Frankfurter-Zagrans thesis has been persuasively rebutted. Many of the key statements quoted by Frankfurter and Zagrans can be re-read, on their own or in the broader context of the debate, with the phrase “under color of law” defined as unauthorized conduct and still make perfect sense.⁴¹ For example, Trumbull’s response to Johnson’s veto of the 1866 Civil Rights Act could be interpreted as referring to “under color of law” as wrongful application of law. Similarly, Sherman’s elaboration of the scope of the criminal enforcement provision included the statement, which Frankfurter omitted, that the statute would cover denials of rights done “under color or pretense” of state regulations.⁴² Because neither Frankfurter nor Zagrans attempted to survey the early attempts to introduce Klan legislation, they failed to acknowledge that the bill drafted by Frelinghuysen used the language “under pretense of law.”⁴³ Shellabarger incorporated Frelinghuysen’s bill in his draft of § 1 of the Ku Klux Klan Act, but he changed the phrase to “under color of law.”⁴⁴ Taking only this change into account, one might plausibly assume that Shellabarger may have been attempting to limit the scope of liability. A more careful examination of the legislative history suggests otherwise, however. Every other change Shellabarger made to Frelinghuysen’s bill was

⁴⁰ (Zagrans 1985) Although Zagrans’ review of the debates is more extensive, it is marred by numerous factual and interpretive errors. For a lengthy catalogue, see (Achtenberg 1999: nn.8, 409) (noting that Zagrans’ factual errors include, *inter alia*, the claim that the Morton-Butler Committee was formed in response to Grant’s message when it in fact disbanded more than a week prior to Grant’s intervention, the claim that the Morton-Butler Committee drafted § 1 when in fact Shellabarger did, the claim that Frelinghuysen was a member of the final Act’s “drafting committee,” and the claim that Frelinghuysen’s April 6 speech referred to the Ku Klux Klan Act, when the speech was actually his introduction of his own S. 243).

⁴¹ (Winter 1992: 378).

⁴² (Winter 1993: 380)(quoting Cong. Globe, 41st Cong., 2d Sess., 3663 (1870) (remarks of Sen. Sherman))

⁴³ See Ch. 2 *supra*.

⁴⁴ (Achtenberg 1999: 51-2).

to *expand* the scope of the protections. It is therefore doubtful that Shellabarger intended to restrict the coverage to only authorized actions. In addition, it is almost certain that Shellabarger was well aware of the use of the phrase “under color of law” in other statutes to refer to “under pretense of law,”⁴⁵ and both Shellabarger and Frelinghuysen are on the record as having used the phrases interchangeably.⁴⁶

What really appears to motivate Frankfurter’s argument is a normative claim regarding the merits of open-ended federal jurisdiction. In his review of the legislative history, Frankfurter even conceded that “under color of law” should not be limited simply to unconstitutional state statutes. Instead, he argued that only widespread failures to enforce the law should be deemed “under color of law.” Only state inaction or conduct that rises to the level of a “custom or usage” should be deemed to trigger the § 1983 “under color of” requirement.⁴⁷ For Frankfurter, occasional, unauthorized and unconstitutional conduct, such as that present in the *Monroe* case, should not be deemed action taken “under color of law.” When effective oversight by state officials, whether administrative or judicial, is available, then federal supervision of isolated official misconduct is, under Frankfurter’s approach, improper.⁴⁸ This is Frankfurter’s stronger argument, because his concerns about federal jurisdiction are directly expressed.⁴⁹

⁴⁵ Nor would members of the 42nd Congress necessarily need to know about these legal usages in order to understand the meaning of the phrases. An 1854 edition of Webster’s Dictionary defined “color” to mean, *inter alia*, “external appearance, false show, pretense, guise.” (Achtenberg 1999: n. 440)(citing Noah Webster, *An American Dictionary of the English Language* (1854) 225 (definition 6)).

⁴⁶ Frelinghuysen also used the phrases interchangeably. *See, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 501 (1871) (remarks of Sen. Frelinghuysen) (introducing his Klan bill, S. 243).

⁴⁷ *Id.* at 235-6.

⁴⁸ Justice Douglas did not effectively rebut Frankfurter’s analysis. In the *Monroe* majority opinion, he described three main purposes for § 1 of the Ku Klux Klan Act: (1.) to override unconstitutional state laws; (2.) to provide a remedy where state law was inadequate; and (3.) to provide a remedy “where the state remedy, though adequate in theory, was not available in practice.” *Id.* at 173-5. Is it easy to assume that the Monroe family had no state remedy available to them? Illinois outlawed all of the behavior committed by the Chicago police officers. Yet Douglas failed to acknowledge that the *Monroe* case did not fit within the three main aims of § 1983 as he described them. Instead, he asserted that “[t]he federal remedy is

In addition to extending § 1983 to cases involving unauthorized conduct, *Monroe* also made it possible for more plaintiffs to receive compensation when it granted the request for a damages remedy. Before *Monroe*, injunctions were the typical remedy for those complaining of unauthorized conduct.⁵⁰ Because such a remedy was available only for ongoing government programs and practices, many constitutional violations were left without a remedy. As Justice Harlan would later assert, for plaintiffs alleging a one-time only violation, “it is damages or nothing.”⁵¹ By endorsing the alternate remedy of damages, the *Monroe* Court encouraged future plaintiffs to pursue “backward-looking”

supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.” *Id.* at 183. *See also* (Developments 1977:) (noting discrepancy); (Note 1968-9: 1489) (“The fact situation alleged in *Monroe* . . . fell within none of these purposes.”); *and cf.* (Chevigny 1969-70: 1353-1356) (defending the “expansive view of federal relief” in *Monroe*, and arguing that it would be *more* burdensome if courts were instead required to determine at the outset whether one of the three prerequisites (claims alleging unconstitutional state laws, inadequate state remedies, or widespread underenforcement or discrimination) had been established in the plaintiff’s complaint).

Frankfurter’s focus on systemic violations may be a plausible reading of the general purpose of the Ku Klux Klan Act, but it is not the most persuasive one. As an alternative approach to civil rights litigation, it is even less appealing once one considers over forty years of subsequent § 1983 and related doctrines. Relying on the same federalism arguments informing Frankfurter’s critique of *Monroe*, the Court has made it very difficult for individual plaintiffs to file claims addressing systemic violations, especially when the remedy sought is a forward-looking injunction. *See, e.g., Rizzo v. Goode*, 423 U.S. 363 (1976) (refusing to acknowledge supervisory liability for police misconduct); *O’Shea v. Littleton* 414 U.S. 488, 499-504 (1974) (“[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief”); *Los Angeles v. Lyons* 461 U.S. 95 (1983) (declining to grant standing to plaintiff alleging a one-time only instance of police misconduct and requesting injunctive relief). In addition, because the Court in *Monroe* refused to permit suits against governmental entities, like the City of Chicago, it is unclear how Frankfurter imagined his alternative would work in practice. Even in the post-*Monell* era, the policy or custom requirement presents barriers to plaintiffs alleging widespread failures to train or institutional liability for inaction. *See* discussion below, *infra*, on municipal liability claims.

⁴⁹ *Cf.* 365 U.S. at 193 (Harlan, J., concurring) (“Those aspects of Congress’ purpose which are quite clear . . . seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority”); (Rutherglen 2003: 964) (suggesting that only Frankfurter’s analysis offered a rationale for including the separate phrase, “custom or usage,” in §1983).

⁵⁰ Such cases were not brought under § 1983. Instead, the *Ex Parte Young* doctrine provided the cause of action.

⁵¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

claims, involving already completed governmental action (or inaction) causing constitutional violations.⁵²

Finally, *Monroe* is notable because it provided the Court its first opportunity to assess whether municipalities themselves could be held liable. In order to evaluate the City of Chicago's defense claiming that it could not be deemed a "person" within the meaning of § 1983, Justice Douglas referred to the debate in the 42nd Congress over the Sherman Amendment.⁵³ The Sherman Amendment had proposed to extend liability to municipalities for failing to prevent acts of violence committed by citizens who had "riotously and tumultuously assembled together."⁵⁴

Because opponents of the Sherman Amendment in the House of Representatives had based their opposition in large part on an argument that the authority of Congress under the Constitution to impose civil liability upon municipal corporations was in doubt, Justice Douglas argued in *Monroe* that Congress had thus meant to exclude municipalities altogether from the threat of liability and so did not intend to include them in the definition of "persons" in Section 1.⁵⁵ The *Monroe* Court, however, chose to disregard the fact that Congress, only a few months before the debate over the Sherman Amendment, had enacted the Dictionary Act, the main purpose of which was to include corporate entities within the definition of "persons."⁵⁶ Douglas argued that the definition in the Dictionary Act was "merely an allowable, not a mandatory, one."⁵⁷

⁵² (Whitman 1997: 666) ("What was new in *Monroe* was the remedy – not the substantive question regarding the constitutional violation, which had been "standard fare in Fourth and Fifth Amendment challenges to criminal conviction.").

⁵³ *Monroe*, 365 U.S. at 187-92.

⁵⁴ (Mead 1986-7: 524) (*citing* Cong. Globe, 42d Cong., 1st Sess. 663 (1871)).

⁵⁵ *Monroe*, 365 U.S. at 190 (referring exclusively to comments by Rep. Poland).

⁵⁶ *Id.*, at 190-1.

⁵⁷ *Id.*

The inferences that the Court drew from the Sherman Amendment debates were not necessary ones. The first version of the Sherman Amendment would have imposed liability on any citizen or the municipality for failing to prevent “private” acts of ordinary citizens against other citizens. It obviously imposed a far more sweeping liability than § 1 of the Act, because there was no mention of a “color of law” requirement in the Sherman Amendment. Any citizen would be held liable for damages for failing to prevent mob violence, and so would the municipal government. After the House rejected the first draft of the Amendment, the second version proposed to exempt citizens from liability and to hold municipal governments liable for mob violence only when judgment could not be had against the private citizens who perpetrated the violence.⁵⁸ During the debate in the House, opponents of the Amendment questioned whether the Constitution had granted to Congress the authority to impose liability on municipalities for acts committed by private citizens over whom the municipality *had no control*.⁵⁹ At no point did the debate include a discussion of municipal liability for *governmental* misconduct.

Monroe’s analysis of the legislative history was poorly reasoned, but it was made somewhat more plausible only because the Court ignored “the background of tort liability” existing at the time the 1871 Act was enacted.⁶⁰ During this period, the common law allowed liability to extend to municipalities – with many jurisdictions even

⁵⁸ Cong. Globe, 42nd Cong., 1st Sess. 749 (1871).

⁵⁹ (Glazer 1992).

⁶⁰ There has been some dispute regarding the meaning of the Court’s comments regarding the “background of tort liability.” In some cases, the Court has interpreted this phrase to recommend considering the common-law tort principles in effect in 1871; while at other times, the Court has chosen to apply modern, innovative tort law concepts and principles when considering the requirements of § 1983. (Mead 1986-7: nn.60-1). *See e.g., City of Oklahoma v. Tuttle*, 471 U.S. 808, 835-8 & 835 n.6 (Stevens, J. dissenting) (*citing* 1 W. Blackstone, Commentaries 429-30) (stating that the doctrine of respondeat superior was applicable to municipalities in 1871). For an example of the Court’s reliance on *modern* tort principles, *see, e.g., Owen v. City of Independence*, 446 U.S. 622 (1980), in which the Court observed that the recent shift in tort doctrine from an emphasis on fault to a focus on deterrence and loss spreading serves as one justification for denying qualified immunity to a municipality.

applying a theory of respondeat superior.⁶¹ Perhaps if the Court had considered more carefully the tort rules in existence in the 1870s, it might not have taken seventeen years⁶² to realize the errors of its analysis in *Monroe*.

C. Federal Officer Liability in *Bivens*⁶³

It is not surprising that the Court sought to find a congruent cause of action to § 1983 for federal officers soon after *Monroe* – the “rationalizing pressures” were compelling. Why should harms committed by federal officers be treated differently than those committed by state officers?⁶⁴ Before *Bivens*, the only damages remedy available to individuals whose rights had been infringed upon by federal officials was through a state common law claims. For cases involving illegal searches by federal investigators, the tort of illegal trespass would have been the only option for individuals seeking redress.⁶⁵ While developing the new “implied cause of action” for federal constitutional torts,⁶⁶ the Court signaled its continued preference for individual officer liability rather

⁶¹(Mead 1986-7: 527).

⁶² *Monroe*'s holding regarding municipal liability was overruled in *Monell v. Department of Social Services* (1978). For early criticisms of *Monroe*'s rejection of municipal liability, see (Kates & Kouba 1972). See also discussion below *infra*.

⁶³ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigations*, 403 U.S. 388 (1971). *Bivens* has been extended to other constitutional protections. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228 (1978) (Fifth Amendment equal protection)

⁶⁴ (Weinberg 1991: 763).

⁶⁵ In these tort cases, the scope of the 4th Amendment remained relevant, because the defendant officer would almost always respond to the trespass claim by asserting an official duty defense. The plaintiff could then use the 4th Amendment in response and show that the defendant's actions exceeded the scope of his official duties.

⁶⁶ The Court later ruled in *Carlson*, 446 U.S. at 14, that the Federal Torts Claims Act, 28 U.S.C.A. § 1346(b), was not an adequate substitute remedy, observing that, even after the 1974 amendments to the statute, administrative exhaustion was a prerequisite for action under the FTCA, there was no jury trial, state tort law rather than the relevant constitutional provision would provide the basis for the claim, and even some *intentional* torts committed by law enforcement officials were excluded (a few are allowed under the FTCA, such as intentional assault, battery, false imprisonment), including intentional violations of privacy rights).

than governmental liability.⁶⁷ The Court may have deemed officer liability the lesser of two evils, but it still endorsed a variety of methods for reducing the scope of individual officer liability under § 1983. The following section describes the Burger Court's multiple lines of assault.

III. In *Monroe*'s Wake: The Burger Court and the Scope and Limits of Officer Liability

Almost immediately after the *Monroe* decision was handed down, concerns regarding the effects the holding would have on the federal docket were voiced by numerous scholars and judges.⁶⁸ These concerns were not entirely unfounded. In 1960, a mere 280 suits were filed in federal court under all of the civil rights statutes. In 1972, approximately 8,000 § 1983 claims were filed.⁶⁹ The main concern for critics was that the type of claim authorized in *Monroe* was very similar to a tort claim. The family was the victim of a one-time only, completed, unauthorized, and unconstitutional abuse of authority. Because these sorts of claims were so easily analogized to tort claims, they prompted concerns about the extent of their reach.⁷⁰ Official misconduct that previously

⁶⁷ See *Butz v. Economou*, 438 U.S. 478, 504 (1978) (extending principles of qualified immunity in § 1983 doctrine to suits against federal officials under *Bivens*); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), (introducing the objective good faith standard of qualified immunity in a *Bivens* action).

⁶⁸ (Aldisert 1973: 558-9)(expressing concerns about caseload burdens and supporting congressional action to impose exhaustion requirement); (Friendly 1973: 87-107)(advocating a state administrative exhaustion precondition for access to federal courts); (Shapo 1965: 327-9)(suggesting that, in order to distinguish state common law torts, only "outrageous" violations of rights should be cognizable under § 1983); (Note 1968-9: 1488, 1494-98)(advocating abandonment of "supplementary remedy" holding in *Monroe* and recommending judicial imposition of state exhaustion requirements, along with "adequacy" and class-based "fairness" exceptions). For an early defense of the *Monroe* no-exhaustion ruling, see (Chevigny 1970).

⁶⁹ (Developments 1977: 1172); (I McCormick 1974: n.2)(citing the 1960 Annual Report of the Director, Administrative Office of the U.S. Courts).

⁷⁰ (Whitman 1997: 667) ("The possibility that existed in *Monroe* – that significant monetary recovery could be sought by victims of isolated and completed past government acts – seemed to call for new substantive rules because the cases now permitted looked superficially like ordinary actions brought in torts.")

would have resulted in a state common law tort claim would now give rise to a § 1983 cause of action in a federal court.⁷¹

The Burger Court accommodated these concerns by attempting to control the growth of § 1983. Although there were a few exceptional pro-plaintiff rulings,⁷² the thrust of the Burger Court approach was to protect officers from excessive exposure to liability and to encourage as many cases as possible to be heard in state courts. The Burger Court, led by then Associate Justice Rehnquist, accomplished these goals by offering an assortment of limiting doctrines, all justified by reference to protecting “Our Federalism.”⁷³ The Court offered narrowing interpretations of the scope of the rights, especially due process rights, underlying the § 1983 claim; it defended the extension of common-law immunity doctrines to individual officer defendants in § 1983 cases; it

⁷¹ Numerous legal scholars have addressed questions surrounding the proper boundary between common law torts and constitutional torts. Christina Whitman has forcefully argued that § 1983 doctrine has -- to its detriment -- imported too much of its analytical framework from common law torts theories. (Whitman 1997). Michael Wells considers the two types of cases to be methodologically similar, but he argues that constitutional torts should be defined as a special subset, dealing with the “abuse of power.” (Wells 1997).

⁷² Despite the abstention-related arguments advocating equitable restraint in *Younger* and *Rizzo*, discussed below, *infra*, the Burger Court never directly overruled Douglas’ holding in *Monroe* that § 1983 remedies were supplementary to state claims. In addition, in *Patsy v. Florida Board of Regents* 457 U.S.496 (1982), the Court held that § 1983 did not require the exhaustion of state administrative proceedings. The Burger Court also overruled *Monroe*’s holding regarding municipal liability in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and rejected arguments for an extension of qualified immunity defenses to municipal defendants. *Owen v. City of Independence*, 445 U.S. 622 (1980). On the Court’s adoption and subsequent retraction of municipal liability, *see below infra*.

⁷³ In *Younger v. Harris*, 401 U.S. 37 (1971), Justice Black provides a useful statement of the values underlying the concept:

What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.

401 U.S. at 44. *See also* (Developments 1977: 1174)(suggesting that “[t]he Court’s new sensitivity to asserted state rights and interests seems to reflect a more generalized national mood of distrust of the federal government”).

introduced a set of jurisdictional doctrines under the guise of “Our Federalism”;⁷⁴ and it carefully hemmed in the liability of government entities.

A. Distinguishing Common Law Torts and the Due Process Clause

What, then, is the proper relationship between tort concepts and doctrine and constitutional damage actions? Delineating the boundary between constitutional and common law torts requires an argument regarding the extent of the protection afforded by the particular clause at issue.⁷⁵ One of the primary ways the Burger Court sought to stem the flood of § 1983 cases was through its Due Process Clause jurisprudence.⁷⁶ An important subset of § 1983 cases depends on the Court’s distinction between procedural and substantive due process rights, and the remedies those rights entail. In a series of cases involving “non-fundamental” rights, the Burger Court argued that plaintiffs could bring procedural due process challenges in federal court only if the state remedies are demonstrably inadequate.⁷⁷ This approach is thought to be technically consistent with

⁷⁴ In 1977, the Harvard Law Review editors considered the Court’s references to the values implicit in “Our Federalism” to be suggestive rather than rigorously defended, and so they undertook an ambitious project, based on an extensive analysis of § 1983 doctrine, to identify some of the possible justifications for concern about state autonomy, to examine the effect of federal judicial enforcement of civil rights on state autonomy, and to determine “the degree to which a concern for federalism justifies restrictions in the availability and scope of section 1983.” (Developments 1977: 1175- 1178, ff.)(arguing that, despite the Court’s expressions of concern for the “independence” of the states in cases like *National League of Cities v. Usury*, 426 U.S. 833 (1976), there are “no specific governmental roles or areas of substantive lawmaking or administrative competence wholly reserved to the states or entirely immune from either federal preemption or the imposition of federal requirements and standards”).

⁷⁵ (Whitman 1997: 674).

⁷⁶ (Durchslag 1979: 724)(“[T]he Burger Court’s articulation and application of federalism concerns in individual rights cases has increasingly resulted in contraction of the substantive constitutional protections afforded individuals.”).

⁷⁷ In determining “adequacy,” the Court does not require that the state provide all of the procedures and remedies available to a § 1983 plaintiff. In *Parratt*, for example, Rehnquist noted that the state would not provide for a jury trial or allow punitive damages, but these differences were not serious ones. See *Parratt v. Taylor*, 451 U.S. 527, 555 (1981). How would a plaintiff prove that the state procedures were inadequate? In addressing the similar problem in the equitable discretion context, Owen Fiss argued:

There is no *sound* way of second-guessing or reviewing [a plaintiff’s decision to request a federal forum]. . . . [In order to do so,] the federal court must either (a) engage in

Monroe's holding that § 1983 causes of action are "supplementary" to state claims because, in this category of cases, a violation of "procedural due process" is not "complete" until the state remedial process is concluded. In the seminal Due Process Clause case involving this kind of analysis, *Parratt v. Taylor*,⁷⁸ Justice Rehnquist argued that a prisoner who sued under § 1993, alleging that prison officials mishandled a hobby kit he had ordered in the mail, could not bring his claim in federal court, because state remedies were available.

Critics of the *Parratt* approach have convincingly argued that the Court has not clearly described the boundary between procedural and substantive due process rights.⁷⁹ *Parratt* is not like other procedural due process cases, where the government's legitimate interest in some activity or policy that infringes on citizens' liberty or property interests is deemed permissible as long as certain procedural requirements to ensure fairness are

irrebuttable presumptions (e.g., that state courts are fair) or (b) place the state court on trial. The first alternative . . . flies in the face of the little we know from experience, particularly the civil rights experience. The second alternative . . . would defeat the very interest to be served. The federal court inquiry would be a massive affront to state officials.

(Fiss 1978: 66-7).

⁷⁸ *Parratt v. Taylor* 451 U.S. 527 (1981). See also (Monaghan 1986: 980)(describing *Parratt* as "one part of an ongoing effort by the Supreme Court, particularly Justice Rehnquist, to reorient fourteenth amendment jurisprudence" in order "to keep the lower federal courts out of the business of monitoring the routine day-to-day administration of state government in areas that only marginally implicate constitutional values").

⁷⁹ See, e.g., (Eaton & Wells 1984) (arguing that even cases like *Parratt* and *Paul* can be redefined as substantive due process cases, and that, rather than focusing on the nature of the interest involved, the Court should instead consider what kind of state actions should count as constitutional deprivations of life, liberty and property and focus especially on those situations alleging an egregious abuse of power); (Monaghan 1986: n. 58)(suggesting that the assessment of the "adequacy" of state procedures requires the application of minimal substantive due process standards); (Fallon 1993: 311, 339-342, 345)(observing that the plaintiff's claim in *Parratt* could be reformulated as a violation of the substantive due process prohibition against arbitrary treatment and suggesting that the Court's policy goals would be equally well served and more justifiable if the *Parratt*-line of cases were characterized instead as a kind of federal abstention doctrine).

followed.⁸⁰ In previous post-deprivation cases, like *Ingraham v. Wright*,⁸¹ the state was alleging an interest in pursuing a permissible activity – maintaining order in schools. In *Parratt*, there is no sense in which one could argue that the state’s activity – negligent mishandling of mail – would be unproblematic as long as certain procedures are followed. The plaintiff argued that the action was *itself* a constitutional wrong. How should this kind of substantive due process claim be assessed? Typically, in constitutional cases, the doctrine involves the exercise of judicial review, so a “rational basis” standard would apply if nonfundamental rights are involved. At the time *Parratt* was decided, it was unclear how that standard could be applied to assess unauthorized harms committed by government officials.⁸²

The Court avoided having to define the claim in terms of substantive due process by arguing that the plaintiff was alleging a procedural due process claim and that, like with unconstitutional takings claims, the constitutional harm is not “complete” until all post-deprivation procedures have a chance to run their course. The *Parratt* solution, requiring the plaintiff to pursue all possible claims first in state courts, applies to random and unauthorized actions that can only be described in terms of the Due Process Clause.

⁸⁰ (Eaton & Wells 1984: 219-20); *cf.* (Rubin 2003: 847)(describing procedural due process as “concerned with the procedures attendant upon some factual or legal determination – be it the decision of a court in the adjudicatory setting of a trial, of an administrator in an agency proceeding, or even of a school official deciding whether certain conduct occurred or warrants punishment”).

⁸¹ 430 U.S. 651 (1977).

⁸² (Eaton & Wells 1984: 219-20, 226-7); (Rubin 2003: 847-)(distinguishing among various types of substantive due process claims). One possibility was to rely on the substantive due process analysis in *Rochin v. California*, 342 U.S. 165 (1952), so the government would only be held liable for damages if its behavior “shocks the conscience.” In a more recent § 1983 case alleging a violation of substantive due process guarantees of fundamental rights, the Court sought to limit the scope of liability. In *City of Sacramento v. Lewis*, 523 U.S. 833 (1998), the plaintiffs alleged a substantive due process violation when a police chase led to the death of their son. The Court responded by introducing a highly restrictive state-of-mind requirement.

If the harm can somehow be defined as a Fourth or Eighth Amendment violation, then the plaintiff may bring the § 1983 claim in a federal court.⁸³

Rehnquist's *Parratt* opinion deserves criticism for describing the plaintiff's claim solely in terms of procedural due process. However, the supposedly more principled alternatives that some critics propose would produce even more troubling consequences. For example, critics of *Parratt* have endorsed two proposals: (1.) the creation of a "Parratt abstention" doctrine,⁸⁴ or (2.) the reassessment of the *Monroe* interpretation of "under color of law" to exclude claims involving interests defined by state law and for which adequate state remedial procedures exist.⁸⁵ The impulse motivating these proposed alternatives – the notion that remedial concerns should not result in narrowing the interpretation of the scope of the right – is a valid one. But these proposed solutions would create enormous obstacles to plaintiffs seeking access to federal courts under § 1983.⁸⁶ The better alternative would be to consider cases like *Parratt* as presenting substantive due process claims that may be filed in federal courts – although they will most likely be dismissed soon after pleading. Another preferable alternative would be to

⁸³ *But see* (Armacost 1999: 598-617)(suggesting that reclassifying Due Process claims as 4th Amendment violations typically creates more burdensome hurdles for plaintiffs); (Rubin 2003: 853-872)(criticizing a broad reading of *Graham v. Connor*, 490 U.S. 386 (1989), which would forbid plaintiffs from seeking a remedy for violations of substantive due process when their claim under a more specific provision, like the 4th or 8th Amendments, fails).

⁸⁴ (Monaghan 1986: 998-9). *See also* (Fallon 1993: 343-4) (referring to the abstention approach and stating that the purpose of his article was to "rationalize" *Parratt* and his own preference would be to overrule *Parratt* and allow the substantive due process claims to proceed in federal court)

⁸⁵ *See, e.g.*, (Monaghan 1986: 998-9).

⁸⁶ Indeed, if the critics' proposed *Parratt* abstention doctrine were accepted *along with* the argument that *Parratt* is best described as a substantive due process case, it is quite possible that, due to the incorporation doctrine's dependence on substantive due process, all claims against state and local officials alleging unauthorized violations of protections guaranteed by the Bill of Rights would be required to be heard first by state courts. To suggest that such an outcome would be revolutionary is an understatement. It would have the same effect as directly overruling both the state action holding of *Home Telegraph & Telephone* and the "under color of law" holding of *Monroe*. (Zagrans 1985: 5223)(referring to *Parratt*'s potential impact on incorporation, *Home Telegraph* and *Monroe*); (Alexander 1993: 594-5)(same); (Monaghan 1986: 982)(describing *Parratt*'s challenge to *Home Telegraph* and *Monroe*) It also would almost completely undermine the Radical Republicans' conception of the Fourteenth Amendment's important role in the protection of individual rights against state infringement. (Rubin 2003: 885-888).

rely on statutory revision rather than constitutional interpretation, by encouraging Congress to modify § 1983 to screen out the most trivial cases.⁸⁷

After *Parratt*, the Court began to consider the extent of that holding's reach. Parratt's claim involved the prison's mishandling of his mail, a random and unauthorized deprivation of his property interests.⁸⁸ What about cases where the complaint alleges harm done pursuant to an established policy?⁸⁹ In *Zinermon v. Burch*,⁹⁰ the plaintiff sought damages under § 1983, claiming that physicians at a state hospital had deprived him of his constitutionally protected liberty when they admitted him to a mental hospital, even though he was mentally incompetent to sign the consent forms. The Supreme Court interpreted the plaintiff's claim as alleging that the state officials' policies for ensuring that he had voluntarily committed himself to a state mental health facility were

⁸⁷ Congress in fact ultimately dealt with claims like Parratt's in the Prison Litigation Reform Act. See The Prison Litigation Reform Act of 1996, Title VIII of the Omnibus Public Services Appropriations Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996) (requiring, *inter alia*, the exhaustion of all administrative remedies for prisoner complaints before granting federal jurisdiction in § 1983 cases). Although its proposed solution has been properly criticized for excluding far more than trivial disputes about lost mail, it is far better to have Congress take the lead in developing specific exceptions to the general rule in *Monroe* establishing that the federal cause of action is supplementary to the state remedies, than to have the Court reversing *Monroe* entirely.

⁸⁸ Soon after *Parratt*, the Court considered another case where the deprivation was *intentional*. Would a post-deprivation remedy be sufficient? In *Hudson v. Palmer*, 468 U.S. 517 (1984), Justice Burger argued that the *Parratt* reasoning applied to intentional deprivations of liberty as well, because the "practicability" of post-deprivation procedures does not turn on the level of intent. The prison could not be asked to predict when unauthorized but intentional deprivations would occur, so it did not make sense to require pre-deprivation remedies. The only time pre-deprivation procedures are required is for cases, like welfare hearings, where deprivations are a regular, anticipated occurrence. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁸⁹ For a pre-*Zinermon* argument suggesting the Court's distinction in *Parratt* between "random and unauthorized acts" and established policies was unclear, see (Bandes 1986-7)(suggesting that, properly conceived, "*Parratt* and *Monell* are correlatives. Where causation by government ends, random and unauthorized acts of its employees begins.") Bandes' argument is troubling for many reasons. First, she concedes the legitimacy of the Court's rejection of vicarious liability in *Monell*. Her intention evidently is to pursue the more practical goal of doctrinal rationalization, in order to keep *Parratt* well confined, rather than offer a more fundamental critique. Cf. *id.* at 132 ("Clarification of the doctrine may help it to better serve its stated purpose of providing assistance to lower courts. In particular it may prevent the misapplication of the doctrine to situations in which the government rather than the individual is the wrongdoer. The consequence of misapplying *Parratt* is the serious erosion of section 1983."); and (Bandes 1990) (offering a theoretically rich critique of the Court's rejection of affirmative duties).

⁹⁰ 494 U.S. 113 (1990).

inadequate. Because the deprivation was not random, but rather was done pursuant to an established policy, the plaintiff was not required to make use of the state post-deprivation remedial scheme first. *Zinermon* thus left open the door to future plaintiffs seeking to avoid the *Parratt*-procedural due process holding. They simply needed to frame their complaint to more closely mirror the facts in *Zinermon*, by alleging systemic deprivations of rights, which amounted to policies that failed to incorporate adequate procedures to avoid constitutional violations.⁹¹

In these same Due Process cases, the Court introduced a second kind of limiting principle, a state-of-mind requirement, which narrowed the availability of the § 1983 cause of action even further. Generally speaking, the elements of a cause of action under § 1983 do not include a fault requirement. To make a constitutional tort claim under § 1983, plaintiffs must simply establish that a person, acting under color of law, violated their constitutional rights. State-of-mind arguments are not completely absent, however. The constitutional right supporting the claim may itself incorporate a state-of-mind requirement.⁹² For Due Process claims, as the Court moved to restrict the availability of § 1983 cause of action, it also moved from a more lenient negligence standard⁹³ to a more onerous “deliberateness” standard.⁹⁴

⁹¹ (Oren 1991: 55-69) (discussing post-*Zinermon* cases).

⁹² For example, the Court has required a showing of discriminatory intent in Equal Protection claims. *Washington v. Davis* 426 U.S. 229 (1976). For Eighth Amendment claims alleging cruel and unusual punishment, the Court has imposed a “deliberate indifference” standard. *Estelle v. Gamble* 429 U.S. 97 (1976); *Farmer v. Brennan* 511 U.S. 825 (1994). In addition, one might argue that the qualified immunity “reasonableness” standard incorporates a kind of fault, or state-of-mind requirement. For more on the doctrine of qualified immunity, see below, *infra*.

⁹³ *Parratt*, 451 U.S. at 527; *cf. id.* at 549 (Powell, J., concurring) (rejecting negligence standard for due process claims).

⁹⁴ *Daniels v. Williams* 474 U.S. 327 (1986); *Davidson v. Cannon* 474 U.S. 344 (1986). For criticisms of the use of state-of-mind requirements and overreliance on torts theories when defining standards for governmental liability, see (Nahmod 1974-5) (“The assistance of tort concepts in 1983 cases is far different from their dispositiveness. . . . [I]t is more consistent with the fourteenth amendment enforcement purpose of section 1983 as well as that section’s language, to suggest that it is the nature and scope of the particular

The most troubling Due Process cases reject even the minimal standards required in the procedural due process-*Paratt* line of cases, and simply conclude that the plaintiff failed to allege a “liberty” or “property” interest protected by the Due Process Clause.⁹⁵ In *Paul v. Davis*, Justice Rehnquist argued that “reputational” interests were not protected by the Due Process Clause.⁹⁶ Clearly, the policy objective motivating the Court was the notion that state courts should have the primary responsibility to setting standards for basic tort causes of action. But Rehnquist met that objective by denying that the plaintiff enjoyed any constitutionally protected interest in his reputation. He did not adopt the approach, later introduced in *Parratt*, focusing on the adequacy of state post-deprivation remedies.⁹⁷ Instead, in *Paul*, no state remedies are required because Rehnquist denied that the Due Process Clause was implicated in any way. To make this argument, Rehnquist strained to distinguish earlier Due Process cases, like *Wisconsin v.*

fourteenth amendment’s duty, and not traditional tort concepts, which determine whether the defendant is liable and the extent of his liability.”); (Nahmod 1988-9: 1720)([T]he Court, by using tort rhetoric, is attempting to marginalize § 1983 and to make it less protective of fourteenth amendment rights. . . . [B]y couching § 1983 interpretation issues in tort rhetoric, the Court is able to send increasing numbers of proposed § 1983 actions to state courts to be disposed of on state law grounds.”); (Burnham 1989: 515, 556)-(criticizing the *Daniels* state-of-mind analysis and offering an alternative “power theory of duty,” focusing on the unique powers government can exert over citizens, to distinguish constitutional and common law torts); (Abernathy 1988-9: 1460)(observing that there is no mention of state-of-mind requirements or tort-like standards of care in the Constitution and arguing that “constitutional law created in this area substantially differs from traditional constitutional law and that it is § 1983 itself that makes the difference”); (Whitman 1997)(arguing that when institutions or structures or legacies of inaction are responsible for constitutional deprivations, it makes little sense to search for a person with a requisite “state-of-mind”).

⁹⁵ The previous standard for determining whether a particular interest was protected was based on its “importance” to the individual. *See, e.g., Bell. v. Burson*, 402 U.S. 535 (1971). After *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court introduced an alternative approach in which the Court assesses the “nature of the interests” that due process protects. (Monaghan 1977: 407-9, 420) (describing the shift from *Burson* to *Roth*).

⁹⁶ 424 U.S. 693 (1976).

⁹⁷ Rodney Smolla has argued that the Court might have instead introduced a *Parratt*-type approach even earlier to cases like *Paul*, by simply requiring that an adequate post-deprivation remedy was necessary to satisfy due process. (Smolla 1982: 842); *see also* (Armocost 1999). Although the *Parratt* approach would have addressed the federalism concerns that appear to motivate his reasoning in *Paul*, Rehnquist continued to uphold *Paul* even after the *Parratt* decision was handed down. In a *Bivens* case, *Siegert v. Gilley*, 500 U.S. 226 (1991), the plaintiff alleged damage to reputation as a deprivation of liberty under the Due Process Clause. Rehnquist dismissed the claim, on the grounds that defamation was not a constitutional violation.

Constantineau,⁹⁸ and many commentators have argued that his efforts were exceedingly unpersuasive.⁹⁹

B. Immunity Doctrines & Sec. 1983

The second way the Burger Court sought to limit the scope of officer liability in § 1983 was through the acceptance of immunity defenses. The Warren Court had previously justified its endorsement of a small number of immunity defenses by referring to common law rules in existence in 1871 and arguing that those tort doctrines must have been well known to supporters of the Ku Klux Klan Act and thus implicitly incorporated.¹⁰⁰ The Burger Court's qualified immunity doctrine evolved in ways that greatly expanded the scope of the immunity defenses. While under the Warren Court's approach in *Pierson v. Ray*,¹⁰¹ the reasonableness standard was applied in an uncontroversial manner to police officers who had acted pursuant to a statute that was later ruled unconstitutional, the Burger Court invoked the immunity defense in a far more sweeping manner. In *Wood v. Strickland*,¹⁰² the Court ruled that the officers' actions were objectively reasonable despite the fact that the school board officials' discretionary actions violated the procedural due process rights of students. The Court in *Wood* did suggest that if there was evidence of malicious intention, the immunity defense would not

⁹⁸ 400 U.S. 433 (1971). In *Constantineau*, the Court invalidated on due process grounds a state statute that authorized a sheriff to post a public notice declaring an individual to be an alcoholic, without a prior notice and opportunity for a hearing. The Court expressed concern not only because the statute interfered with the plaintiff's opportunity to purchase alcohol, but also because the posting was an act of defamation.

⁹⁹ Rehnquist distinguished *Constantineau* by emphasizing that the statute infringed on the plaintiff's right to purchase alcohol, a more tangible interest established by state law. According to Rehnquist, claims of defamation alone were insufficient to establish a liberty interest implicating the Due Process Clause. For influential critiques, see (Shapiro 1976: 324-8); (Monaghan 1977: 423-9); (Durschlag 1979: 738-9).

¹⁰⁰ The Warren Court first applied the common law defenses of absolute immunity to cases brought against legislators and judges under § 1983. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges). The Burger Court extended the judicial absolute immunity defense to prosecutors in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

¹⁰¹ 386 U.S. 547 (1967).

¹⁰² 420 U.S. 308 (1975).

be extended, but it was still evident that the Burger Court was willing to apply the reasonableness standard to a broad range of contexts, not just the relatively rare context of officers relying on a statute that was later ruled unconstitutional, as in *Pierson*.

In these early Burger Court cases, there was also a second prerequisite for a qualified immunity defense: a subjective good faith requirement, which entailed weighing additional evidence about officials' states of mind, their sources of information, and so on. Because few claims could be resolved on summary judgment, the Court soon responded by dramatically reformulating the immunity doctrine in *Harlow v. Fitzgerald* in order to abolish the subjective good faith component.¹⁰³ All that remained after *Harlow* was the objective reasonableness test.¹⁰⁴

Law enforcement and other government officials as a result enjoyed a qualified immunity allowing them to avoid personal damages liability¹⁰⁵ when the constitutional right was not "clearly established" at the time of the alleged violation.¹⁰⁶ In *Anderson v. Creighton*, Justice Scalia complained that many constitutional standards can be described at a very abstract level of generality, and that when so described it is a simple matter to conclude that they are clearly established.¹⁰⁷ Scalia emphasized that, in such cases, as long as the defendant officials can establish they acted in an "objectively reasonable"

¹⁰³ *Harlow v. Fitzgerald*, 457 U.S. 800, 815-6 (1982) (Powell, J.) (criticizing the subjective test for allowing meritless claims to go before a jury solely because the immunity defense required the resolution of disputable questions of fact).

¹⁰⁴ The Court had earlier elaborated a test for establishing "objective reasonableness" in *Procunier v. Navarette*, 434 U.S. 555, 565 (1978), which focused on the issue of whether the constitutional right in question was "clearly established."

¹⁰⁵ Qualified immunity is not a defense to injunctive actions. See *Prisco v. United States*, 851 F. 2d 93, 97 (3d Cir. 1988), cert. denied, 109 S.Ct. 2428 (1989).

¹⁰⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Following *Harlow*, lower courts defined "clearly established" to require a controlling precedent in the district or circuit court where the claim was filed. A precedent would be deemed controlling only if it presented facts sufficiently similar to the facts alleged in the § 1983 claim. (Rudovsky 1989-90: 49-50, n. 164). As long as the law was not "clearly established," not even evidence of subjective bad faith or malice will defeat the immunity defense. See also *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

¹⁰⁷ 483 U.S. at 639.

manner, by showing that a reasonable officer would not have known that his *particular* actions violated the Constitution, then they should still be protected against damages liability.¹⁰⁸ After *Anderson*, plaintiffs were therefore required to show that the relevant constitutional standard was clearly established in a very particularized sense, so that it clearly covered the facts in the allegation.¹⁰⁹

Critics of this doctrine have convincingly argued that the Court improperly imposed a judge-made doctrine in defiance of the legislative goals of the drafters of § 1983.¹¹⁰ In *Tenney v. Brandhove*,¹¹¹ the Court focused on the legislative intent, arguing that supporters of the Ku Klux Klan Act meant to incorporate the common law in existence in 1871, and, for this reason, common law immunities should provide a defense to claims for damages brought under § 1983. The Burger Court endorsed this approach in some of the qualified immunity cases.¹¹² More often, however, the Court has sought to justify its approach solely in terms of policy considerations. In *Harlow*, the Court suggested that the goal was to seek “a balance between the evils inevitable in any

¹⁰⁸ 483 U.S. at 639-41.

¹⁰⁹ Most recently, in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court simplified the plaintiff’s task by arguing that as long as the Court could determine the defendant had fair warning, the defense would remain unavailable.

¹¹⁰ Both *Harlow* and *Anderson* were cases involving *Bivens* causes of action, so the Court did not need to defend its interpretation of § 1983. The Court simply referred to its earlier statement that it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officers under § 1983 and suits brought directly under the Constitution between federal officials.” See, e.g., *Harlow*, 457 U.S. at 818, n. 30 (quoting *Butz v. Economou*, 438 U.S. 478,504 (1978)). But see also (Matasar 1987)(suggesting the Court’s assertions regarding the prevalence in 1871 of common law immunities for judges and executive officials is not supported by the evidence, and arguing that there is evidence in the debates preceding the Ku Klux Klan Act demonstrating that both supporters and opponents believed the provisions would apply to executive officers, judges, and legislators); (Rudovsky 1989-90)(observing that the Court relies only occasionally on historical arguments); (Achtenberg 1991-2)(same).

¹¹¹ 341 U.S. at 379.

¹¹² See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 638 (1980)(stating that § 1983 incorporates those immunities that were “well established at common law at the time § 1983 was established”).

available alternative,” and it proclaimed that its approach to qualified immunity provided “the best attainable accommodation of competing values.”¹¹³

When abolishing the subjective test, the Court expressed a great deal of concern about subjecting individual officials to extensive discovery and the costs of trial.¹¹⁴ The prospect that the objective standard would fail to hold accountable some officers acting with malicious intent was evidently not deemed equally worthy of concern. There was, however, at least one consideration that outweighed the Court’s concern about the burdens of fact-specific inquiries: the desire to defend the *breadth* of the scope of the immunity defense. When it highlighted the availability of the alternative, objective reasonableness test in *Anderson*,¹¹⁵ the Court left open the possibility that plaintiffs would allege facts to support allegations that the conduct of the officer defendants was not consistent with the behavior of a reasonable officer, while the defendant officers would offer a set of facts to support the opposite claim.¹¹⁶ Although discovery would be required in those cases, the Court tolerated such a result because it allowed government officials an additional opportunity to escape liability for damages.¹¹⁷

The task, therefore, is to identify the substantive policy concerns driving this support for a broad official immunity doctrine. The Court appears most concerned about the incentive effects that would likely follow from a broad exposure to damages liability.

¹¹³ *Harlow*, 457 U.S. at 814.

¹¹⁴ 457 U.S. at 814-15 (conceding that promoting the quick termination of “insubstantial” lawsuits before trial requires an adjustment in the test for establishing a good faith immunity defense).

¹¹⁵ *Anderson*, 483 U.S. at 640-1. Even in *Harlow*, the Court mentioned in passing that the “clearly established” law test was not the only test. Officers seeking an immunity defense still had a second chance: “If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the officer pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.” *Harlow*, 457 U.S. at 818-9.

¹¹⁶ *Anderson*, 483 U.S. at 646, n.6.

¹¹⁷ 483 U.S. at 641 (emphasizing that the discovery would be more narrowly tailored than what would have occurred under the subjective test).

In *Harlow*, the Court emphasized “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”¹¹⁸ The Court also expressed concern that the prospect of facing liability for damages would discourage competent individuals from entering government service.¹¹⁹ Immunity defenses are a reasonable method for avoiding such problems. But these problems were created in the first place by the Court’s refusal to embrace governmental entity liability. When all of these strategies are taken together – both the Court’s restrictions on governmental entity liability and its efforts to shield officials with immunity defenses – the result is a framework that is very anti-plaintiff.¹²⁰

C. “Our Federalism” and Section 1983

The Burger Court blunted the impact of *Monroe*’s no-exhaustion rule – which held that the § 1983 cause of action is supplementary to any state claim – by introducing jurisdictional doctrines forcing the initiation of more claims in state courts.¹²¹ In *Younger v. Harris*,¹²² Justice Black argued that federal courts should not enjoin an ongoing state criminal prosecution, even when the § 1983 claim alleged a violation of the Constitution.

¹¹⁸ *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))

¹¹⁹ *Id.* at 814, 816.

¹²⁰ (Kates & Kouba 1972: 138)(“Forcing this loss on the injured individual is the least desirable alternative.”); (Morrison 1977: 848)(“It may be, as a matter of policy, government officials should have a limited immunity even where constitutional rights have been violated. But barring actions against governmental entities that employ these officials, however, the Court shifts the entire burden of loss for a violation of constitutional rights from the government to the individual victim.”)

¹²¹ One exception to the general trend of limiting doctrines is the Court’s ruling in *Mitchum v. Foster*, 407 U.S. 225 (1972) (holding that claims for injunctions under § 1983 were an express exception to the terms of the Anti-Injunction Act, 28 U.S.C.A. § 2283, barring most applications of federal injunctions against ongoing state proceedings). Of course the Court’s earlier application of an abstention doctrine in *Younger* blunted the impact of its ruling in *Mitchum*. See (Weisberg 1976-7: 1212)(“And so the real explanation for ‘Our Federalism’ surfaces: It obliterates section 1983 as a threat to established patterns of judicial federalism; the Court decided *Younger* as it did because *Mitchum* was waiting in the wings. After *Younger* the Court could decide *Mitchum* without fear of opening up any new jurisdictional doors other than those it was prepared to open.”)

¹²² 401 U.S. 37 (1971).

If the plaintiff could raise the constitutional issue as a defense in the state court proceeding, then principles underlying what Black termed “Our Federalism” required the federal courts to defer to the state judicial process and dismiss the § 1983 claim.

Following *Younger*, plaintiffs might theoretically be able to bring the separate federal claim later, but in practice that option was rarely available. In the 1980 case, *Allen v. McCurry*,¹²³ the Court ruled that constitutional claims brought in state courts will have full preclusive effect in later § 1983 actions. If, for example, a 4th Amendment claim was given a full and impartial hearing by the state court in an exclusion hearing, then the plaintiff would be collaterally estopped from bringing a claim later against the officers under § 1983. Four years later, the Court extended its preclusion doctrine in *Migra v. Warren County Board of Education*,¹²⁴ by barring plaintiffs from later bringing federal claims under § 1983 if they had an opportunity to raise them in the earlier state court action against the same defendant, and if the state law of *res judicata* required plaintiffs to bring all claims arising out of the same transaction in one action. Taken together with the Court’s abstention doctrine, these jurisdictional doctrines demonstrate how Justice Douglas’ holding in *Monroe* that the § 1983 claim is supplementary to any relevant state claim was severely undercut by these Burger Court procedural doctrines.

It soon became clear that Justice Rehnquist did not think the federalism concerns underlying *Younger* were limited to the context of ongoing state criminal prosecutions. Following *Monroe*’s ruling prohibiting suits against municipalities, plaintiffs sometimes sought to name a supervisory official as the defendant in a §1983 action. The plaintiffs in

¹²³ 449 U.S. 90 (1980).

¹²⁴ 465 US 75 (1984).

*Rizzo v. Goode*¹²⁵ sought to hold high-ranking city officials accountable for inadequate procedures within the police department for handling citizens' complaints regarding mistreatment. In response to the District Court's approval of their request for an injunction, Rehnquist argued that injunctive relief had always been used sparingly, with due consideration of the principles of federalism. He urged courts to rely on principles of equitable restraint, and not only in cases seeking to enjoin criminal proceedings or any ongoing proceedings in a state judicial branch: "We think these principles likewise have applicability where injunctive relief is sought . . . against those in charge of executive branch of an agency of state or local governments such as the respondents here."¹²⁶

In *Rizzo*, Rehnquist also addressed the plaintiff's theory of liability.¹²⁷ He rejected the plaintiffs' claim on the grounds that it did not describe any "affirmative link" between the police misconduct and any action on the part of the supervisors that indicated their authorization or approval.¹²⁸ Rehnquist distinguished previous § 1983 cases

¹²⁵ 423 U.S. 362 (1976); see also (Cooper 1988: ch. 11)(a case study of the *Rizzo* litigation, including a more complete description of the tensions and escalating violence in Philadelphia during late August 1970, which culminated in the murder of a number of police officers, followed by police raids on Black Panthers' residences and offices, during which police arrested numerous men, lined them up in the street, and conducted strip searches, many of which were photographed and published in the papers the next day)

¹²⁶ *Id.* at 380. This broad expansion of the *Younger* doctrine did not go unnoticed:

By a *coup de main* the *Rizzo* Court transplanted the doctrine of *Younger v. Harris*, which since 1971 has blocked federal injunctions against state *proceedings*, to the much more complex and sensitive area of federal injunctions against state *officials*. As a little reflection will show, a defense applicable in both contexts covers the board: It could block all federal judicial challenges to state action.

(Weinberg 1976-7: 1195).

¹²⁷ This portion of the opinion, focusing on the liability theory, would have a more widespread impact on civil rights claims because Rehnquist's theory of supervisory liability applied not only to requests for injunctions but also to § 1983 claims seeking monetary damages.

¹²⁸ *Id.* at 377. Commissioner Rizzo had in fact issued numerous inflammatory statements about protestors, and the Black Panthers in particular. Apparently, for Rehnquist, what mattered is that these statements were not made pursuant to any official plan or policy. See *id.* at 371 (referring to the link between "incidents of police misconduct and the adoption of any plan or policy by [the supervisors] – express or otherwise – showing their authorization or approval of such misconduct").

involving high-ranking officials, such as *Hague v. C.I.O.*,¹²⁹ on the grounds that the named defendants, including Mayor Hague, participated in promulgating an official policy of harassment.¹³⁰ Beyond offering that distinction, Rehnquist failed to provide any other guidelines regarding the causation requirement for cases involving allegations of institutional breakdown or systemic malfunction.¹³¹ Lower federal courts later ruled that supervisory officials can be held liable for their subordinates' misconduct, even in those instances where the supervisors did not take part in or witness the harmful act itself, but no consensus regarding a more precise legal standard has developed in the lower courts.¹³² Generally speaking, the Court's resistance to supervisory liability claims can be likened to its refusal to recognize respondeat superior liability¹³³ in the *Monell*-line of municipal liability cases, which are introduced in the next section. The result is a § 1983 doctrinal framework that is woefully ill equipped to deal with claims alleging institutional breakdown¹³⁴

¹²⁹ 307 U.S. 496 (1939).

¹³⁰ 423 U.S. at 373-5.

¹³¹ Rehnquist actually denied the characterization that the problems in Philadelphia were systemic, noting that proof of approximately 20 constitutional violations in a city with three million inhabitants is similar to problems facing all police departments in major urban areas. *Id.* at 375.

¹³² (Kinports 1997: 147, 150, 158) (“[T]he Court has given no more specific guidelines as to precisely what constitutes an ‘affirmative link’, or how egregious a ‘failure to supervise’ is required to make out a case against a supervisor. Any level of culpability ranging from negligence to deliberate intent would appear faithful to the language in these opinions.”).

¹³³ Respondeat superior theories of liability permit holding employers – ie., a municipal agency – responsible for harms caused by the actions of its employees. *Monell v. New York Department of Social Services*, 436 U.S. 658, 671 (1978).

¹³⁴ In *Monell*, the Court expressly acknowledged this link when it asserted that *Rizzo* similarly rejected the argument that § 1983 liability can be premised on “the mere right to control without any control or direction having been exercised and without any failure to supervise.” *Id.* at 694, n. 58. This reasoning fails to acknowledge that an institutions' power to control, and its failure to use that authority to prevent violations of rights, can also cause harm. Why should liability be withheld in such cases? For more on the “Control Model” of liability, see Ch. 6 *infra*.

IV. *Monell* and the Rejection of Respondeat Superior Liability for Municipalities

After the *Monroe* decision, the Court left little room for civil rights lawyers to maneuver when challenging school segregation.¹³⁵ The rejection of municipal liability meant that they were unable to sue the school boards, and the Court's rejection of supervisory liability in *Rizzo* made it clear that it would be difficult to bring a suit under that theory. The Court, therefore, surprised many when it upheld a number of cases

¹³⁵ At first, *Monroe* did not appear to eliminate opportunities for school desegregation lawsuits to proceed. The facts of *Monroe* were limited to the holding that municipalities themselves could not be held liable for damages remedies, rather than injunctions. The part of the opinion holding that municipalities were not "persons" within the terms of § 1983 did not have an immediate effect on the school desegregation litigation. That would soon change, however. In *Kenosha v. Bruno*, 412 U.S. 507 (1973), Justice Rehnquist raised the jurisdiction issue *sua sponte* and argued that *Monroe* did not permit a "bifurcated" approach to municipal liability, allowing suits for equitable relief to proceed while banning claims for damages. The Court in *Monroe* had held that municipalities were not "persons" within the terms of the statute. For Rehnquist, that meant also that plaintiffs seeking to sue municipal entities could not make use of § 1983's jurisdictional counterpart, § 1343. The Court remanded *Kenosha* for a determination whether the lawsuit could proceed under the general federal jurisdiction provision, § 1331. 412 U.S. at 514.

In *Aldinger v. Howard*, 426 U.S. 1 (1976), Justice Rehnquist rejected an argument requesting that claims against the county be heard under pendent jurisdiction, which would allow the plaintiff to join the county on a state law claim. Rehnquist now argued that the legislators in the 42nd Congress had expressed a preference against suing municipalities that was so strong, it barred even claims brought under an independent theory of federal jurisdiction.

In response to these narrow interpretations of § 1983, civil rights litigators began suing cities and counties in police misconduct cases under a *Bivens*-style theory – a private right of action implied directly by the Fourteenth Amendment and supported by the general federal jurisdiction state, § 1331. In these cases, district court judges recalled Justice Douglas' dissent in *Kenosha* and argued that the legislative history suggested that opponents of municipal liability in the 42nd Congress raised their concerns in the context of damages liability. In some cases, district court judges emphasized that denying an implied right of action against municipal entities would eliminate the availability of the sort of injunction issued in *Brown v. Board of Education*. See (Murphy 1985)(discussing lower court responses).

In *Mount Healthy City School District v. Doyle*, 429 U.S. 148 (1976) the school district's attorneys argued that jurisdiction should also be barred under § 1331. The Court acknowledged that the claim had merit, but argued that the defendants should have directly addressed the question whether school boards were "persons" for purposes of a § 1983 remedy. When the Court's encouragement in *Mt. Healthy* was read in conjunction with Rehnquist's invocation of federalism concerns in *Rizzo* to justify disfavoring injunctions sought against "those in charge of an executive branch of an agency of state or local governments," 423 U.S. at 380, the threat to the school desegregation lawsuits was unmistakable. See, e.g., (Shapiro 1976: 320)(suggesting that Rehnquist's federalism argument posed a threat to ongoing desegregation lawsuits and so would not likely prevail). The lawyers for the petitioner in *Monell* emphasized this threat to desegregation lawsuits, and argued that suing individual school board officials might not be effective.

upholding liability on school boards, and the school officials acting in their official capacities on behalf of the school districts.¹³⁶

In *Monell*, the Court overruled the *Monroe* Court's municipal liability holding and concluded that the Forty-Second Congress had intended municipalities to be deemed "persons" subject to liability under Section 1 of the Civil Rights Act of 1871.¹³⁷ To justify the reversal, Justice Brennan undertook a lengthy reappraisal of the relevant legislative history. As Douglas did in *Monroe*, Brennan focused its attention on the House's rejection of the proposed Sherman Amendment. However, at this time, rather than follow the *Monroe* Court's analysis by relying on those debates as support for the general conclusion that Congress did not have the constitutional authority to impose liability on municipalities, Brennan instead offered an explanation of the errors in the *Monroe* Court's reasoning. The focus of the Forty-Second Congress, he suggested, was on the lack of constitutional authority for Congress to impose on municipalities a general "duty to keep the peace."¹³⁸ The basic authority of Congress to impose liability on municipalities was not in question. In any case, the duty proposed in the Sherman Amendment dealt with "private" sources of harm, and so, the majority concluded, nothing in the debates regarding the Sherman Amendment warrants drawing the conclusion that it would be unconstitutional to hold "a municipality liable under Section 1 of the Civil Rights Act for *its own* violations of the Fourteenth Amendment."¹³⁹

¹³⁶ See, e.g., *Millikin v. Bradley*, 433 U.S. 267 (1977); *Bradley v. Richmond School Bd.*, 416 U.S. 267 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)).

¹³⁷ *Monell*, 436 U.S. at 669.

¹³⁸ *Id.* at 673.

¹³⁹ *Id.* at 683 (emphasis added).

In addition, further support for this revised interpretation of Congress' intent can be found by considering the 1871 Act's supporters' stated aim – to create a broad remedy for all civil rights violations committed under “color of law.” The goal was clearly expansive. Moreover, because in 1871 – and especially after the passage of the Dictionary Act – it was never even questioned that Congress was willing to consider municipal bodies to be “persons” under the law, it would simply be perverse to attempt to argue anything to the contrary.

After *Monell*, once municipalities were considered potentially liable, the scope of §1983 was tremendously expanded. The Court, however, was still evidently concerned about the potential burdens on municipal governments, and so sought to ensure that the scope of liability did not become overly broad. The challenge for the Court was in formulating standards for holding an entity liable when it itself did not (and, literally speaking, could not)¹⁴⁰ conduct the acts which directly resulted in the harm alleged. Because the text of §1983 imposes liability on any state official who “subjects” the plaintiff to a deprivation of a constitutional right, or who “causes [him or her] to be subjected” to such a violation, it is fairly clear that the standard must refer in some respect to the causal links. But the text alone does not at all dictate the type or strength of the causal link that must attach the municipal entity to the particular harms alleged.

The Court argued that the causation language did rule out one option – that of vicarious liability. The Court's rejection of respondeat superior liability, and its endorsement of the “official policy or custom” requirement, was defended with references to the Court's analysis of the statute's language. Because of the causation

¹⁴⁰ Obviously, a corporate entity cannot commit “acts.” Only the members of the group can. The task is to formulate some standards then by which to distinguish when a member is or is not acting under the authority of the body in which he or she is a member.

language, Brennan argued, liability could not attach to the municipality solely because of the employment relationship between the tortfeasor and the municipality.¹⁴¹ If a respondeat superior theory were applied, the link between the municipality and the violation would not be causal in nature; it would instead be derived solely from the nature of the relationship between the municipality and its employee.¹⁴²

The Court struggled to articulate a standard in *Monell* that could be causal in the way that (it thought) the text of the statute required.¹⁴³ Brennan concluded that this sort of causal requirement could be met only if the municipality's "policies or customs" were found to cause the harm. In such cases, and in those cases alone, could the municipality itself properly be held liable. After *Monell*, therefore, in order to hold a municipality liable, a plaintiff must show that the violation was caused by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."¹⁴⁴ In order to show that the municipality had in some manner "caused" the injury – to prove, in other words, that it was "the moving force" behind the violation – plaintiffs could not rely on the theory of respondeat superior.

The precise degree of causation required for municipal liability was not directly set forth in the *Monell* opinion. But by examining the fact-situation presented in *Monell*,

¹⁴¹ *Monell*, 436 U.S. at 693. See also (Kinports 1997: 157).

¹⁴² In justifying its rejection of respondeat superior liability, Brennan supplemented his textual analysis with another examination of the debates surrounding the Sherman Amendment. *Monell*, 436 U.S. at 694. From this analysis, Brennan somehow reached the conclusion that "imposing liability based on respondeat superior would run afoul of the Constitution by imposing on municipalities an obligation to keep the peace – the very problem that Congress had addressed in choosing to defeat the Sherman Amendment." (Mead 1986-7: 531).

¹⁴³ Which is not surprising, especially given the logical hurdles required to characterize the relationship between any corporate entity and a particular act in *causal* terms.

¹⁴⁴ 436 U.S. at 694. See also *id.* at 690-1 (offering only a rudimentary explanation of the "policy or custom" requirement, by suggesting that a "policy" results from an official decision by a governmental body, while a "custom" typically involves a widespread practice which has the force of law, but was not subject to an official or formal endorsement).

it is possible to identify at least one acceptable way in which causation may be shown – when the official policy itself is unconstitutional and thus directly causes the violation. It is important, though, to emphasize that the Court never suggested that this was a necessary requirement for municipal liability, only that it is sufficient. Liability may be warranted in other circumstances, whenever the official policy or custom – even when a policy is itself constitutional – is a “moving force” behind a violation. The Court, however, offered no further elaboration in *Monell*.¹⁴⁵

V. Protecting State and Local Governments from Liability for Constitutional Torts

A. State Sovereign Immunity and § 1983

After *Monell*, there existed a discrepancy in the treatment of municipalities and states under § 1983. Why were municipalities considered “persons” for purposes of § 1983, but not states? In order to understand how this distinction developed in the doctrine, a brief review of 11th Amendment immunity cases is required. Debates about the constitutional status of state sovereign immunity have become one of the most prominent doctrinal disputes among members of the Rehnquist Court. Critics of the Court’s state sovereign immunity doctrine point out that the text of the 11th Amendment does not refer to suits against a state by its own citizens.

¹⁴⁵ Nor did the Court subsequently produce a consensus position. Five-four decisions occur with unusual frequency in §1983 cases, and in many recent cases the Court has merely been able to muster a plurality for any one position. *See, e.g.*, (Schuck 1989: 1752) (contending that the post-*Monell* decisions “provide little or no direction for the resolution of municipal liability claims,” and observing that “in four recent cases the Court has been unable to muster even a bare majority in favor of a particular rationale or formulation”) *See also*, (Mead 1986-7: 520) (“It is a rare section 1983 case that does not contain multiple opinions.”).

The 11th Amendment was passed soon after the Court's ruling in *Chisholm v. Georgia*.¹⁴⁶ The case originated in a South Carolina executor's suit against the state of Georgia to recover property involved in a contract agreement. After the Court rejected Georgia's sovereign immunity claim in *Chisholm*, states expressed alarm that they would be confronted with a series of lawsuits brought by holders of state issues of paper or credit, or by Loyalist supporters seeking compensation for lands confiscated during the war. Critics of *Chisholm* pushed for a constitutional amendment to nullify its effects by restoring the states' common law immunity. The text of the 11th Amendment refers to suits brought against states by citizens of other states, because the purpose of the provision was to amend the Article III provisions concerning the diversity jurisdiction of federal courts.¹⁴⁷ The Amendment does not distinguish between suits brought under state and federal law, because there was no general federal jurisdiction for cases "arising under" federal law or the Constitution. The purpose was to alter diversity jurisdiction, so it was assumed that only suits brought under state law were at issue.

The 11th Amendment's protections were invoked nearly a century later during Reconstruction, when states became alarmed at the prospect of suits brought by bondholders to recover unpaid interest on their state bonds. In *Hans v. Louisiana*,¹⁴⁸ a bondholder brought suit to force his home state of Louisiana to pay outstanding interest on his bonds. Although the suit did not involve diversity jurisdiction, the Court

¹⁴⁶ 2 U.S. 419 (1793).

¹⁴⁷ William Fletcher points out that the first proposal for an amendment provided that "no state shall be liable to be made a party defendant [in federal court.]" Such a provision would have covered suits brought by both in-state and out-of-state citizens, as well as applied to both common law diversity and federal question cases. (Fletcher 1983: 1060) ("[R]ather than intending to create a general state sovereign immunity protection from all suits by private citizens, as the first proposal would have done, the drafters of the second and third proposals intended only to limit the scope of that part of article III's jurisdictional grant – the state-citizen diversity clause – that had led to *Chisholm*.")

¹⁴⁸ 134 U.S. 1 (1890).

nonetheless invoked the principle of state sovereign immunity to bar recovery. In defending the result, Justice Bradley did not rely upon the text of the 11th Amendment, but rather general principles of state sovereign immunity that he culled from quotations by Hamilton, Madison, and Marshall – all of which, he concluded, had assumed that it was “inherent in the nature of sovereignty” that states could not be sued without their consent.¹⁴⁹

If Bradley’s arguments were accepted without qualification, the scope of *Hans* was potentially enormous. The Court, however, did impose some limitations. A theory that elevated state sovereign immunity to constitutional status might be thought, for example, to preclude suits not only against the state itself, but also against subdivisions of the state, like counties or municipalities. Yet on the same day the Court issued the opinion in *Hans*, it held that the 11th Amendment did not protect counties from being sued in federal court.¹⁵⁰ In addition, the most expansive reading of Bradley’s argument in *Hans* might be thought to prevent *injunctio*ns against state officials. The Court, however, nearly two decades later issued a ruling in *Ex parte Young* suggesting that prospective relief was an exception to the 11th Amendment immunity doctrine.¹⁵¹

¹⁴⁹ 134 U.S. at 12-15. Akhil Amar emphasizes that the Framers believed states were sovereign only when acting within their delegated powers. (Amar 1987: 1437)(suggesting that when Hamilton, Madison, Marshall, and Iredell “spoke of government as sovereign they meant sovereign in a necessarily limited sense. By definition, government’s sovereignty was bounded; government was sovereign within its sphere of delegated power, and powerless beyond”). Thus, none of those statements should be taken to mean that states could not be sued if they violated federal laws or the Constitution.

¹⁵⁰ *Lincoln County v. Luning*, 133 U.S. 529 (1890). See also *Workman v. New York*, 179 U.S. 552 (1900) (cities are not protected by the 11th Amendment).

¹⁵¹ *Ex parte Young*, 209 U.S. 123 (1908). The Court defended this exception to sovereign immunity doctrine by arguing that an individual officer seeking to enforce a law violating the federal Constitution is “stripped of his official or representative character . . . [because] [t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.” *Id.* at 160. Moreover, forbidding the officer to enforce the law “does not affect the State in its sovereign or governmental capacity.” *Id.* at 159.

Legal scholars criticizing these developments concede that the principle of state sovereign immunity was widely acknowledged at the time of the creation and ratification of the Constitution, but they argue that these immunities were based on the common law and so were subject to the limitations imposed by federal laws and the Constitution. These scholars argue that, even after the passage of the 11th Amendment, state immunities in general remained a creature of the common law, and remained eligible for abrogation by any federal law. The 11th Amendment did not constitutionalize the general principle of state sovereign immunity, but only resurrected the common law immunity of states named as defendants in diversity lawsuits. Suits brought under any federal law or the Constitution could proceed against states as defendants.¹⁵²

Justice Bradley's opinion in *Hans* generated such divergent interpretations because it failed to distinguish clearly between state law claims brought under diversity or "arising under" federal jurisdiction and cases directly involving federal claims. In a very persuasive revisionist reading of *Hans*, William Burnham argues that Bradley likely intended only to invoke state sovereign immunity when the underlying claim was based on the common law.¹⁵³ The reason *Hans*' claim would have failed as a direct

¹⁵²This so-called "diversity interpretation" of the 11th Amendment has many supporters in the legal academy. For influential defenses of this position, see (Fletcher 1983); (Amar 1987); (Fletcher 1989). Supporters of the diversity interpretation believe *Hans* was wrongly decided and should be overruled. There is another position – call it the "common law immunity interpretation" – which holds that the broader purpose of the 11th Amendment was to restore the state's traditional common law immunities from suit. Because the claim underlying *Hans* was a state law claim, one could argue that the common law immunity would apply. Properly interpreted, *Hans* thus is not based on a sweeping view of the 11th Amendment, but rather a common law doctrine of state sovereignty. (Burnham 1990).

¹⁵³ See (Burnham 1990). William Burnham served as counsel in two Supreme Court cases involving sovereign immunity defenses. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Green v. Mansour*, 474 U.S. 64 (1985). One suspects, therefore, that one motivation prompting the development of his revisionist reading is his desire to convince Justices concerned about stare decisis principles that overruling *Hans* is unnecessary in cases involving federal statutes or constitutional claims. Indeed, in parts of his 1990 article, he counts up the number of cases that would have to be overruled in order to accept his revisionist reading. (Burnham 1990: 980-3)(estimating no more than four cases are affected, and arguing that three of them may be reconciled with his revisionist reading).

constitutional claim is based on the Court’s distinction between rights that are “secured” by the Constitution and those that are “protected” by the Constitution.¹⁵⁴ As it had in *Carter v. Greenhow*,¹⁵⁵ the Court would have likely argued that the underlying right to recover the value of his bonds was based on the common law rules regarding contracts. The only guarantee the Contracts Clause “secured” was the right to seek judicial review in order to invalidate the state law (or, in the case of *Hans*, the provision of the Louisiana Constitution).¹⁵⁶

Hans brought suit in federal court, because his claims met the broader pre-*Mottley* requirements of “arising under” jurisdiction – which would grant jurisdiction in cases involving a common law claim against a state, when the state could invoke, as a defense to the claim against it, a state constitutional provision or law that the plaintiff could then argue violated a federal law or the Constitution. It would be a mistake, therefore, to conclude from the grant of “arising under” federal jurisdiction in *Hans*, that the *original* claim was based directly on the Contracts Clause. Instead, the Contracts Clause argument was apparently assumed to be the obvious rejoinder to an anticipated defense. This kind of indirect establishment of federal jurisdiction was, according to Burnham, rejected eighteen years later in *Louisville & Nashville R.R. v. Mottley*,¹⁵⁷ which prohibited, as part of the “well-pleaded complaint rule,” efforts to establish federal

The “diversity theorists” do not appear to care whether *Hans* can be narrowly reinterpreted. As a historical matter, Bradley’s opinion was so ambiguous about the scope of its reasoning that the Supreme Court would soon enough invoke it in support of the proposition that cases brought under federal question jurisdiction implicated the 11th Amendment. For an extensive examination of Bradley’s likely motivations to reach the result he did, focusing especially on his desire to promote sectional reconciliation, see (Purcell 2003). Justice Souter mentioned some of these motivations in his dissenting opinion in *Seminole Tribe*. 517 U.S. 44, 116-123 (Souter, J., dissenting). Justice Rehnquist responded by arguing that Souter’s “undocumented and highly speculative explanation of the decision in *Hans* is a disservice to the Court’s traditional method of adjudication.” *Id.* at 68-9.

¹⁵⁴ See Ch. 3 *supra*.

¹⁵⁵ 114 U.S. 317 (1885).

¹⁵⁶ (Burnham 1990: 942-3).

¹⁵⁷ 211 U.S. 159 (1908).

jurisdiction by anticipating possible state defenses that could be challenged on grounds of unconstitutionality.¹⁵⁸ By carefully attending to these distinctions, it is possible to read Bradley's opinion far more narrowly, as implying nothing about state sovereign immunity in federal cases raising claims under the Constitution or federal laws.

After *Hans*, the Court argued more broadly that states could claim sovereign immunity in *any* case for damages where the state itself was the named defendant.¹⁵⁹ In the post-*Monroe* era, the Burger Court liberally applied the revised *Hans* doctrine to a § 1983 claim in *Edelman v. Jordan*,¹⁶⁰ arguing that state sovereign immunity precluded claims against the state officials – even when the state itself is not a named party – for a retroactive payment of welfare benefits, or any claim of monetary damages.¹⁶¹ Although many of the early cases addressing 11th Amendment defenses in § 1983 litigation, including *Edelman*, involve statutory claims rather than constitutional torts, they still offer important clues regarding the Court's evolving views concerning whether or to what extent the state may be responsible for damages remedies.

¹⁵⁸ See also (Burnham 1990: 950-955, & n. 67) (arguing that the *Mottley* Court incorrectly suggested that this rule was in existence at the time *Hans* was decided).

¹⁵⁹ See, e.g., *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (citing *Hans* for the proposition that states cannot be sued by their own citizens even when the suit is brought under federal laws or the Constitution); *Employees of the Dep't of Public Health and Welfare v. Department of Pub. Health and Welfare*, 411 U.S. 279, 280 (1973) (citing *Hans* for the “established” principle that state cannot be “sued in federal courts by her own citizens”).

¹⁶⁰ 415 U.S. 651 (1974). *Edelman* concerned Illinois' calculation of the starting point for benefits under the Aid to the Aged, Blind and Disabled (AABD) program. The Court narrowly decided in favor of Illinois by a vote of 5-4. Rehnquist wrote the majority opinion, joined by Burger, Stewart, White, and Powell. Douglas dissented on the grounds that the state's participation in the program constituted a waiver. Marshall, joined by Blackmun, also argued that Congress had required the waiver as a condition for participation. Brennan's dissent was based on the more fundamental objection that the 11th Amendment only barred federal court suits against states by citizens of other states.

¹⁶¹ The Court introduced this argument in an earlier case, *Ford Motor Co. v. Department of the Treasury*, 32 U.S. 459, 464 (1945), where it held that “when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.”

Rather than focus on overruling *Hans* completely, opponents of the Court's reassertion of state sovereign immunity, especially Justice Brennan, began defending arguments to limit its reach.¹⁶² They eventually met success in cases, like *Fitzpatrick v. Bitzer*,¹⁶³ where the Court limited the reach of *Hans* by holding that statutes brought pursuant to congressional authority under Section 5 should be understood to have waived state sovereign immunity.

After *Fitzpatrick*, one could then plausibly argue that § 1983 abrogated state sovereign immunity, because the statute was passed pursuant to congressional authority under Section 5 of the 14th Amendment. When Rehnquist referred to § 1983 in the *Fitzpatrick* opinion, he sought to deemphasize the abrogation theory by arguing that *Monroe*'s exclusion of municipalities from the definition of "person" made it reasonable to conclude that states were excluded as well.¹⁶⁴ When the Court later offered a revised interpretation of the history of the Ku Klux Klan Act, and held in *Monell* that municipalities could be sued after all, the "premise" for Rehnquist's argument was

¹⁶² *Parden v. Terminal Railway*, 377 U.S. 184 (1964) (Brennan, J.) For a fuller elaboration and defense of Brennan's reading of *Hans*, see (Burnham 1990)(emphasizing that, because contrary to common perception, *Hans* did not rely on a federal constitutional claim but only involved a common law contracts claim, the doctrine of state sovereign immunity can be narrowed to exclude federal claims against states without overruling *Hans*).

By the 1980s, Brennan was the leading advocate for the diversity interpretation. Marshall, Blackmun, and eventually Stevens, joined his call to overrule *Hans*. See, e.g., *Welch v. Texas State Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 496-521 (1987) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (arguing the 11th Amendment applies only to state-citizen diversity cases). For the evolution of Stevens' views, compare *Florida Dep't of Health and Rehabilitative Serv. v. Florida Nursing Home Assoc.*, 450 U.S. 147, 151-55 (1981)(Stevens, J., concurring)(declining to overrule *Hans* on stare decisis grounds), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302 (1985)(Stevens, J., dissenting) (concluding the benefits of reconsidering *Hans* outweigh the benefits of stare decisis).

¹⁶³ 427 U.S. 445 (1976). *Fitzpatrick* concerned 11th Amendment defenses bought by the state of Connecticut, in a class action for retired male employees alleging discrimination in the state's retirement plan that violated the 1972 amendments to Title VII, which covered state employers. Rehnquist wrote the majority opinion in *Fitzpatrick*, and argued that the 1972 amendments were authorized by § 5 of the Fourteenth Amendment, which limited the 11th Amendment.

¹⁶⁴ 427 U.S. at 452.

“undercut.”¹⁶⁵ Given the Court’s recent decision in *Fitzpatrick*, the argument that the 11th Amendment would protect states seemed in doubt.¹⁶⁶ Yet, just one year after the *Monell* opinion introduced these questions about state liability, the Court reasserted the position that Congress did not intend to abrogate state sovereign immunity when it passed § 1983.

In *Quern v. Jordan*,¹⁶⁷ Rehnquist’s majority opinion concluded that the members of the 42nd Congress who drafted and voted for § 1983 did not intend to revoke the states’ immunity from lawsuits in federal courts. Throughout the lengthy debates in the 42nd Congress, there was no mention of the Eleventh Amendment. If leading supporters of the Ku Klux Klan Act had debated the question, they likely would have invoked Marshall’s dicta in *Cohens v. Virginia*, which suggested that 11th Amendment immunity did not extend to cases bringing constitutional claims.¹⁶⁸ In fact, in the pre-*Hans* years, when members of the 42nd Congress considered these liability provisions, no constitutional or

¹⁶⁵ *Quern v. Jordan*, 440 U.S. 332, 351 (1979) (Brennan, J., concurring).

¹⁶⁶ In *Hutto v. Finley* the Court accepted awards of attorneys fees in case brought against state officials in their official capacities.

¹⁶⁷ 440 U.S. 332, 345 (1979). The holding in *Quern* stated that notice relief – rather than an injunction requiring the state to reimburse the plaintiff class for wrongfully withheld welfare payments, which the Court had already rejected in *Edelman* – did not violate 11th Amendment immunity. Notice relief allowed the court to order state officials to notify all affected persons in order to inform them of the appropriate state administrative procedures to follow in order to recover the withheld payments. The bulk of the opinion, however, addressed the prior issue of whether § 1983 abrogated state sovereign immunity entirely.

¹⁶⁸ 19 U.S. 264 (1821). In *Cohens*, a case brought fairly soon after the passage of the 11th Amendment, Chief Justice Marshall rejected state sovereign immunity in cases involving non-diversity federal jurisdiction:

From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to one another; the nature of our constitution; the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, without respect to parties.

19 U.S. at 412. In *Hans*, the Court rejected Marshall’s comments as dicta, noting that the actual holding in *Cohens* was based on the argument that, for a writ of error on appeal, the state was not considered a party for purposes of the 11th Amendment. 134 U.S. at 19-20. For more on *Cohens* and 11th Amendment doctrine, see (Jackson 1988: 13-39).

legal scholar ever defended such a broad reading of the 11th Amendment.¹⁶⁹ So why did the Court infer from this silence that Congress had *not* intended to revoke immunity? Rehnquist merely concluded that the Court remains “unwilling to believe, on the basis of such slender ‘evidence’, that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the states.”¹⁷⁰ Yet Rehnquist placed the burden on Congress to express an opinion about a vision of state sovereign immunity incorporating claims brought under the Constitution that was not prevalent in the 1870s. It was not for another two decades that the Bradley opinion in *Hans* was misinterpreted to promote a broad view of state sovereign immunity in all cases requesting damages – whether brought under diversity or federal jurisdiction, and including both common law and constitutional claims.

Nor could Rehnquist do much with the fact that Congress, just two months prior to debating the Ku Klux Klan Act, passed the Dictionary Act,¹⁷¹ the purpose of which was to provide guidance for the interpretation of statutes. The Dictionary Act provided that “in all acts hereafter passed . . . the word ‘person’ may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.”¹⁷² Justice Brennan responded to Rehnquist’s dicta by arguing:

¹⁶⁹ Burnham mentions the treatises of Joseph Story on the Constitution and Judge Conkling’s treatise on the federal courts. When discussing the 11th Amendment, Justice Story cited *Osborn v. Bank of the United States*, 22 U.S. 738, 857-8 (1824), where the Court stated that the 11th Amendment has “its full effect” to diversity suits brought “against a State, by the citizens of another State, or by aliens.” Judge Conkling argued further that “if the case arises under the Constitution. . . or if it is of admiralty or maritime jurisdiction, it matters not at all who may be the parties.” See (Burnham 1990: 994, n. 263).

¹⁷⁰ 440 U.S. at 341.

¹⁷¹ Act of Feb. 25, 1871, § 2, 16 Stat. 431.

¹⁷² *Id.*

The plain words of § 1983, its legislative history and historical context, all evidence that Congress intended States to be embraced within its remedial cause of action. The Court today pronounces its conclusion in dicta by avoiding such evidence. It chooses to hear, in the eloquent and pointed legislative history of § 1983, only ‘silence’. Such silence is in fact deafening to those who have ears to listen.¹⁷³

Many constitutional torts scholars have endorsed Brennan’s critique of Rehnquist’s approach to the legislative history. Theodore Eisenberg, for example, criticizes Rehnquist for ignoring the broader purposes of the Act’s supporters:

[F]rom this historical perspective, one may question the Court’s suggestion in *Quern v. Jordan* that section 1983 left unaffected the immunity of states from suit because Congress would not have lightly overturned such a tradition. Not only did the misbehavior of states play a prominent role in prompting enactment of section 1983 but, in the same act, Congress was willing to deem state complicity with the Klan to be “rebellion against the government of the United States” and to back that declaration with authorization to use federal force. What more can Congress do to a state? By comparison, civil liability for states, which section 1983 literally encompasses, is child’s play. To say that the 1871 Congress would have thought twice about the federalism implications of civil liability for states is to scorn reality.¹⁷⁴

If legislative intent is to frame the waiver issue, then Rehnquist surely cannot ignore the broader purposes of the Ku Klux Klan Act – its overriding purpose was to hold states accountable for their failures to protect citizens.¹⁷⁵ Rehnquist’s choice to rely on burden-shifting clear statement canons of statutory interpretation in this context have been much criticized. Why apply such substantive canons when interpreting a statute passed by a Congress that had no knowledge of this interpretive presumption, and indeed that had made it clear its position that, as a remedial statute, the Ku Klux Klan Act should be

¹⁷³ 440 U.S. at 365.

¹⁷⁴ (Eisenberg 1982: 486).

¹⁷⁵ (Hart & Sacks 1994: 1374-80)(describing purposivist theories of statutory interpretation).

interpreted liberally?¹⁷⁶ Rehnquist's approach to interpretation in *Quern* can only make sense when one accepts the substantive commitments informing his choice of canon in the sovereign immunity context.¹⁷⁷ The purpose is to favor states' rights.

The Court's dicta in *Quern* regarding 11th Amendment immunity did not preclude constitutional tort claims against state governments in state courts.¹⁷⁸ The Court, however, eliminated this option in 1989 when it held in *Will v. Michigan Department of State Police*¹⁷⁹ that a state was not a "person" under §1983.¹⁸⁰ White's opinion relied on a canon of statutory construction that applied a presumption against waivers of sovereign immunity in federal statutes.¹⁸¹ Because this case originated in a state court, White could

¹⁷⁶ Eskridge et al. describe this as "the bait and switch" problem. (Eskridge et al. 2000: 360)("[C]anonical evolution can amount to a 'bait and switch'. Congress may have frequently legislated in ways that would have been interpreted as reaching the state under the interpretive regime in place when Congress acted, only to discover that because of canonical evolution it must formally amend the statutes to reach the states today.").

¹⁷⁷ It has long been acknowledged that the use of interpretive canons of statutory construction provides few constraints on judges. (Lewellyn 1950) In the case of the "clear statement" canons, there is an even more straightforward opportunity for judge's to safeguard their political preferences – especially when they are applied retroactively to a Congress that had never operated under the new burden of persuasion.

¹⁷⁸ (Burnham 1991: 4, n. 14)(collecting state court cases addressing whether states were "persons" under § 1983).

¹⁷⁹ 491 U.S. 98 (1989). In this case, Ray Will, a computer analyst employed by the state of Michigan, sued the Michigan Department of State Police when he discovered he had been denied a promotion in 1973 because of his brother's anti-war protest activities, which the Department had been monitoring.

¹⁸⁰ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

¹⁸¹ 491 U.S. at 64 (referring to "the often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it'" (quoting from *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979)). Burnham rejects White's suggestion that this interpretive presumption was well entrenched. He emphasizes that all of the cases cited in the majority opinion, including the *Omaha Tribe* case, refer to the sovereign enacting the federal statute – the United States. In *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 161-2, n. 21 (1983), the Court made that distinction clear, holding that "sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders." White attempted to distinguish *Jefferson County*, by arguing that its holding was limited to statutes involving states serving in a proprietary function. 491 U.S. at 64, n. 5. In any case, the sovereign exception rule did not apply if the statute was "for the public good" or to "prevent injury or wrong." (Burnham 1991: 14) White ignored these important qualifiers, which would easily apply to a civil rights statute. Finally, Burnham cites numerous cases in which courts have held federal statutes included states within the definition of "person." (Burnham 1991: 11). He gives particular attention to Justice Frankfurter's opinion in *California Shipping v. United States*, 320 U.S. 577, 585 (1944):

We need not waste time on useless generalities about statutory construction, in order to conclude that entities other than technical corporations, partnerships and associations are

not rely on the “unmistakably clear” abrogation language the Court had recently endorsed in the 11th Amendment context. White nevertheless cited *Atascadero* and applied the equivalent of a clear statement rule to the question of the definition of “person” in § 1983.¹⁸² Despite Scalia’s preference for textual approaches to statutory interpretation,¹⁸³ he joined White’s opinion. To do so, he had to dismiss the considerable evidence Brennan had cited in his dissent suggesting that the late nineteenth-century definitions of “persons” in the law included “bodies politic and corporate” and that states were referred to as “bodies politic.”¹⁸⁴

The practical effect of *Will* was to make the Eleventh Amendment immunity doctrine irrelevant: Because a “state” is not a “person” under §1983, the state itself cannot be sued for damages under § 1983 in either federal or state courts.¹⁸⁵ But state official may still be sued, either in an *Ex parte Young* suit for an injunction or a § 1983 claim brought against the state officials.¹⁸⁶ The § 1983 doctrines for state officer liability

‘included’ among the ‘persons’ to whom the Shipping Act applies if its *plain purposes* preclude their exclusion. *The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers.* (emphasis added)

¹⁸² 491 U.S. at 65. In response to this improper invocation of *Atascadero*, Brennan wrote in the opening of his dissent: “Like the guest who would not leave, ... the Eleventh Amendment lurks everywhere in today’s decision and, in truth, determines its outcome.” *Id.* at 71.

¹⁸³ For more on Scalia’s approach to statutory interpretation, see (Scalia 1997)(criticizing resort to legislative history in statutory interpretation); (Eskridge 1999)(assessing the “new textualism” approach defended by Scalia). For a leading criticism of Scalia’s approach, by a fellow Supreme Court Justice, see (Breyer 1992). Law professor Peter Strauss has argued that resort to legislative history and the broader political context is necessary if interpreters are to discern the purpose of a statute. (Strauss 1998)

¹⁸⁴ 491 U.S. at 78-82.

¹⁸⁵ Even without *Will*, this option might have been eliminated soon enough. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court held that states could claim state sovereign immunity even in cases brought to enforce rights, established in Article I legislation, in state courts. Even without *Will*, the arguments in *Alden* might have been extended to cases regarding constitutional rights under § 1983, because of *Quern*’s dicta suggesting that Congress did not intend to abrogate 11th Amendment immunity in § 1983. The *Fitzpatrick* abrogation doctrine thus would not have insulated § 1983 from the effects of *Alden*.

¹⁸⁶ Thus *Will* leads to the absurd result that requires one to believe members of the 42nd Congress had concluded that state officials were not “persons” when sued for damages, but they *were* “persons” when

are extremely complicated, however. Recall that the Court had previously, in *Edelman v. Jordan*,¹⁸⁷ rejected a class action claim for welfare payments that had been withheld in violation of a federal statute on the grounds that offering retrospective relief would violate the 11th Amendment. A decade later, in *Kentucky v. Graham*, the Court finally attempted to articulate the distinction between lawsuits brought against individuals in their official and personal capacities.¹⁸⁸ According to the Court, when cases are brought against officials in their personal capacities, the 11th Amendment is not implicated. The opinion, however, offered no way to distinguish between the two categories. The distinction between official and personal capacities did not refer to the activities prompting the lawsuit. Personal capacity, for example, was not defined in terms of those actions taken that were beyond the scope of employment.¹⁸⁹

Because the option of officer lawsuits under § 1983 remain available, some constitutional torts scholars have questioned whether too much attention has been paid to the recent Rehnquist Court state sovereign immunity cases: “Eleventh Amendment scholarship neglects a crucial fact . . . In almost every case where action against a state is barred by the Eleventh Amendment, suit against a state officer is permitted under Section 1983.”¹⁹⁰ For cases against state officials, the doctrine of qualified immunity may provide some obstacles, but the continued availability of the § 1983 cause of action is a significant limitation on the doctrine of state sovereign immunity. Although the distinction between official capacity suits violating the 11th Amendment and personal

sued for prospective relief. For an extensive criticism of the *Will* Court’s reasoning, written by a legal scholar serving as attorney for the petitioner, *see* (Burnham 1991: 30-31).

¹⁸⁷ 415 U.S. 651 (1974).

¹⁸⁸ 473 U.S. 159 (1985).

¹⁸⁹ *Hafer v. Melo*, 502 U.S. 21 (1991) (rejecting defendant employer’s claim that because the allegations involved a firing decision, they should be described as “official capacity” claims barred by the 11th Amendment).

¹⁹⁰ (Jeffries 1998: 50). *See also* (Monaghan 1996); (Karlan 2001).

capacity suits which do not remain unclear, courts typically defer to a plaintiff's characterization in the original pleadings.

Only on rare occasion have courts have invoked the 11th Amendment to reject plaintiffs' characterization of the case as a personal capacity lawsuit.¹⁹¹ These cases involve claims similar to those presented in *Edelman*. For example, in *Mello v. Woodhouse*,¹⁹² a plaintiff attempted to sue to enforce a retirement contract that the state legislature had rescinded. He attempted to force the state retirement officials to perform under the original contract, but the district court dismissed the claim, arguing that it would violate the 11th Amendment to force the officials to perform, because it would require taking money from its state treasury. This justification is puzzling, because *Ex parte Young* injunctions will also often require officials to spend state money, and many if not most § 1983 lawsuits brought against officials in their individual capacities involve the state because the state typically indemnifies its employees. The constitutional torts scholar, John Jeffries, offers a different explanation for the Court's rejection of certain claims. He argues that what cases like *Edelman* and *Mello* shared in common is "that, like the action that gave birth to the Eleventh Amendment, [these cases] sounded in contract rather than tort. Traditional rules of agency declare that while a servant is responsible for a tort committed in the master's business, the servant is not responsible for the master's contracts."¹⁹³

¹⁹¹ (Jeffries 1998: 63-6) (surveying lower federal court decisions from 1991 to 1996).

¹⁹² 755 F. Supp. 923 (D. Nev. 1991).

¹⁹³ (Jeffries 1998: 66) Jeffries also mentions Louis Jaffe's study of early twentieth century cases, which also referred to the distinction between contract and tort when considering whether remedies would be barred for violating the 11th Amendment. See (Jaffe 1963: 29).

Karlan explains how these distinctions operate in practice by examining a case, *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985), involving the firing of a New York state employee. He sued his supervisor for backpay, compensatory and punitive damages, as well as attorneys' fees. The Second Circuit rejected his claim for backpay, arguing that the supervisor was not responsible for the payment of salary. Suits for

Because a prerequisite for prospective relief under *Ex parte Young* requires the prospect of irreparable injury, the Court's 11th Amendment jurisprudence may encourage savvy lawyers to sue state officials immediately for prospective relief, on the grounds that damages in these "contracts-based" cases will be barred on 11th Amendment grounds.¹⁹⁴ Numerous scholars have highlighted the paradoxical and ironic result that the Court's 11th Amendment doctrine serves only to encourage such strategies, because injunctive remedies typically entail more invasive judicial oversight of state decision-making.¹⁹⁵ Given the Court's commitment to the principle of state sovereignty, it may choose to address this paradoxical effect by expanding the sovereign immunity doctrine even farther, and a number of scholars have already cautioned that the *Ex parte Young* remedy appears increasingly vulnerable.¹⁹⁶

backpay can only be brought against the state treasury, but such a suit is barred by the 11th Amendment. However, the Court approved the plaintiff's claims for compensatory and punitive damages, arguing:

[We are] aware of no theory that could render Regan individually liable for Dwyer's backpay, such is not the case with respect for the claim for damages. While Regan had no duty in his individual capacity to pay Dwyer's salary, he did have a duty not to deny Dwyer his federally protected right to due process. Thus, if Dwyer can establish that he requested and was denied a pretermination hearing into his claim that the announced elimination of his of his position was a sham, there is no Eleventh Amendment impediment to his recovering damages for that denial from Regan. Similarly, if Dwyer were to establish that he timely requested and was denied a posttermination hearing, there would be no Eleventh Amendment impediment to his being awarded damages for that denial.

Id. at 836-7; (Karlán 2001: 1320, n. 64)(suggesting "it may be possible to provide a rough description of the class [of "contracts-like" officer suits under § 1983 prohibited by the 11th Amendment] by saying that they are cases where, if federal law had been followed, the plaintiff would have been paid money out of the state treasury, and the state official's only malfeasance was in obeying a contradictory state directive not to pay the money. If the state official engaged in some other misbehavior as well – for example, she discriminated against the plaintiff on the basis of race in deciding not to pay him the amount to which he was entitled – then the claim becomes 'tortious' and actionable under 1983").

¹⁹⁴ (Meltzer 2000: 1018-21).

¹⁹⁵ (Karlán 2001: 1314, 1319)(observing that the original justification for introducing prospective injunctive relief under *Ex parte Young* was that damages would not be available because of the state's 11th Amendment immunity).

¹⁹⁶ (Karlán 2001: 1330). The Court has in recent years signaled its willingness to limit the availability of *Ex parte Young* suits. In one of the most important of all its federalism-based cases, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Court rejected an *Ex parte Young* claim

The main problem with state sovereign immunity is that, by shifting the enforcement burden to injunctive remedies under *Ex parte Young* and officer liability suits under § 1983, it fails to provide sufficient relief in the extremely large category of constitutional tort cases that often involve one-time violations of constitutional provisions, such as the 4th and 8th Amendments,¹⁹⁷ that have produced doctrines based on standards rather than clear bright-line rules.¹⁹⁸ The principle of qualified immunity works in these cases just as it does in the local officer cases to shield the government

asserting pendant jurisdiction (now called supplemental jurisdiction), which involves a mixture of state law and federal law claims arising from the same operative facts. The Court held that litigants could bring federal law claims against state officers in federal courts, but they could not attach pendant state claims. Justice Powell, in the Court's majority opinion, argued that allowing state law claims to be heard in federal court – whether they involved money damages or injunctive relief – would violate the 11th Amendment. *Id.* at 121. The Court's justification for this result was based on policy concerns. Powell argued that the *Ex parte Young* exception to the 11th Amendment was based on the importance of securing conformity with federal law, but that there is no similar need to create an exception to sovereign immunity allowing suits against officers on state law grounds. *Id.* at 120-1. In response, commentators have argued that this policy-oriented argument ignores the original principled justification for *Ex parte Young* suits: when officers act illegally, they are stripped of state authority and therefore cannot rely on state sovereign immunity. Whether the officers' illegal behavior defies federal or state law should make no difference. *See, e.g.*, (Chemerinsky 1999: 426).

Justice Kennedy has recently defended a far more sweeping limitation on *Ex parte Young*. In a portion of his opinion in *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997), joined only by Justice Rehnquist, Kennedy argued that injunctive relief under *Ex parte Young* should be made available in only two circumstances: when there is no state forum available, and when there is a showing of a "particular need" for federal court enforcement of a federal law. *Id.* at 267-80. Chemerinsky offers harsh criticism for Kennedy's approach:

Justice Kennedy's approach, had it attracted support from a majority of the Court, would have radically altered constitutional litigation in the United States. Virtually all constitutional challenges to state laws and state government actions, now brought to federal court pursuant to *Ex parte Young*, would have been shifted to state courts. Rarely is a state forum unavailable and seldom under Justice Kennedy's approach could it be shown that there was a special need for federal court review. Justice Kennedy's approach would do no less than largely overrule *Ex parte Young*. Although this would have the virtue of furthering federalism by expanding state immunity from federal court review, it would undermine state accountability by eliminating the primary mechanism which is used to ensure state compliance with federal law.

(Chemerinsky 1999: 431).

¹⁹⁷ *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (refusing to grant standing to victim of improper police use of the choke-hold method of restraint, on the grounds that it was unlikely that the victim would ever suffer a similar injury and so could not allege an "ongoing violation" requiring injunctive relief).

¹⁹⁸ (Sullivan 1993)(discussing the use of rules and standards in constitutional doctrine).

from liability in precisely those categories of actions where they should bear the burden of guaranteeing compliance with the Constitution.

The Court, however, appears unwilling to endorse any doctrine expanding a government's liability exposure under § 1983. As the next section will show, the Court has in recent years attempted to narrow the category of cases for which a municipal government may be held liable. Some scholars have already expressed concern that the Court will apply the arguments presented in *Alden* to shield *local* government entities as well as states from liability for damages.¹⁹⁹ If that happens, then perhaps the only regime remaining under §1983 will be the officer liability doctrine. That prospect should concern anyone committed to the maintenance of an effective remedial regime. As it stands today, the Court's hostility to entity liability already undermines the deterrence function that should structure constitutional torts doctrines, and its preferred individual officer liability approach is an inadequate substitute. When it comes to torts caused by the government, "[m]uch wrongdoing is rooted in organizational conditions and can only be organizationally deterred."²⁰⁰

B. The "Policy or Custom Requirement" for Municipal Liability

The Supreme Court's lack of guidance when it introduced the "policy or custom" causation requirement in *Monell* produced considerable doctrinal disarray in the lower

¹⁹⁹ (Meltzer 2000: 1027) ("[I]t is a familiar point that the litany of values associated with federalism, particularly those related to political participation, often are most fully realized by local rather than by state governments. One wonders whether one of the few limits on state sovereign immunity that the Court has consistently observed – that it shields only the state or arms of the state, and not local governments – will be maintained.") See also (Seamon 1998-9) (arguing immunity should extend to local governments).

²⁰⁰ (Schuck 1983: 98); see also (Whitman 1986); (Whitman 1997); and the discussion below *infra*.

federal courts.²⁰¹ Some of these courts limited liability to fact patterns closely similar to that presented in *Monell*, holding the municipality liable only in cases involving policies that are themselves unconstitutional. The municipal policy itself must “compel” the violation in order to have “caused” it. Other lower courts suggested that the “policy or custom” requirement need not be that narrowly construed. They interpreted the general holding of *Monell* as stating that as long as the policy or custom is “the moving force” behind the unconstitutional action, the municipality can be held liable. In addition, in some cases, lower courts have held municipalities accountable for their failure to train its employees. *Monell*’s rejection of respondeat superior liability has remained in force, however, so courts have struggled to prevent this “failure to train” category from becoming too open-ended. For this reason, lower courts rarely hold municipalities liable for the random, unauthorized acts of low-level government employees. In short, implementing the “policy or custom” requirement has proven to be very difficult. It did not help matters when most of the post-*Monell* Supreme Court opinions attempting to apply the “policy or custom” requirement failed even to muster a majority in support of a theory of liability.

The first challenge for the Supreme Court following *Monell* was to explain when policies may be said to be “the moving force” behind unconstitutional conduct. In *City of Oklahoma v. Tuttle*,²⁰² the Court was unable to form a majority view on this causation question. In the plurality opinion, Justice Rehnquist argued that if a city policy itself was

²⁰¹ The best account of the first decade of lower court struggles to apply *Monell* is (Kritchevsky 1988-9). For arguments criticizing the *Monell* policy or custom limitation and endorsing the alternative of respondeat superior liability, see (Mead 1986-7); (Kramer & Sykes 1988); (Schuck 1988-9).

²⁰² 471 U.S. 808 (1985). In this case, the widow of a man shot and killed by a police officer sued the City for monetary damages. She also named the officer in the suit, but the judge instructed the jury that he was entitled to qualified immunity, to the extent they determined he had acted in good faith and with a reasonable belief that his actions were lawful. *Id.* at 811-12.

not unconstitutional, then evidence of a single incident is not enough to hold the municipality liable. There was not, in other words, a sufficient “nexus” between the single instance of the use of excessive force by a police officer, and the city’s training and supervision policies.²⁰³ In addition, Rehnquist argued that the term “policy” “generally implies a course of action consciously chosen from among various alternatives.”²⁰⁴ Rehnquist chose a highly restrictive definition of policy, one that would rule out the most common kinds of claims of municipal liability. For example, in inadequate training or supervision cases, plaintiffs applying Rehnquist’s definition of “policy” would be required to show that the municipality deliberately chose the allegedly harmful program from an array of other options. Not surprisingly, Rehnquist’s proposal generated much sharp criticism.²⁰⁵

The Court soon backed away from Rehnquist’s proposal in *Tuttle*. In *Pembaur v. City of Cincinnati*,²⁰⁶ the Court conceded that if the appropriate policymaker – defined as one with “final decisionmaking authority” – is responsible for even a single instance of a constitutional violation, then a municipality may be held liable.²⁰⁷ This development was a significant advance over Rehnquist’s approach in *Tuttle*, because it allowed liability to be assigned to the municipality, even in cases where the constitutional violation was not committed pursuant to a formal, official policy. Even so, the O’Connor approach was

²⁰³ 471 U.S. at 823-4.

²⁰⁴ *Id.* at .823.

²⁰⁵ (Kritchevsky 1988: 1230).

²⁰⁶ 475 U.S. 469 (1986).

²⁰⁷ 475 U.S. 469 (1986). In *Pembaur*, a county district attorney ordered the sheriff and city police officers to enter a medical clinic to arrest two individuals. The prosecutor – mistakenly, it turned out – believed they were suspects who had been resisting service of an arrest warrant. The doctor who owned the clinic sued under § 1983 for damages, alleging an unlawful search of his building.

still subject to much criticism.²⁰⁸ The Court’s continued resistance to respondeat superior mandated the search for more formalistic criteria for triggering municipal liability, like the “final decisionmaking authority” standard. The Court’s approach in *Pembaur* offered little guidance for lower courts, because the Justices failed to reach a consensus on the criteria for identifying when certain policymakers may be said to have final decisionmaking authority.²⁰⁹

In *City of St. Louis v. Praprotnik*,²¹⁰ the Court reexamined this issue, but once again failed to reach agreement. The case was brought by a government employee who claimed he was retaliated against for exercising his free speech rights. His claim was rejected on the grounds that those who retaliated against him were not policymakers with “final decisionmaking authority.” Justice O’Connor’s opinion for the four-justice plurality suggested that courts should rely on the state law to identify the relevant policymakers, and she concluded that only those who had the power to establish and alter employment policy were the relevant decisionmakers, not those who were in charge of implementing it. According to O’Connor’s analysis, only the Mayor, Alderman, and perhaps the City’s Civil Service Commission, could be deemed officials with final decisionmaking authority. Even if subordinate officials were given the power to hire, supervise, and fire other city employees, that did not make them policymakers for the purposes of municipal liability.²¹¹ Justice Brennan, on the other hand, writing separately

²⁰⁸ See, e.g., (Schnapper 1979: 229)(“The unconstitutional customs with which the supporters of section 1983 were concerned were [not] . . . exercises of final or delegated authorities, but the widespread and persistent practice of ordinary sheriffs, judges, and prosecutors.”).

²⁰⁹ *Id.* at 481-2.

²¹⁰ 485 U.S. 112 (1988).

²¹¹ Justice Brennan, on the other hand, in his concurring opinion, argued that although initially recourse may be had to state law, the final responsibility for determining which officials retain policymaking authority must remain with the fact-finder. His alternative approach was rejected in the following term’s *Jett* case, discussed below.

for a three-justice concurrence, argued that although initially recourse may be had to state law, the final responsibility for determining which officials retain policymaking authority must remain with the fact-finder.

In *Jett v. Dallas Independent School District*,²¹² the Court was finally able to form a majority to support a holding clarifying the final policymaker rule. The Court adopted a slightly less stringent version of O'Connor approach, holding that (1.) courts must look to state law when determining whether a given official possesses final decisionmaking authority,²¹³ and (2.) this inquiry is a matter of law for the court to decide before the case reaches the jury.²¹⁴

Even more difficult questions of causation were presented in cases involving inadequate supervision or training. Should the municipality be held responsible for its failure to screen, train, or discipline these employees? In *Canton v. City of Harris*,²¹⁵ the Court examined a case involving the failure of the police department to provide adequate medical treatment while the plaintiff was in detention at the police station. The Court concluded that, even if the official policy at issue is constitutional, it can still be said to have “caused” a violation of constitutional rights. In the more controversial part of its opinion, the Court also imposed a fault requirement. According to the Court, the requisite level of fault can be established when “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights,

²¹² 491 U.S. 701 (1989).

²¹³ The Court loosened the standard somewhat by agreeing that, even if there is no state statute resolving the issue, as long as in practice an official's decisionmaking power is deemed unreviewable, then that official would be considered an official with final decisionmaking authority.

²¹⁴ *Id.*, at 737.

²¹⁵ *Canton v. Harris*, 489 U.S. 378 (1989).

that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.²¹⁶

A more recent Court decision focusing on the causation inquiry in municipal liability claims is *Board of the County Commissioners v. Brown*,²¹⁷ a Texas case involving an inadequate screening process preceding the hiring of a police officer, whose prior record included numerous misdemeanors for assault and battery, resisting arrest, among others. The Court reversed the Fifth Circuit decision holding the municipality liable. The opinion, written by Justice O'Connor, focused on the question of whether a "single hiring decision" can constitute a "policy" triggering municipal liability. Justice O'Connor relied in part on the *Pembaur* "final decisionmaker" standard, but she *also* introduced a state-of-mind requirement. She distinguished the facts in *Pembaur* on the grounds that the prosecutor in that case was the final decisionmaker and he himself

²¹⁶ The Court's approach in *Canton* was criticized for importing a fault requirement in a "trans-substantive" manner, to apply to all § 1983 "failure to train" cases, regardless of the underlying constitutional right as issue. *See, e.g.*, (Schuck 1989: 1761) (criticizing *Canton*). Kritchevsky disapproves of this development, arguing:

Nothing in *Monell* suggested that fault was an element of municipal liability analysis. . . . *Monell* does not discuss whether New York City's Department of Social Services had been negligent, grossly negligent, or deliberately indifferent in adopting its policy. Nor did the Court suggest that those questions mattered. Indeed, by reserving comment on the question of immunities, *Monell* left open the possibility that a city could be liable even though it had acted in the utmost good faith.

(Kritchevsky 1988: 1219-20). The Court rejected a good faith immunity defense for municipalities in *Owen v. City of Independence*, 445 U.S. 808 (1980). Before *Canton*, the Court had emphasized that state-of-mind requirements were only components of the constitutional violation. It should be noted here that that the state-of-mind standard in *Canton* appears to be an "objective test" – the court need only consider whether the facts warrant concluding that the municipality's policy was the result of deliberate indifference. *Id.* at 389-90. For Eighth Amendment violations, the Court requires proof of subjective recklessness, such as disregard for actually known risks rather than risks the defendant should have known about. *See Farmer v. Brennan*, 511 U.S. 825 (1994). Although the subjective fault requirement does require more evidence, the *Canton* objective fault standard still requires litigators to do more than demonstrate the inadequacy of the municipality's training procedures. They may also need to provide evidence of the municipality's response to past incidents, because without such evidence it will as a practical matter become much more of a challenge to persuade juries or judges that a municipality should have known that its policies would have resulted in the plaintiff's injuries. (Kritchevsky 1988: 1222).

²¹⁷ 520 U.S. 397 (1998).

ordered the unconstitutional conduct. This case, on the other hand, involved an allegation of unauthorized conduct by a low-level official. So, in order to avoid a respondeat superior theory, the Court needed another standard to determine when the municipality should be held liable. The more stringent state-of-mind requirement served as a means of avoiding the slippery slope to respondeat superior liability. According to Justice O'Connor, "Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the Plaintiff's deprivation of federal rights."²¹⁸

VI. Conclusion: Comparing Entity Liability and Officer Liability

The Court's interpretation of §1983 has resulted in an increasingly strict set of criteria for showing municipal liability. The Court has placed undue emphasis on a questionable interpretation of the clauses in §1983 which restrict liability to "any person who shall subject, or cause to be subjected" an individual to an actionable injury. When determining the possible scope of municipal liability, the Court inexplicably reached the conclusion that these clauses precluded vicarious liability of any form. By endorsing this constraint, the Court initiated – and pursued in a series of municipal liability cases – a long, futile search for a method to distinguish when a municipality has "directly" caused

²¹⁸ *Id.*, at 400 (emphasis added). In this case, the Sheriff had ordered the driving and criminal records of the deputy who was accused of using excessive force during an arrest, but he testified that he had not closely reviewed either of them and so did not learn that the applicant he was considering had previously pled guilty to numerous driving infractions and other misdemeanors, including assault and battery. *Id.* O'Connor rejected the plaintiff's invocation of *Canton*, by arguing that in the training context, constitutional violations are "highly predictable consequences" of an inadequate program. The consequences of a failure to screen, however, are not nearly as predictable. O'Connor would likely not have held the county liable even if the Sheriff had admitting reading the reports and making the decision to hire Deputy Burns regardless. In order to hold the county liable, the report itself would have to show not only that "Burns' use of excessive force would have been a *plainly obvious consequence* of the decision to hire him." *Id.* at 410-11 (emphasis added).

the alleged violation. As the initial step in this effort, the *Monell* Court endorsed the “official policy or custom” requirement²¹⁹ – a limitation on liability which has created one of the most serious barriers to plaintiffs attempting to sue a municipality under § 1983 for its failure to act.

The Court’s attempts to restrict municipal liability and to protect states from liability through the theory of state sovereignty suggest that it prefers to hold individual officers accountable. However, as we have seen, the Court has also introduced a variety of immunity doctrines to protect individual officers from liability. The Court has repeatedly argued that the modern framework for § 1983 is compelled by the legislative history. Thus far, this Chapter has sought to demonstrate that the Court’s interpretation of the legislative history in its development of modern § 1983 doctrine is easily contested. Supporters of the Ku Klux Klan Act were motivated above all else by their desire to secure citizens their constitutional rights by reining in or curbing the violence in the South. For this reason, the deterrence function in § 1983 should be given the highest priority. Concerns for the value of federalism gave way when the protection of constitutional rights was at stake. In addition, the remedial purposes of § 1983 cannot be ignored. Citizens who have been harmed as a result of constitutional violations should be compensated for their injuries whenever possible.

²¹⁹ The other serious problems resulting from the imposition of this requirement are more obvious. The official policy or custom requirement leaves unexposed to liability the *majority* of contexts in which the government should be liable for harm, such as the failure to supervise or train street-level employees who are most likely to be in a position to cause harm to citizens. The only contexts in which the requisite causal connection is deemed sufficient are (1.) when a formal policy issued by a high-level official causes the harm, or (2.) when informal customs, which are long lasting and continuing, cause a harm.

If these twin goals are to be secured, a complete overhaul of § 1983 doctrine must occur.²²⁰ The current preference for officer liability should be rejected on the grounds that it fails to promote the compensatory and deterrence goals of § 1983. Because government entity liability is the best means to achieve both of these goals, municipal liability should be expanded to include vicarious liability, and the state sovereign liability holding should be abandoned in § 1983 cases. What follows is an elaboration these claims and a defense of this radical reordering of § 1983 doctrine.

The Court's preferred officer liability approach seriously undermines the compensatory goals of § 1983 doctrine. Plaintiffs seeking compensatory damages have reason to worry that juries might be less willing to hold a low-level government employee, such as a caseworker, liable when they are presented with arguments about the constraints within which that officer was forced to work.²²¹ Indemnification is an imperfect solution to the problems created by the officer liability doctrine, for a number of reasons. First, there are no comprehensive statistics available regarding the extent to which states and local governments indemnify their employees when they are named

²²⁰ In *Bryan*, 529 U.S. at 430-1, 435-7, Justice Breyer -- in a dissenting opinion joined by Ginsberg and Stevens, and warmly praised by Souter in his own dissenting opinion -- argued strongly in favor of a complete overhaul of § 1983 doctrine, including the abandonment of the *Monell* Court's holding rejecting vicarious liability. With four Justices favoring a complete reassessment, these suggestions for reform are not impractical. The changes recommended below could also occur through congressional intervention, but legislative reform favoring plaintiffs is an unlikely prospect at a time when the public is so distrustful of litigation as a tool of social reform or government accountability. I do not here intend to suggest that the prospects for new legislation are likely, but rather defend their historical legitimacy and normative persuasiveness. Congress has on occasion introduced bills proposing amendments to § 1983, but none have succeeded. *See, e.g.*, S. 35, 95th Cong. (1977); S. 1983, 96th Cong. (1979); S. 990, 97th Cong. (1981); S. 585, 97th Cong. (1978); H.R. 721, 99th Cong. (1985); S. 325, 100th Cong. (1987). *See also Monell*, 436 U.S. 658, 724 (1978) (Rehnquist, J. dissenting) (calling on Congress to weigh in on the issue of municipal liability); *Parratt*, 451 U.S. at 553-4 (Powell, J., concurring) (urging further congressional action to screen out insignificant claims).

²²¹ (Schuck 1983: 101) ("Imposing liability upon individual officers, whose 'objective bad faith' may consist of little more than being an instrument of impersonal bureaucratic, political and social processes over which they have little or no effective control" is an affront to "the moral basis of public tort law"); *see also* (Whitman 1986: 59) (officer liability leads to the perception that the defendant official is the sole source of wrongdoing, rather than a part of a malfunctioning institution); (Rudovsky 1989: 31, n. 45) (predicting jurors' reluctance to impose liability on individual officers).

defendants in cases regarding actions they took while acting within the scope of their employment.²²² Plaintiffs in those states without indemnification policies would be unable to collect compensatory damages, if the officer has no significant personal assets. In addition, even in states providing indemnification benefits, policies often exclude conduct that is egregious, or criminal, or willful. As a result, for plaintiffs bringing the most serious claims under § 1983, the kinds of claims more likely to involve serious injuries and warrant large compensatory damages awards, the defendant may not be eligible for indemnification.²²³ Finally, in many states, indemnification policies are designed to *reimburse* officials once judgment has been rendered against them. These policies typically pay out *to the officials* an amount covering the losses resulting from an execution of judgment against them. That means that the state would only indemnify to the extent of the *actual* loss. If the officer is faced with a \$200 million dollar claim, but clearly would never be able to execute such judgment, the indemnification policy may only cover what the official is able to pay (via real estate attachments, wages garnished, etc.).²²⁴ If plaintiffs were instead able to sue the agency, city, county or state under a theory of respondeat superior, then damages would be available to cover the full extent of their loss.

Even when indemnification is available, government officials have ample reason to avoid increasing their exposure to liability. Qualified immunity defenses are thus most commonly defended as a necessary measure to prevent officials from becoming

²²² (Schuck 1983: 85).

²²³ (Schuck 1983: 86-8)(describing the diverse types of indemnification policies).

²²⁴ (Meltzer 2000: 1019-21).

excessively risk-averse when performing their assigned duties.²²⁵ The problem with this kind of defense of the Court's immunity doctrine is that it assumes that officer liability is the only option available. Immunity defenses may be a necessary method of remedying the problem of overdeterrence, but they do so at the cost of creating a liability regime that fails to deter future misconduct.²²⁶ It would not make sense simply to remove the immunity defenses, and leave the rest of the Court's § 1983 doctrine alone. Instead, it is the Court's preference for officer liability that must be challenged.

The priority given to individual officer liability is part of a larger phenomenon of overreliance on common law tort categories.²²⁷ The most typical common law torts involve individual actors suing individual actors for causing an injury. This common law tort paradigm fails to offer an adequate model for constitutional torts, where the injury is best described more generally as being caused by the government. When the Court focuses on the common law paradigm, it ignores the ways that "injuries can be brought about quite inadvertently through the workings of institutional structures . . ."²²⁸

Liability could be imposed on government entities when they possessed the power to stop

²²⁵ See, e.g., (Jeffries 2000: 269)(suggesting investigative searches provide the most convincing example of the need for qualified immunity, because the threat of officer liability for monetary damages would "seriously inhibit the legitimate activities of government").

²²⁶ As I suggest below, a more effective approach is to sue the government agency or municipality itself. Many scholars favor entity liability, because it can ensure that the supervisory officials responsible for setting new policies have the incentive to put in place new policies that optimally deter future harms without encouraging street level officials to behave too cautiously and not contribute to the agency's mission. (Whitman 1980) (favoring entity liability because "systemic problems" require "systemic changes"); (Schuck 1983: 100-7)(entity liability is more likely to prevent future harm because government agencies rather than street-level officials can set policy);(Gilles 2001: 849)(endorsing municipality liability on the grounds that it can impose reputational costs and encourage managers to engage in broad-ranging policy reforms).

²²⁷ See, e.g., (Wells 1998)(endorsing judicial incorporation of tort principles but also cautioning that judges should not simply borrow common law tort doctrines without considering the unique context of constitutional torts); (Schuck 1983)(recommending consulting tort theories for guidance while also offering a sophisticated analysis of the unique context of government power); (Whitman 1997)(rejecting the use of tort doctrine because it fails to take into account the institutional dynamics of government power).

²²⁸ (Whitman 1986: 226).

an injury and yet failed to take “reasonable preventative steps” to stop it. The *cause* of that failure is irrelevant to the analysis; the source of the failure might be the willful obstruction of an individual officer or overburdened resources or “an excessive diffusion of responsibility” within the government agency. Identifying what constitutes actionable failures should not focus on pinpointing the precise cause, or “rely on the language of choice and intent and motive.”²²⁹ The inquiry should instead involve an appraisal of the performance of the government institution.²³⁰

In order to give full effect to a new preference for government entity liability, a complete restructuring of the constitutional torts framework is required. The policy or custom limitation would be replaced by a doctrine incorporating the theory of respondeat superior, or vicarious liability.²³¹ It would entail abandoning the strained statutory construction of § 1983 claiming that “person” does not refer to state governments. Congress would need to adjust the Federal Torts Claims Act, to offer a suitable replacement for the *Bivens* doctrine holding individual federal officers liable.

These goals require quite dramatic reforms, but they are necessary ones. Only government entity liability can effectively promote § 1983’s deterrence function. Only government entity liability can ensure that liability will affect those in the best position to prevent future wrongdoing. If the agency *as a whole* is held liable using the theory of respondeat superior, a much greater deterrence effect will be the likely result, because high-level decision makers, unlike the average street-level employee, have the authority

²²⁹ (Whitman 1986: 255-6).

²³⁰ (Whitman 1986: 255); *see also* (Burnham 1989); (Gerhardt 1999) and Ch. 5 *infra*.

²³¹ Even respondeat superior or vicarious liability does not offer a perfect description of the reform I have in mind, because when those doctrines are applied the analysis is still focused first on the culpability of *individual* actors. The kind of entity liability that should be at the center of constitutional torts doctrine would instead acknowledge “injuries that cannot be traced to particular behavior, but are attributable to institutions, or to communities or cultures within institutions . . .” (Whitman 1986: 228).

to consider all the available alternative policies and procedures. When choosing from among these options, high-level decision makers are in a position to consider the full range of options.²³² Why continue current policies when the danger of liability exists? What reforms will prevent future violations? Only these decision makers are in a position to pursue the institutional reforms necessary to restructure incentives in an optimal manner. They may after due consideration decide to impose new standards and guidelines to prevent lower-level employees from shirking duties and causing violations. In other cases, the main need may be to devote the necessary resources for screening and training of new employees so that the risk that they will cause constitutional harms is significantly if not completely reduced.

It is impossible to predict in advance how successful the process of institutional change will be across the board, in a variety of policy settings, once governmental entity liability became the preferred method of implementing the constitutional torts regime. It is, however, possible to assess the circumstances under which agency leaders will be more likely to try and also to succeed. In his book, *Suing Government*, Peter Schuck addresses these issues in Part III of his book, entitled “Inside the Bureaucratic Black Box,” by drawing upon some of the insights from early classics in the field of organizational theory.²³³ Schuck concedes that the obstacles reformers must confront are

²³² Schuck calls this effect “the locational advantage of governmental liability.” (Schuck 1983: 103).

²³³ (Schuck 1983: Chs. 6-8) (*citing, inter alia*, works by Martin Lipsky, Peter Blau, Daniel Mazmanian, James Q. Wilson and Herbert Kaufman). In the years since his book was published, the topic of organizational change became the focus of two rapidly growing and influential literatures. First, studying the dynamics of organizational change has in recent years become a central preoccupation in the field of public administration, in large part due to the widespread “reinventing government” movement of the 1990s. *See, e.g.*, (Osborne & Plastrik 1998). Second, the branch of the “new institutionalism” literature focusing on organizational learning and change has offered important insights. *See, e.g.*, (March & Olsen 1984); (Hall & Taylor 1996); (Suchman & Edelman 1996); (Immergut 1998). For future empirical work assessing the effectiveness of the constitutional torts remedial system, these two flourishing literatures seem like a more fruitful source of inspiration than more recent law-and-economics approaches offering

most daunting in the case of direct service providing agencies. In these types of agencies, street level employees are granted a great deal of discretion, which is often guided by an entrenched culture of bureaucratic routines. These employees are in a position to stymie change, no matter how great the external political pressure. Furthermore, the modes of hierarchical control within an agency are usually limited by powerful public employee unions and civil service protections.

These challenges are not insurmountable. The deterrence goals of § 1983 can be promoted even when the most recalcitrant bureaucracies are the targets of the litigation. As Schuck persuasively argues, if four key prerequisites are taken into account, government entity liability will produce the changes required to prevent future wrongdoing. Once they are made to confront the prospect of § 1983 liability, agency leaders will have every incentive to make use of each of these prerequisites of reform. The first prerequisite is “information that identifies the conditions and behaviors that produced the problem in question and the changes that can produce a desired end-state.”²³⁴ Agency leaders can commission reports, order surveys of public opinion, and then take into consideration how the costs and benefits of various alternative reforms would be distributed throughout the agency.

The second prerequisite, developing and marshaling “communicative power,” is one that poses a particularly strong challenge for leaders of direct services agencies. But because agency leaders are well-positioned to change the organizational structure and the

predictions about the likely failure of an agency liability alternative, predictions which are based on nothing more than an analysis of the ways government agencies are and are not like private firms. *Cf.* (Levinson 2000), and the discussion in Ch. 6 *infra*. See also (Moe 1991: 106)(arguing that political scientists should be developing a “political theory” of organizational behavior and change in political institutions).

²³⁴ (Schuck 1983: 129).

channels of communication within the agency, they can continue to monitor and test the effectiveness of their communications strategies in order to adjust them as needed.²³⁵

The third prerequisite, restructuring incentives, is another especially difficult task for managers of street-level bureaucrats. These service providers are typically extremely overburdened, and as a result they have developed “coping strategies” that are highly resistant to change. When implementing reforms, leaders must secure the “acceptance, or at least acquiescence, by those at the bottom who must carry it out.”²³⁶ They can do so by hiring only those applicants who have expressed a willingness to pursue the agency’s new policies. For their existing staff, leaders have numerous reward and sanctioning devices at their disposal. If the staff remains resistant because of their doubts concerning the likelihood of success, then the agency supervisors must do a better job communicating their justifications for the proposed changes. To be successful, the leaders must invite feedback from the street level officials who know the most about how the reforms would affect their everyday duties. Once their insights are incorporated, resistance based on pessimism is likely to be eliminated.²³⁷

The fourth and final prerequisite of successful agency change is political support. The agency leader must use all of the communication resources at their disposal not only to convince agency employees of the merits of reform, they also must persuade the public – both legislators and their constituents – that the changes are necessary and beneficial.²³⁸

²³⁵ (Schuck 1983: 130).

²³⁶ (Schuck 1983: 132).

²³⁷ (Schuck 1983: 131-4).

²³⁸ (Schuck 1983: 134-5). The political environment will often provide the public pressure to eliminate wrongdoing, but it can also encourage agency leaders to tolerate a certain level of violations. For example, a police commissioner may consider exposure to liability when illegal searches are conducted against innocent citizens to be a tolerable necessary accompaniment to vigorous law enforcement.

Even when these conditions are present, agency leaders may refuse to address the problems or they may conclude the agency lacks the budgetary capacity to implement the necessary reforms. For example, a supervisor of a state foster care agency may well conclude that it is impossible to prevent all future violations, given the administrative burdens and budgetary constraints. Because such agencies are not driven by a profit motive, the inefficiency of paying out big payments on relatively rare occasions may be more tolerable than implementing widespread reforms. In such cases, direct court intervention may be required either to guide the process of reform when agency leaders resist, or to provide the necessary leverage with the legislature in order to expand the agency's budget.²³⁹

Obviously, a revised § 1983 doctrine expanding the scope of governmental liability for damages cannot offer a perfect, all-purpose method of deterring future constitutional violations. But when it is compared to the problems plaguing the Court's current official liability doctrine, its comparative strengths are compelling. As the above analysis attempted to demonstrate, the move to governmental entity liability is a necessary, if not sufficient, condition for satisfying the compensation and deterrence goals of constitutional torts litigation.

The doctrinal shift proposed here would also offer additional advantages. Focusing on government liability would streamline the litigation process dramatically, by reducing the number of issues to be resolved through pretrial discovery, by eliminating the need for multiple defendants and counsel, and by allowing the government to move quickly to settle the case (an option that is not always allowed with the indemnification

²³⁹ For a recent review of the literature on equitable remedies, *see* (Sabel & Simon 2004)(arguing that public law litigation seeking equitable remedies should proceed in an experimentalist manner rather than rely on a "command and control" model of the managerial judge).

alternative).²⁴⁰ In addition, a shift to a respondeat theory of government liability would push the Court to consider a wider variety of § 1983 claims. Because of its rejection of all forms of vicarious liability, including respondeat superior liability, the Court has not had to consider whether it could devise adequate principles by which to limit the extent of a municipality's liability for the actions of a third party of any sort. With no experience in similar cases involving government supervisors and their employees, the Court was left with no analytical resources at hand to apply to problems involving injuries caused in part by private third-party actors. Perhaps if the Court had grappled with alternatives like the respondeat superior theory, it might have been more confident when confronted with cases in which a private actor – acting in some manner, and to some extent, in conjunction with the government – causes an actionable injury. Instead the Court has been driven to limit the potential scope of municipal liability, and as a result it has endorsed overly broad limitations on the affirmative duties of government. In Chapter Five, I shall argue that either the Court or Congress should reexamine the case for a broader municipal liability doctrine in order to retrieve useful principles for confronting the affirmative duties cases.

²⁴⁰ (Schuck 1983: 102).