

Implementing the Rule of Law: The Role of Citizen Plaintiffs

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I. Civil Rights Litigation and the Rule of Law

Appeals to the “rule of law” today encompass many different aims – from the establishment of stable markets, to the enforcement of criminal laws and the protection of substantive human rights.¹ Over the past decade, the United States has supported a number of new programs designed to promote these “rule of law” objectives, in order to assist countries along a path of advancement that is assumed to end with the achievement of policies matching the American polity’s mature expression of the rule of law.² Because the rule of law is thought ultimately to require the protection of basic civil and political rights, one cannot help but observe an irony in the fact that the United States has – during this same period – increasingly failed to practice what it preaches.

¹ Richard Fallon argues that most conceptions of the rule of law appeal to three “values and purposes that the Rule of Law is thought to serve”:

First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.

Richard H. Fallon, Jr., *The Rule of Law’ as a Concept in Constitutional Discourse*, 97 COL. REV. 1, 8-9 (1997).

² See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the ‘Rule of Law’*, 101 MICH. LAW REV. 2275, 2276, n.5 (2003) (suggesting that the concept of the rule of law underlying these promotion efforts is “amorphous and undertheorized”). See also THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999); Thomas Carothers, *The Rule of Law Revival*, FOR. AFF. Mar./Apr. 1998.

One can, to be sure, find recent court opinions endorsing expansive definitions of some constitutional rights,³ but less attention has been paid to developments hindering the effective protection of those rights. In his recent work, Mark Graber has urged scholars to bridge the divide between the fields of constitutional law and constitutional politics in order to address these enforcement issues:

The question at the heart of a liberal democratic constitutional order is, How (and how well) does this constitution protect fundamental rights? The question is not simply, What rights does this constitution protect? The first question incorporates the second. We cannot evaluate how well a constitution protects fundamental rights until we know what rights that constitution was designed to protect. Still, the questions of constitutional law do not exhaust the constitutional analysis. *Constitutionalists must identify and assess those constitutional mechanisms responsible for realizing rights. Placing a right in the text of the constitution does not necessarily increase the probability the right will be protected.*⁴

Much of constitutional theory offers a narrow view of the required mechanisms. This essay seeks to shift the focus away from traditional emphasis on theories of judicial decision-making and the role of judicial review, in order to highlight another mechanism for implementing the rule of law: citizen lawsuits against the state.

For the thousands of citizens seeking access to courts, the idea that rights are “mere parchment barriers” is simply not persuasive.⁵ Their faith in litigation is, under some circumstances, warranted – especially when lawsuits are used, not for the purpose

³ See e.g., *Bond v. United States*, 529 U.S. 334 (2000) (warrantless squeeze of luggage placed in overhead compartment of a bus violates reasonable expectations of privacy); *Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless use of thermal imaging device to monitor a private home violates reasonable expectations of privacy).

⁴ Mark Graber, *The Constitution as a Whole: A Partial Political Science Perspective (Commentary on Akhil Reed Amar's The Bill of Rights: Creation and Reconstruction)*, 1999 U. RICH. L. REV. 343, 361 (emphasis added).

⁵ The Federalist No. 48 (Madison); see also STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND SOCIAL CHANGE* (1974); CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

of producing vast social reform, but rather as a method of holding government accountable for constitutional violations.⁶

Alternative approaches to implementing the rule of law, such as theories focusing on inter-branch checks and balances, seem inadequate to protect citizens from the kinds of abuses of power now more likely to occur after the rise of the Positive State.⁷ In contemporary constitutional democracies, additional “auxiliary precautions” are required.⁸ To an extent that is unprecedented in our history, citizens interact more often with, and depend more upon, government officials. Constitutional harms are inflicted every day by government officials misusing the authority granted to them under legislation that is itself constitutional. Judicial review as a mechanism for securing constitutional rights is irrelevant in such cases. Allowing citizen plaintiffs to sue the government when it abuses its authority has become an indispensable element of constitutionalism, and an essential method of implementing the rule of law. But it is also a method that has generated much criticism. In what follows, I describe the growth of opposition to citizen suits against the state, and explain why these developments are so troubling.

II. The Role of § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

⁶ Cf. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS ACHIEVE SOCIAL CHANGE?* (1991); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

⁷ For studies highlighting the role of separation of powers in theories of constitutionalism, see M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1998 2d. ed.); SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* (1999); Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

⁸ The Federalist No. 51 (Madison).

jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .⁹

Section 1983 is the primary vehicle citizens may use to vindicate their constitutional rights against state and local government officials and municipalities.¹⁰ The provision offers plaintiffs a cause of action in federal court for damages and injunctive relief against those who violate federal rights.¹¹

The body of law interpreting § 1983 has grown in both volume and complexity. During the past four decades, § 1983 has produced an increasingly large category of litigation in the federal courts. The number of nonprisoner civil rights cases filed in district courts grew from 296 in 1961 to 13, 168 in 1979.¹² A similar upward trend is apparent for state prisoner filings in federal courts – an increase from 218 in 1966 to 11, 195 in 1979.¹³ But the increase over the past two decades has been far less extreme. In

⁹ 42 U.S.C. § 1983

¹⁰ Section 1983's coverage is limited to state and local officers, and municipalities. Because of the Court's Eleventh Amendment sovereign immunity doctrine, plaintiffs cannot rely on § 1983 to sue state governments for damages. For harms committed by *federal* officials, courts have developed a separate doctrine, originating in its *Bivens* decision. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying from the Fourth Amendment the ability of an individual to bring a damage action against federal officials for an illegal search).

¹¹ Although in this essay the focus is on constitutional torts, it is worth noting that § 1983 may also be used in cases involving statutory rights, unless the statute at issue itself provides a "comprehensive statutory scheme." See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) ("[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) (establishing "comprehensive statutory scheme" rule).

¹² Administrative Office of the U.S. Courts, 1979 Annual Report of the Director at 6; Administrative Office of the U.S. Courts, 1975 Annual Report of the Director at 194.

When evaluating trends in § 1983 cases, one should approach the Annual Report statistics with caution. The category of "other civil rights" cases used in the Annual Reports is not limited to those actions brought under § 1983. It also encompasses other kinds of civil rights cases, including *Bivens* actions brought against federal defendants, cases based upon 42 U.S.C. § 1985, 42 U.S.C. § 1981, and housing discrimination cases brought under Title VIII of the Civil Rights Act of 1964. (Eisenberg 1982: 533-4)

¹³ Administrative Office of the U.S. Courts, 1979 Annual Report of the Director at 61; Administrative Office of the U.S. Courts, 1975 Annual Report of the Director at 207. See also Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 531 (1982)

2001, the number of state prisoner filings held steady at 13,707.¹⁴ The increase in the category for nonprisoner civil rights suits was modest: In 2001, the total was 18,331.¹⁵

Section 1983 suits are not the only option for citizens seeking to sue government officials for harms, constitutional or otherwise, but the dramatic increase in their use significant for two reasons. First, they offer citizen plaintiffs an opportunity to protect and vindicate their constitutional rights in federal courts, rather than to sue the state official under a tort theory in state courts. There are many advantages for plaintiffs in pursuing a constitutional claim in federal courts.¹⁶ An important difference for many plaintiffs is the availability of the attorneys fees provision in 42 U.S.C. § 1988(b), which offers prevailing plaintiffs reimbursement for the costs of the litigation.¹⁷ State common law tort cases are also thought to be poorly suited for many cases of governmental misconduct because the language of fault and responsibility in common law tort doctrine is often not easily transferable to cases involving governmental entity liability.¹⁸ In addition, there may be a symbolic or educative value in framing the dispute in terms of constitutional rather than common law doctrines.

(examining the activity following filing a § 1983 claim and concluding that claims filed in 1975 and 1976 did not overwhelm judges in the Central District of California).

¹⁴ Administrative Office of the U.S. Courts, 2002 Annual Report of the Director, Table C-2, <http://www.uscourts.gov/caseload2002/tables/c02mar02.pdf>

¹⁵ *Id.* The number of prisoner filings had been increasing more dramatically until 1996 (much of the increase corresponded with rapidly growing prison populations), when Congress passed the Prisoner Litigation Reform Act, discussed further below.

¹⁶ It is also possible to rely on § 1983 to sue governmental officials for federal constitutional violations in state courts. For further discussion, see Susan Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057 (1989) (explaining the usefulness of this approach when combining a § 1983 and state tort claims).

¹⁷ See discussion in Part III, *infra*.

¹⁸ Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225-6 (1986) (observing that, in constitutional tort cases, “tort language leads them to look for individual choices and motives, for an actor or a ‘mind’ that can be evaluated,” rather than acknowledge “the possibility of looking at an institution as a unit distinct from the separate individuals who compose it” or recognize “that injuries can be brought about quite inadvertently through the workings of institutional structures – through the massing or fragmentation of authority, or by the creation of a culture in which responses and a sense of responsibility are distorted”).

Second, although the Court has long acknowledged that citizens may sue the government for violations of their constitutional rights directly, in order to obtain injunctive relief,¹⁹ § 1983 provides for an important alternative remedy – a damages award. In 1961, in *Monroe v. Pape*, the Warren Court first endorsed claims for damages in a case alleging a constitutional violation by officials who were disobeying state laws and agency guidelines.²⁰ Soon after *Monroe*, the term “constitutional tort” was born.²¹

The introduction of a damages remedy for constitutional violations has been described as “one of the great innovations of modern American law.”²² In many constitutional tort cases, monetary damages offer an important alternative to injunctive relief. An injunction mandating the cessation of the harmful action does not alone adequately compensate the citizen plaintiff for the previous harms suffered. In addition, injunctions serve no useful purpose for those plaintiffs whose rights were violated by the government in a single episode. For these plaintiffs, a damages remedy provides the only possible form of relief.²³

The role of constitutional torts litigation has not been highly valued by the federal judges in charge of supervising its development. Except for a brief period of revival

¹⁹ *Ex Parte Young*, 209 U.S. 123 (1908).

²⁰ *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.”)

²¹ Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965) (coining the phrase “constitutional tort” and describing it as an action that “is not quite a private tort, yet contains tort elements; it is not quite ‘constitutional law,’ but employs a constitutional test”).

²² John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 80 (1998); see also Marshall S. Shapo, *Symposium, Re-Examining First Principles: Deterrence and Corrective Justice in Constitutional Torts: Afterword*, 35 GA. L. REV. 931, 934 (2001) (“[J]udicial elaboration of the *Monroe* interpretation of § 1983 has made it the case of the century for our rights as citizens.”); NORMAN DORSEN, ET AL., 2 EMERSON, HABER, AND DORSEN’S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976) (“[W]ithout section 1983 (and *Monroe v. Pape* which liberated it) many reforms of the Warren era would have been remitted to the tender mercies of hostile state judiciaries.”)

²³ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (rejecting standing for plaintiffs requesting injunctive relief, when alleging a one-time deprivation of constitutional rights).

following the *Monroe* decision, much of the history of constitutional torts litigation is a story of retrenchment and hostility to the claims of citizen plaintiffs.²⁴ Because of the enormous growth in litigation during the 1960s and 1970s, § 1983 litigation has been charged with “burdening” the federal courts.²⁵ Since the mid-1970s, the Court has introduced a complex array of doctrines limiting the availability and scope of the constitutional tort remedy.

These efforts to shield the government from liability became increasingly prominent in the Rehnquist Court era. The revival and expansion of state sovereign immunity doctrines, and the extension of various forms of immunity to individual government officials became more prominent during Rehnquist’s tenure. Another concern has been to distinguish constitutional from common law torts in order to control access to the federal courts under § 1983. Similar concerns appear to motivate Rehnquist’s effort to distinguish between public and private responsibility in *DeShaney v. Winnebago County*.²⁶ Rehnquist’s conclusory and much-criticized *DeShaney* opinion

²⁴ See, e.g., Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. J. 1323 (1952); Jack Beermann, *The Unhappy History of Civil Rights Litigation, Fifty Years Later*, 34 CONN. L. REV. 981 (2002). For a comprehensive review of this history, see Lynda G. Dodd, *Securing the Blessings of Liberty: The History and Politics of Constitutional Torts Litigation* (2004) (unpublished Ph.D. dissertation, Princeton University). In my dissertation, after discussing the origins of the Ku Klux Klan Act of 1871 (the predecessor statute to § 1983), and the “forgotten years” of constitutional torts litigation (from 1871 to 1961), I examine four types of strategies influencing the evolution of the Court’s contemporary constitutional torts doctrine: (1.) narrowing the scope of rights, especially due process rights, to curtail remedies; (2.) favoring individual officer liability over governmental entity liability, (3.) protecting governments and officials with a variety of immunity doctrines, and (4.) establishing bright-line distinctions between public and private actors.

²⁵ See, e.g., *Cleavinger v. Saxner*, 474 U.S. 193, 210-11 (1985) (Rehnquist, J., dissenting) (expressing concerns about the increases in § 1983 filings); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights -- Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1, 2 (1985) (“There appears to be a growing belief that § 1983 actions are likely to be frivolous complaints by litigants who seek to use the statute to convert or bootstrap garden-variety state-law torts into federal cases.”).

²⁶ *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189 (1989). Two weeks before his fourth birthday, Joshua DeShaney fell into a coma after suffering a brutal beating at the hands of his father. The Winnebago County Department of Social Services had received numerous reports of continued abuse, including hospital reports describing serious injuries, its case workers did nothing to intervene. For Justice Rehnquist, it took a mere nine pages to dismiss all of Joshua’s constitutional claims against the County and

cannot be explained simply with reference to the notion of “remnants of belief”²⁷ in the pre-New Deal constitutional order, or *Lochner*’s continued legacy.²⁸ It is true that the ideology of negative constitutionalism has persisted despite its lack of fit with the sweeping responsibilities of the modern state.²⁹ But Rehnquist’s embrace of this ideology appears more deliberate and purposeful.³⁰ Future evaluations of Rehnquist’s legacy³¹ should consider that it may be incorrect or incomplete to focus attention on his more renowned states’ rights doctrines and then interpret those simply as part of an

its employees. I discuss the case and Rehnquist’s reasoning in more detail in *Securing the Blessings of Liberty* Chs. 1 & 5 (2004) (unpublished PhD Dissertation, Princeton University).

²⁷ LOUIS MICHAEL SIEDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1997).

²⁸ Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 893 (1987).

²⁹ SAMUEL HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981) (describing Americans’ anti-statist ethos); and cf. Robert Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697, 702 (2002) (calling attention to the “incoherence” of many political orders, due to layering of new ideals and institutions upon previous patterns).

³⁰ It is also remarkably consistent. Just four years after Rehnquist joined the Court, David Shapiro published a critical appraisal of Rehnquist’s opinions in the *Harvard Law Review*, and summed up Rehnquist’s agenda with three main propositions:

- (1.) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
- (2.) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and
- (3.) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against that exercise.

David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARVARD L. REV. 293, 294 (1976). In her thoughtful and thorough study of Rehnquist’s entire career as Associate Justice, Sue Davis concludes that the source of Rehnquist’s federalism is a commitment to majority rule and the protection of those units of government that are closest to the people and more likely to respect the majority’s will. SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 24-5, 32-7(1989). Although Rehnquist has not been able to muster a majority of votes, during his time as Chief Justice, in support of his agenda in all areas of the law, Shapiro’s three-part description of Rehnquist’s agenda does fit remarkably well with many of his most notable opinions.

³¹ For recent appraisals of Rehnquist and his tenure as Chief Justice, see TINSLEY E. YARBOROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* (2000); STEPHEN GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* (2000); Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477 (2001); Keith E. Whittington, *William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* (Earl Maltz ed., 2003).

attempt to promote the “liberty-promoting” aspects of federalism.³² Instead, by focusing on governmental liability, more attention can be given to Rehnquist’s state sovereign immunity doctrines, expansion of immunities for officers, and narrow interpretations the scope of the Due Process Clause. The statist values underlying the Rehnquist Court’s civil rights doctrines will become more visible in such an analysis.³³

One way to assess these developments is to consider whether many of the policy concerns motivating these doctrinal developments are supported by empirical evidence. Fifteen years ago, the legal scholar Jack Beermann argued that “the indeterminacy of legalistic analysis of § 1983 should send us back to political discussion over the function and consequences of federal civil rights enforcement.”

[A] pragmatic approach . . . would open the courtroom doors to detailed studies of the effects that § 1983 litigation has had on plaintiffs and defendants, actual and potential. Does § 1983 litigation really vindicate constitutional rights? Whose rights? And what are its effects on state and local government officials?³⁴

Beermann’s suggestions went unheeded. There is still today a great need for more empirical analysis of the operation and effects of constitutional torts litigation.

While political scientists have offered interesting contributions to the debates about the “litigation crisis,” very few have focused on constitutional torts litigation.³⁵

³² See, e.g., *New Ice Co. v. Liebman*, 285 U.S. 262, 311 (1931) (Brandeis, J. dissenting)(introducing the metaphor of states as laboratories, which, if left free to introduce “novel social and political experiments,” can promote diversity).

³³ Using Karen Orren’s terminology of “officers’ rights” and “citizens’ rights” helps to highlight that the thrust of many Rehnquist Court doctrines has been the protection of governments and officers from liability in federal courts. See Karen Orren, *Officers’ Rights: Toward a Unified Field Theory of American Constitutional Development*, 24 LAW & SOC. REV. 873 (2000).

³⁴ Jack M. Beermann, *A Critical Approach to Section 1983 With Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989).

³⁵ See e.g., Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001); Judith Aks, William Haltom, and Michael McCann, *Symbolic Stella: On Media Coverage of Personal Injury Litigation and the Production of Legal Knowledge*, 7 Law and Courts Newsletter 5-7 (1997); THOMAS F. BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 1-59 (2002).

Although critiques of “rights strategies” have always found a constituency among political scientists,³⁶ without more systematic studies of the impact of *all* forms of rights claims, such assessments seem premature. Many political scientists have addressed the benefits and drawbacks of injunctions,³⁷ but they have paid almost no attention at all to the damages remedy § 1983 made available on a broad scale.³⁸ Given that the availability of a damages remedy for unauthorized conduct has made it possible for thousands of plaintiffs to vindicate their constitutional rights, it would seem like a fruitful topic for empirical research, especially for public law scholars in political science seeking to bridge the normative scholar’s interest in arguments about constitutional law doctrine with a more thorough investigation of how these claims are processed and implemented.

The most likely explanation for the lack of an extended analysis of § 1983 by political scientists has to do with the doctrine’s tremendous complexity. These doctrines have been described as “confusing,”³⁹ “rococo,”⁴⁰ “tortuous,”⁴¹ and “beset by exceptions, indirections, and complications.”⁴² Even Supreme Court Justices in recent cases have voiced complaints about the increasingly impenetrable rules the doctrine has produced.⁴³

The complexities of § 1983 doctrine must appear daunting to any public law scholar who

³⁶ For one influential critique, see DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 260 (1977) (rights approaches oversimplify and decontextualize disputes, and may cause harm by failing to acknowledge the impact any given resolution may pose for complex social and institutional relationships).

³⁷ See, e.g., PHILLIP J. COOPER, *HARD JUDICIAL CHOICES* (1988); MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998); SUSAN GLUCK MEZEY, *PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS* (2000).

³⁸ One exception is Charles Epp, whose recent study, *Do Rights Matter? Exploring The Impact of Legal Liability on Administrative Policies*. Presented at the Annual Meeting of the American Political Science Association (2001), is discussed further in Part III.

³⁹ Susan Bandes, *The Emperor’s New Clothes*, 48 *DEPAUL L. REV.* 619, 621 (1999).

⁴⁰ John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 *VA. L. REV.* 47, 54 (1998).

⁴¹ Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 *MICH. L. REV.* 225, 244 (1986).

⁴² John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 90 (1999).

⁴³ See, e.g., *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997) (Breyer, J., dissenting) (complaining that § 1983 doctrine has become so complicated it is nearly impossible to apply).

might be a capable student of constitutional law doctrines but has less knowledge of theory and doctrines in other areas of the law informing § 1983 jurisprudence, such as common law torts, federal jurisdiction, civil procedure, and remedies.⁴⁴

Political scientists have paid attention to caseload patterns in federal courts,⁴⁵ but they have thus far devoted far less attention to the impact of increases in particular categories of litigation, including § 1983, in the federal courts over time. Although law professors, members of judicial conferences, and groups like the ABA have produced an enormous literature assessing the current “caseload crisis” in the federal courts,⁴⁶ this

⁴⁴ In the first book examining the purpose and function of public tort remedies, *Suing Government*, Peter Schuck describes the state of public tort scholarship two decades ago:

Public tort remedies touch upon four legal specialties: tort law, administrative law, constitutional law, and civil procedure. Like many cross-specialty subjects, it resides in limbo, languishing in a kind of academic no-man’s land. Standard courses and texts in tort law, for example, focus on disputes between private parties under state law. Public tort remedies are marginal topics for study, momentary excursions to the rapidly vanishing realm of common law immunities. The leading torts treatise [Prosser’s *Handbook* (1971)], over 1,000 pages in length, contains not a single reference to 42 U.S.C. § 1983, the remedial fountainhead of today’s public tort law. Administrative law texts and scholars treat public tort actions as an exotic, mutant form of judicial review, peripheral and ancillary to traditional direct review of administrative decisions under the Administrative Procedures Act. Constitutional scholars are far more concerned with substantive conceptual and doctrinal developments than with their remedial underpinning. Proceduralists, who do study remedies as such, seldom analyze them from a comparative or extraprocedural perspective. To them, damages are far less interesting than injunctions, and immunities are of no interest at all.

PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* xxi (1983). In the years since Schuck wrote his book, a number of constitutional torts treatises have entered the market. *See, e.g.*, SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (3d. ed. 1991) (“the firstss treatise of its kind to consider § 1983 comprehensively”). In addition, because many law schools now offer “civil rights litigation” as an upper-level elective, casebooks have been produced to fill that niche, and Section 1983 litigation is typically one of the main bodies of law covered in those courses and casebooks. *See, e.g.*, SHELDON H. NAHMOD, ET AL., *CONSTITUTIONAL TORTS* xv (1995)(“the first casebook to focus exclusively on constitutional tort damages actions”); THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* (1996); JOHN JR. JEFFRIES, ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* (2000); MARK R. BROWN & KIT KINPORTS, *CONSTITUTIONAL LITIGATION UNDER SECTION 1983* (2003).

⁴⁵ *See, e.g.*, Joel B. Grossman, et al., *Dimensions of Institutional Participation: Who Uses the Courts, and How?*, 44 *JOURNAL OF POLITICS* (1982); DONALD R. SONGER, ET AL., *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* (2000).

⁴⁶ For overviews of the literature, *see* THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994) (surveying reform proposals); LARRY YACKLE, *RECLAIMING THE*

literature is unfortunately rarely examined by public law scholars in political science.⁴⁷ If political scientists studying the congressional supervision of the federal courts focused their attention on § 1983 litigation, their analyses of the empirical support for the docket burden objection to § 1983 would perhaps bring to light many of the substantive commitments lurking behind seemingly neutral expressions of concern about burdens imposed upon federal courts' dockets.⁴⁸

FEDERAL COURTS (1994) (defending broad access to federal courts); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996) (proposing judicial self-restraint as a solution); Judith Resnick, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 *Georgetown L.J.* 2589 (1998) (offering a critical assessment of the judicial perspective on the expanding federal court docket).

⁴⁷ Indeed, two of the most acclaimed studies of the lower federal courts by political scientists in recent years focus primarily on judicial behavior. See DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* (2002); DONALD R. SONGER, ET AL., *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* (2000). Songer et. al. discuss caseload trends, but they fail to offer an analysis of the reform debates among lawyers and members of the judiciary. For a review of Songer et. al. see Christopher P. Banks, *Review of Songer et. al., Continuity and Change on the United States Courts of Appeals (2000)*, 11 *LAW AND POLITICS REVIEW* 20 (2001) (commenting on their failure to relate their data to The Long Range Plan for the Federal Courts (1995) or to discuss whether other reforms are necessary, and suggesting “the topic legitimately deserves more attention than it received”). Other studies address the caseloads issue, but fail to examine systematically the accuracy of perceptions regarding its impact or to assess proposals for reform. See, e.g., JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* (2002) (interviewing federal appellate judges in the Ninth, Seventh, First, and D.C. Circuits, and endorsing circuit-by-circuit experimentation).

For earlier political science scholarship, focusing on the growth of the lower federal courts in the post-Civil War era and the process of federal judicial selection, see DEBORAH J. BARROW, ET AL., *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1996). Barrow et al. briefly discuss whether the size of the federal judiciary should be capped to prevent future growth, but they do not examine the “docket crisis” allegations at length, nor do they offer evaluations of competing proposals for reform. Two younger political scientists have produced innovative research concerning the recent history of congressional supervision of the federal courts, but neither addresses the docket crisis debate. See, e.g., Bruce G. Peabody, *Legislative Authority Over the Supreme Court's Subject Matter Jurisdiction, 1981-2003*. Presented at the Annual Meeting of the American Political Science Association, August (2003) (observing that “Congress’s powers over the Court’s jurisdiction have attracted relatively little attention in political science”); Lori Johnson, *Who Governs the Guardians? The Politics of Policymaking for the Federal Courts* (2003) (unpublished Ph.D. dissertation, University of California, Berkeley) (examining sentencing reform, rules of civil procedure, and subject-matter jurisdiction).

⁴⁸ Defenders of the PLRA, including sponsor Senator Jon Kyl, emphasized the burdens these cases placed on federal court dockets. See 141 Cong. Rec. 14, 572-3 (remarks of Sen. Kyl). In response to these assertions, one might reasonably ask: If the docket burdens are so severe, how then might one explain recent proposals to *increase* the diversity jurisdiction of federal courts, in order to benefit corporate defendants in far more complex and time-consuming class action lawsuits? See, e.g., S. 1751, *Class Action Fairness Act of 2003*, 108th Cong. (2003); H.R. 1115, 108th Cong. (2003). Originally introduced in slightly different forms in 1999 and again in 2001, these bills proposed to remedy “abuses” of class actions

Because a common proposal for dealing with docket pressures is to narrow federal jurisdiction, many law professors who are critical of this approach have voiced concern that state judges will be less inclined to protect constitutional rights.⁴⁹ Political scientists are well positioned here as well to offer empirically grounded comparisons of the behavior of federal and state judges. Important studies in political science offer more systematic evaluations of the impact different modes of judicial selection have on case outcomes.⁵⁰ A long tradition of empirical political science scholarship suggests that law professors often tend to exaggerate the independence of Article III judges and that the “countermajoritarian difficulty” is based on little more than myth.⁵¹ Yet there is no lively debate in political science journals that directly addresses the claims presented in the law professors’ “parity debate.”⁵²

Whether concerns about the expansion of constitutional torts litigation are framed in terms of caseload burdens in the federal courts or the need to protect governmental immunities, recent cases and public debate reveal one common feature: that the role of citizen plaintiffs in securing the rule of law is, to put it mildly, under-appreciated by many members of the federal judiciary, by politicians, and even by many constitutional theorists. New empirical research suggesting that constitutional torts do not unduly burden federal courts, or other work offering more systematic evidence that life tenure

by lawyers “forum shopping” for friendly state juries. In 2003, the House bill passed by a large margin, but the Senate bill only barely failed to attract sufficient support.

⁴⁹ See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

⁵⁰ See, e.g., DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY (1995) (suggesting judges in states with gubernatorial appointments are more protective of the rights of criminal defendants than judges chosen in partisan elections); Paul Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Structure in the Politics of Judicial Choice*, 59 J. OF POL. 1206 (1997) (comparing death penalty cases in states with different selection systems and finding judges respond to electoral pressures).

⁵¹ For an overview of the empirical literature, focusing especially on the Supreme Court, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (2001).

⁵² But see DAN PINELLO, GAY RIGHTS AND AMERICAN LAW (2003) (evaluating the parity debate as part of an empirical study of gay rights claims in federal and state courts).

increases the likelihood that constitutional rights will be enforced, will not have much of an impact if the current hostility to citizen plaintiffs continues unabated.

III. The Role of Citizen Plaintiffs

A. Do Citizen Plaintiffs Deserve Our Respect?

Citizen plaintiffs and their lawyers are today confronting alarming levels of hostility.⁵³ In the past, celebratory praise was offered to citizens who had “the courage of their convictions”⁵⁴ to seek justice in the court system and vindicate the rights of all their fellow citizens. Today, far more skeptical views about their role abound.

The problem is that these impressions appear to be influenced largely by popular anecdotes about frivolous cases that are cited over and over by opponents of litigation. This type of rhetorical attack was used to great effect during the years leading up to the Prison Litigation Reform Act of 1995.⁵⁵ Opponents of civil rights litigation clearly won the “battle of the sound bites,” and the news media hyped those stories relentlessly.⁵⁶ For example, in 1995 the National Association of Attorneys General asked its members to develop lists of the ten most frivolous prisoner complaints, which they then pared down to a shorter list and widely disseminated it to the media.⁵⁷ In a letter to the New

⁵³ For recent discussions of this trend, see David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003); Pamela Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183.

⁵⁴ PETER H. IRONS, *THE COURAGE OF THEIR CONVICTIONS* (1988).

⁵⁵ Prison Litigation Reform Act of 1995, Title VIII of the Omnibus Public Services Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.) (hereinafter “PLRA”) (requiring, *inter alia*, the exhaustion of state administrative remedies before granting federal jurisdiction in § 1983 cases, and barring inmates claiming mental or emotional injuries without a prior showing of physical injuries from suing in *either* state or federal courts).

⁵⁶ Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64 (1997).

⁵⁷ Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520, fn 3 (1996) (*citing* Attorneys General Seek to Curtail Frivolous Inmate Lawsuits; Call Upon U.S.

York Times, a group of state Attorneys General described a number of frivolous prison suits, including one filed by a prisoner allegedly complaining about something as trivial as receiving creamy peanut butter rather than the preferred chunky variety.⁵⁸ The incidents described in that letter were widely reported in the media and cited by many politicians supporting the PLRA.⁵⁹

When legislation affects such an important element in our constitutional democracy as one of the key mechanisms for implementing the rule of law – citizen lawsuits against the state – more than mere anecdotes should be required before restricting access to justice. Legislators should take their duties seriously enough to move beyond anecdote and instead commission or seek out more comprehensive studies examining the impact of the growth of prisoner complaints, in order to determine the extent to which frivolous complaints are filed. At the very least, those widely deplored anecdotes of frivolous claims should be placed in the broader context of the full spectrum

Congress, States Legislatures to Respond, News Release (Nat'l Ass'n of Att'ys Gen., Washington, D.C.), Aug. 1, 1995). Another example of the influence of this list also illustrates how these anecdotes are used without adequate empirical support: The conservative grassroots lobbying group, Citizens for a Sound Economy, was still citing the National Attorneys General Association's top-ten list in 2000, *long after* the passage of federal legislation, the PLRA, that not only eliminated such frivolous claims (actually truly frivolous claims could be dismissed even prior to the PLRA), but also many far more serious allegations of constitutional violations. Citizens for a Sound Economy, News Release, Federal Criminal Lawsuits Reflect Need for Tort Reform, September 18, 2000, available at http://www.cse.org/newsroom/press_template.php?press_id=287.

⁵⁸ Dennis C. Vacco et al., Letter to the Editor, Free the Courts from Frivolous Prisoner Suits, N.Y. Times, Mar. 3, 1995, at A3. Judge Newman points out that this particular claim was incorrectly described. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 521-2 (1996) The complaint alleged a violation of procedural due process and concerned improper charges on the prisoner's account. Although the amount at issue was only \$2.50, and so the claim still could be criticized for forcing the court to deal with a trivial matter, it is not as ridiculous as the publicized version. The prisoner was *not* suing in order to have "a right to the peanut butter of his choice" enforced.

⁵⁹ The claim was quickly dismissed. But this particular complaint, and others describing bad haircuts and broken cookies, would later be cited by Senate Majority Leader Robert Dole on the floor of the Senate during the debates preceding passage of the Prison Litigation Reform Act. See 141 Cong. Rec. S144, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). According to Kermit Roosevelt, the peanut butter story was cited repeatedly throughout the debate. Kermit Roosevelt, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771, fn. 34 (2003) (citing 142 Cong. Rec. S11,492 (daily ed. Sept. 27, 1996) (statement of Sen. Reid); 142 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham); 142 Cong. Rec. S2219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid)).

of prisoner abuse complaints, in order to acknowledge the prevalence of more serious cases of abuse and to assess the impact of proposed reforms on such cases.⁶⁰

Politicians, of course, always score bonus points for being tough on criminals, so perhaps calls for comprehensive empirical research are beside the point.⁶¹ If members of Congress really wanted to demonstrate that they could be tough on criminals, then they have succeeded. Recent interpretations of the PLRA exhaustion requirement have made it far more difficult for prisoners to serve as successful whistleblowers, even when very serious constitutional violations occur.⁶² The discourse highlighting lost hobby kits and boxes of broken cookies fails to mention this consequence, however. Because of the PLRA, it is now far less likely that more serious violations will ever be publicized and remedied. In recent months, citizens across the country, as well as members of Congress, have been vocal in expressing outrage over the prison abuse in Iraq, yet few participants in the current debate acknowledge that very little has been done in this country to support

⁶⁰ Cf. Alan Elsner, *Abuse Common in U.S. Prisons, Activists Say*, REUTERS, May 6, 2004. <http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=5063899>.

⁶¹ A pre-PLRA study by the Department of Justice estimated that frivolous claims constituted 19% of the total prisoner complaints filed in federal court. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* 6, 8, 20 (1994) (estimating, from a sample of 2, 738 § 1983 suits processed in 1992, that 19% of them were dismissed as frivolous), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf>. Although the 19% percent figure does not seem unduly burdensome, federal judges evidently formed the impression that they were being inundated with frivolous suits. One judge has described the task of searching for serious, meritorious claims in the pre-PLRA era as “searching for a needle in a haystack.” Judge Newman states at the outset of his essay that “the vast majority” of these cases are dismissed as frivolous. Following that assertion there is no footnote; the judge offers no citation to evidence to support his claim. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519 (1996). The DOJ study cited above not only does not support such his characterization; in fact it suggests the opposite. In more than 80 % of the cases examined in the study, the complaints were deemed not to be frivolous.

⁶² Kermit Roosevelt, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771 (2003) (discussing *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002)).

– and indeed a great deal has been done in the past decade to harm – longstanding methods of implementing the rule of law in our own prison systems.⁶³

The public is not just hostile to prisoner lawsuits. Proponents of tort reform have largely succeeded in mobilizing public opinion to view all plaintiffs in a more negative light. Anecdotes are the tool of choice here as well. Websites like Walter Olsen’s www.overlawyered.com offer numerous examples of silly and occasionally outrageous tort claims. The American Tort Reform Association (ATRA) offers another source of anecdotes; on their front page there is a link to a page listing “loony lawsuits.”⁶⁴ Although we might expect professional journalists to attempt more than report the anecdotes mentioned in these groups’ press releases and websites, they all too often do not perform the work required to verify or place these anecdotes in their proper context.⁶⁵

Civil rights groups who are concerned about access to justice issues need to pay more attention to this aspect of their public education campaigns. Public outreach and media campaigns can offer a counterweight to the anti-litigation anecdotes offered by powerful government and business groups. Scholars, public intellectuals, and journalists who are concerned about civil rights and access to justice need to contribute to this debate as well. More must be done to explain and defend the role of citizen plaintiffs in upholding the rule of law.⁶⁶

⁶³ Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1560-1 (2003) (observing that, in 2001, “filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.”)

⁶⁴ American Tort Reform Association, <http://www.atra.org/display/13>.

⁶⁵ For a recent example of “journalism by anecdote,” see the cover story, “Lawsuit Hell,” *Newsweek* (December 15, 2003). By the time the *Newsweek* issue was printed, the Center for Justice & Democracy had prepared and posted a rebuttal memo on its website, <http://www.centerjd.org/Newsweekrel.pdf> (press release, December 7, 2003).

⁶⁶ For example, one pro-access to justice group, the Center for Justice and Democracy, offers particularly effective summaries of research findings by nonpartisan organizations like RAND and the National Center for State Courts, but it makes them available to journalists only upon request; all others, including members

The Brennan Center for Justice⁶⁷ is one pro-litigation group that has done a superb job in promoting awareness of access to justice issues. The Brennan Center's website and e-alerts service includes coverage of cases, including some brought by citizen plaintiffs to sue the government for its abuses of power.⁶⁸ Much of their attention has been focused on a recent effort in Congress to impose restrictions on the work funded by the Legal Services Corporation. This legislation, signed into law by President Clinton in 1996, offers one more example of the growing hostility towards citizen plaintiffs.

In 1974, Congress passed legislation creating and funding the Legal Services Corporation ("LSC").⁶⁹ The purpose of the LSC was to promote "equal access to the

of the public, who wish to view the content on their website must pay a registration fee. See The Center for Justice & Democracy, <http://www.centerjd.org/index.html>.

⁶⁷ The Brennan Center for Justice was founded in 1995 by Justice Brennan's former law clerks, and, under the direction of E. Joshua Rosenkranz and legal director Burt Neuborne, became an enormously influential legal center, by serving as lead counsel in litigation in state and federal courts, including the Supreme Court; participating as *amici* in numerous Supreme Court cases; organizing academic conferences in law schools; conducting social science research with affiliated and in-house political science experts; testifying before Congress and state legislatures; and engaging in media outreach and public education campaigns. The Brennan Center is by no means spearheading a grassroots movement, and so some progressives would likely find its approach less appealing for that reason. But its impressive achievements over the past decade do offer one important model of collaborative lawyering, and in my opinion deserves the attention of other "Progressive Constitutionalists" who are trying to move away from strictly court-centered litigation campaigns.

The Center was especially bold in its fight for campaign finance reform. Its efforts to forge relationships with social scientists and develop the data to support their arguments in the campaign finance litigation exposed them to some harsh criticism, but it is certainly better to fight it out over the empirical data than not to attempt developing it at all. See E. Joshua Rosenkranz, Press Release http://www.brennancenter.org/programs/bcra/mccain_jr_statement.html (discussing the Brennan Center's mission and the *McConnell v. FEC* litigation); David Tell, *An Appearance of Corruption: The Bogus Research Undergirding Campaign Finance Reform*, Weekly Standard (May 26, 2003) <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/692anfkd.asp> (describing James Gibson's critique of Kenneth Goldstein's coding and Jonathan Krasno's data analysis); Thomas Mann, *No Merit in Brennan Center Smear Campaign*, Roll Call (May 22, 2003) <http://www.brookings.edu/views/articles/mann/20030522.htm> (defending Goldstein and Krasno).

⁶⁸ See, e.g., Brennan Center for Justice, Access to Justice Series on the 1996 restrictions the Legal Services Corporation (LSC), <http://www.brennancenter.org/resources/atj/index.html>; Brennan Center, Access to Justice E-alerts, <http://www.brennancenter.org/programs/lse/pages/index.php>.

⁶⁹ See Legal Services Corporation Act of 1974, 42 U.S.C. 2996 (1994).

system of justice in our Nation" by administering congressional appropriations through grants to local legal aid programs.⁷⁰

After surviving attempts by the Reagan Administration to eliminate it, LSC confronted renewed threats to its existence when the Republicans took control of Congress after the 1994 midterm elections.⁷¹ In 1995, Representative Dan Burton, along with twenty-seven other conservative members of Congress, wrote to then House Speaker Newt Gingrich, urging legislation to abolish the LSC. In a 1996 press release, Burton claimed that the LSC spends "millions of taxpayers' dollars on outlandish test cases to promote a left-wing political agenda that hurts the poor more than it helps."⁷² Senator Bob Dole used even harsher language:

[The LSC has] become ... the instrument for bullying ordinary Americans to satisfy a liberal agenda that has been repeatedly rejected by the voters The impoverished individual who has run-of-the-mill, but important, legal needs is shunted aside by Legal Services lawyers in search of sexy issues and deep pockets.⁷³

Other opponents of the LSC offered similarly broadly worded, extremely negative attacks, and offered a select few anecdotes to support them.⁷⁴ Although a great deal of evidence demonstrated that these portrayals of the LSC caseload were inaccurate, much

⁷⁰ Legal Services Corporation, "What is the LSC?" http://www.lsc.gov/welcome/wel_who.htm.

⁷¹ John Newberry, *Staying Alive*, 81 A.B.A. J. 89 (April 1995).

⁷² Brennan Center for Justice, *Unsolved Mystery: Why are Rogue Politicians Trying to Kill a Program That Helps Their Neediest Constituents?* Access to Justice Series, No. 3 (March 2000), available at <http://www.brennancenter.org/resources/atj/index.html>.

⁷³ 141 Cong. Rec. S14605 (Sept. 28, 1995) (statement of Sen. Dole).

⁷⁴ Representative Steve Largent, one of the conservative Republicans who had signed onto the Gingrich letter, wrote an op-ed for USA Today, arguing that LSC attorneys "see themselves as social reformers rather than advocates for the most needy in our society – abused women and children." Once Largent received more information about how the LSC-funded agencies in his own district operated, he changed his position in 1998 and voted to support LSC funding. Brennan Center for Justice, *Unsolved Mystery: Why are Rogue Politicians Trying to Kill a Program That Helps Their Neediest Constituents?* Access to Justice Series, No. 3 (March 2000), available at <http://www.brennancenter.org/resources/atj/index.html>.

of the criticism portrayed the clients of LSC-funded lawyers as dupes of political activists who were manipulating them to serve a political agenda that was not in their interests.⁷⁵

The 1996 LSC appropriations bill cut the agency's budget by \$122 million, and imposed a series of restrictions on grant recipients.⁷⁶ The welfare-specific regulations were struck down in 2001 by the Supreme Court as impermissible "viewpoint discrimination" under the Free Speech Clause in *Legal Services Corp. v. Velasquez*.⁷⁷ All the other restrictions, including the ban on class actions, were left untouched by the Court one week later.⁷⁸ Currently, legal aid lawyers receiving funding from the LSC cannot offer advice to potential clients (i.e., the lawyers cannot advise them that they have an actionable legal claim); they cannot bring class actions; and they cannot represent many categories of immigrants. Lawyers receiving LSC funds cannot engage in any of these prohibited activities even if they are fully supported with non-LSC funds (unless the non-LSC funds are used to maintain a physically separate legal office). Although much of the public discourse concerning the 1996 restrictions and the Court's opinion in *Velasquez* has focused on the role and rights of legal services attorneys, the Brennan Center has

⁷⁵ See, e.g., Rael Jean Isaac, *War on the Poor: Criticism of the Legal Services Corporation*, 47 NAT'L REV. 32 (1995) (suggesting that LSC-funded programs "are designed to implement the philosophy of an elite corps of Sixties-style radicals (Green Berets of the Left, as one critic has termed them) who use the poor as tools, and then leave them behind as victims"). LSC had accumulated detailed records of grantees' activities, but its opponents apparently made little use of this data.

⁷⁶ Some of the most significant restrictions included bans on class actions, welfare reform challenges, and cases involving redistricting or abortion. LSC-funded attorneys were also prohibited from representing prisoners, drug offenders challenging public housing evictions, and certain kinds of aliens. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104- 134, 504, 110 Stat. 1321, 1321-53-57 (1996).

⁷⁷ 531 U.S. 533 (2001).

⁷⁸ The Court declined to grant certiorari to plaintiffs challenging the parts of the Second Circuit ruling in *Velasquez v. Legal Services Corporation*, 164 F.3d 757 (2nd Cir. 1999), that upheld the district court's denial of a preliminary injunction for the remaining restrictions on the LSC, including the ban on class actions.

instead chosen to highlight the true victims: indigent plaintiffs who as a result of the restrictions have fewer or no opportunities to defend their rights in court.⁷⁹

One issue that the Brennan Center's Access to Justice Project has not adequately publicized is the obstacles imposed by new doctrines curtailing attorneys fee awards for citizen plaintiffs bringing civil rights actions under § 1983 and other statutes with fee-shifting provisions.⁸⁰ These attorneys fees cases will have an enormous impact on the future role of citizen plaintiffs and § 1983 in implementing the rule of law, and so deserve much more scrutiny than they have thus far received by the public and media.⁸¹

In the mid-1970s, the Supreme Court began to prohibit plaintiffs bringing suit under § 1983 from receiving attorney's fees. In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁸² the Court overturned the D.C. Circuit Court's award of attorneys' fees to the plaintiffs, arguing that courts should not depart from the presumption favoring the "American Rule" requiring parties to pay for their own lawyers, unless a legislature specifically provides for fee-shifting. After *Alyeska*, § 1983 plaintiffs were ineligible for recovery of these costs, but plaintiffs bringing claims under Title VII, Title IX, and a host of other statutes remained eligible, because those statutes contained attorneys fees

⁷⁹ Brennan Center for Justice, Access to Justice Series on the 1996 restrictions the Legal Services Corporation (LSC), <http://www.brennancenter.org/resources/atj/index.html>;

⁸⁰The Center focuses so much attention on the LSC restrictions, and because LSC lawyers have since 1996 been prohibited from accepting attorneys fees under § 1988 or any other statute, the impact of recent court developments will be minimal for LSC attorneys. Even so, the Brennan Center's Access to Justice Project has participated as *amici* in litigation involving attorneys fees provisions in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(enacted in 1980 to help citizens sue the federal government for statutory violations).

⁸¹ Speaking at a Fourth Circuit Conference in 2001, Justice Rehnquist chose to discuss a handful of opinions from the 2000 Term that he believed would have an enormous impact, even though they may not have received many headlines. Given the consequences I describe below, it is interesting that Rehnquist, quoting from a poem by Thomas Gray, suggested that *Buckhannon* is one of those cases that are "like flowers which are born to blush unseen and waste their sweetness on the desert air." See Jennifer Myers, *No Talk of Retirement at Circuit Meeting*, LEGAL TIMES (July 9, 2001).

⁸² 421 U.S. 240 (1975).

provisions. Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976⁸³ soon thereafter, modeling the new law on the fee-shifting provisions in the 1960s civil rights statutes.⁸⁴

In 1994, the Fourth Circuit broke away from the consensus developed in all of the other circuits and offered a unique interpretation of the meaning of “prevailing party” in § 1988 and all other fee-shifting statutes using similar language. The settled interpretation of § 1988, known as “the catalyst theory,” understood the statutory term “prevailing party” to include all plaintiffs whose legal challenge produced some beneficial change in the defendant’s behavior. No final judgment was required. Nor was a settlement required, as long as the defendant took voluntary steps to alter its behavior.

State officials obviously disliked the catalyst theory because it meant that they would have to pay out significant amounts for attorneys fees, even when there was no judicial determination of fault and the amount of damages is much lower than the fees. With the catalyst theory structuring incentives, states had an incentive to attempt to settle quickly by proposing generous terms; otherwise citizen plaintiffs would have no reason to settle so soon.

In developing a challenge to the catalyst theory, state officials pointed to the Supreme Court’s 1992 opinion in *Farrar v. Hobby*,⁸⁵ which held that a plaintiff who was awarded nominal damages was a prevailing plaintiff entitled to the award of attorneys fees and costs. When explaining its reasoning, the Court stated that “the touchstone of

⁸³ Now codified at 42 U.S.C. § 1988(b).

⁸⁴ Because the text of the provision refers to the “prevailing party,” some have argued that it should be read as allowing a general “loser pays” rule, but the Court rejected that literalist reading in favor of one that permits only prevailing *plaintiffs* to claim costs. See *Hughes v. Rowe*, 449 U.S. 5 (1980) (rejecting literalist reading).

⁸⁵ 506 U.S. 103 (1992).

the prevailing party inquiry must be the material alteration of the *legal* relationship of the parties.”⁸⁶ Focusing on the Court’s language referring to the “legal relationship of the parties,” state lawyers began arguing that the Supreme Court had signaled its willingness to reconsider the catalyst theory. This argument was quickly adopted by the Fourth Circuit, which announced in a 1994 case⁸⁷ that it would no longer apply the catalyst theory to any fee-shifting provisions using the prevailing party language.

In *Buckhannon Board & Care Home v. W. Va. Department of Health and Services*,⁸⁸ the plaintiff was challenging the enforcement of a state regulation requiring residents of all residential board and care homes to be capable of “self-preservation” in the event of a fire. Because three of its residents were too elderly or infirm to comply with the regulation, they would have to be transferred to a nursing home or the facility would lose its license. The owner of the Buckhannon facility could not afford to hire attorneys, but a lawyer agreed to take the case because he thought the prospects for winning on the merits at trial were strong, and he assumed that he could recoup his costs then. Although the state initially refused to settle the case, state attorneys continued lobbying⁸⁹ the West Virginia state legislature to repeal the self-preservation rule, which it eventually did. Because the state’s decision to repeal the law in no way affected the legal relationship of the parties, the Fourth Circuit rejected the plaintiff’s motion for attorneys fees, which had by then totaled nearly \$200,000.⁹⁰

⁸⁶ *Id.* at 111 (emphasis added) (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989)).

⁸⁷ *S-1 & S-2 ex rel. P-1 & P-2 v. State Board of Education of North Carolina*, 21 F. 3d. 49 (4th Cir. 1994) (en banc), cert. denied 513 U.S. 876 (1994).

⁸⁸ 532 U.S. 598 (2001).

⁸⁹ In Ginsberg’s dissenting opinion, she notes that the state lawyers had failed to provide notice to the plaintiff’s lawyers regarding the proposed repeal of the state self-preservation regulation, and were sanctioned under Rule 11. *Id.* at 625, n.4.

⁹⁰ Marcia Lowry, *Fee Change is a Sea-Change*, NAT’L L. J. (June 11, 2001).

In his majority opinion,⁹¹ Rehnquist announced that the “clear” meaning of “prevailing party” was something other than what eleven other circuits and four of his colleagues on the Supreme Court believed. The clear meaning, according to Rehnquist, can be found in a Black’s Law Dictionary.⁹² Quoting from an edition that was not yet in existence when the phrase in question was incorporated in many fee-shifting statutory provisions, Rehnquist defined a “prevailing party” as “one in whose favor a judgment is rendered.”⁹³

In a concurring opinion, Scalia argued that the catalyst theory rewarded citizen plaintiffs who could force defendants to change their behavior by “threatening” a lawsuit. Defendants might feel pressured to alter their position just to avoid the hassle of litigation and not because they had done anything wrong. Because no legal determination of the merits of the plaintiff’s case had yet been made in such cases, Scalia argued that it was unfair to allow a catalyst theory to force the defendant to pay for attorneys fees. Scalia concluded by arguing that citizen plaintiffs should not be rewarded for their “extortion.”⁹⁴

Scalia’s characterization suggests that the reputation of citizen plaintiffs has reached its nadir in some quarters. There is no empirical evidence to support his assumption that, during the entire time the catalyst theory was endorsed by federal courts, civil rights attorneys were agreeing to pursue citizen plaintiffs’ meritless claims in order to be awarded attorneys’ fees.⁹⁵ There is in fact some evidence to suggest that fee

⁹¹ 532 U.S. at 600-610.

⁹² 532 U.S. at 603.

⁹³ *Id.*

⁹⁴ *Id.* at 618.

⁹⁵ If they chose to pursue a client’s clearly meritless claim, not only would the attorneys be denied fees for doing so, they would very likely be confronted with sanctions under Rule 11 of the Federal Code of Civil Procedure. See Arthur R. Miller, *The Pre-Trial Rush to Judgment: Are the ‘Litigation Explosion’, ‘Liability Crisis’, and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. REV. 982, 1007-1009 (2003) (discussing the role of Rule 11 in curbing frivolous cases).

shifting should be encouraged because it provides a much-needed incentive for otherwise reluctant citizen plaintiffs. Based on the existing empirical evidence regarding the underreporting of common law torts,⁹⁶ one can reasonably conclude that most victims of many constitutional torts never file a claim against the government. In cases involving constitutional torts, there is an especially weighty *public* interest in encouraging citizen plaintiffs to act as “private attorneys general”⁹⁷ to hold governments accountable for their unconstitutional actions.⁹⁸ For Scalia, however, the hypothetical possibility that a plaintiff with a “phony claim” can be awarded fees “far outweighs” the harm to the public interest that is caused by abandoning the catalyst theory.⁹⁹

Following *Buckhannon*, citizen plaintiffs must find attorneys willing to pursue a case vigorously after an early settlement offer is on the table. Civil rights attorneys may feel pressured to take early settlement offers because of the fear that, after investing in the

⁹⁶ Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW AND SOC. REV. 544 (1980-1); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, UCLA L. REV. 314 (1983).

⁹⁷ The phrase “private attorneys general” is the traditional term used to describe citizen plaintiffs. For *constitutional torts* cases, Robert Tsai suggests that the better analogy is that of political dissidents. See Robert Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U.L. REV. 835, 870 (2002). For cases involving government official’s unauthorized actions, it seems to me that either term is appropriate. My emphasis here is on the role of citizen plaintiffs’ participation in the processes of checks and balances that can help implement the rule of law. That participation can be described in terms of “enforcing” the rule of law or “protesting” the government’s departure from it.

⁹⁸ Because some constitutional harms do not cause serious physical injury or property loss, plaintiffs will in those cases receive only nominal damages. In *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986), the Court held that any injuries that would also be compensated under the applicable common law doctrines may be considered in the estimation of damages under § 1983. In addition to physical injury and property loss, compensable injuries can thus sometimes include emotional distress and other forms of monetary loss. In cases where no such injuries can be established, the Court had held that the “abstract value” of a constitutional right to a plaintiff cannot form the basis of a damage remedy. In these cases, the plaintiff typically will receive a nominal damage award of one dollar. See *Carey v. Piphus*, 435 U.S. 247, 266-7 (1978). If constitutional torts litigation depended upon contingency fees arrangements alone, many lawyers likely would have focused on cases for which there could be shown serious physical injury or some other injury supporting a large damages award. Many other important constitutional torts cases would have gone unheard. Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997). The Civil Rights Attorneys Fees Act of 1976 was, for this reason as well, a crucial breakthrough for § 1983 citizen plaintiffs.

⁹⁹ 532 U.S. at 618.

case, defendants will opt to remedy the problem at the eleventh hour and moot the case. One way to prevent that type of scenario is to request damages remedies along with declaratory and injunctive relief, in order to prevent last-minute reforms mooting the case, but that will not be in option in civil rights cases brought against state agencies, like in *Buckhannon*, because of the Court's sovereign immunity doctrine. In any case, without the bargaining advantages the prospect of attorneys fees provided to citizen plaintiffs, defendants are better able to behave strategically about their litigation strategies without taking into account the fees and costs.¹⁰⁰ For example, in § 1983 cases, defense attorneys discourage lawsuits, by forcing plaintiffs to spend far more in pre-trial litigation costs – i.e., by filing a series of motions for qualified immunity¹⁰¹ – compared to what is typically awarded in § 1983 compensatory damages claims. Without the catalyst theory as leverage, when they are willing to pursue the case at all, plaintiffs are likely to settle early and on less favorable terms.

B. Do Citizen Plaintiffs Deserve Our Encouragement?

Buckhannon has been aptly described as a “neutron bomb” for civil rights litigation,¹⁰² but calls for Congress to overturn *Buckhannon* by expressly incorporating the catalyst theory into § 1988 will likely go unheeded while anti-plaintiff Republicans control both the House and Senate.¹⁰³ Even among those generally respectful of the role of citizen plaintiffs can have in enforcing the rule of law, some have expressed doubts

¹⁰⁰ Frances Kahn Zemans *Fee Shifting and the Implementation of Public Policy*, 47 LAW AND CONT. PROB. 187 (1984).

¹⁰¹ In § 1983 cases, many circuits allow the defense to file motions for qualified immunity repeatedly as discovery progresses.

¹⁰² Margaret Graham Tebo, *Fee-Shifting Fallout: In the Two Years Since the Supreme Court Limited Catalyst Theory, Civil Rights Lawyers Find Themselves Torn Between Losing Fees and Settling for Their Clients*, 89 A.B.A. J. 54 (July 2003).

¹⁰³ Senator Edward Kennedy and Representative John Lewis have co-sponsored legislation entitled “FAIRNESS: The Civil Rights Act of 2004,” which includes a provision overturning *Buckhannon*.

concerning the potential effectiveness of constitutional torts litigation. There is a rich tradition of empirically grounded work by political science and law and society scholars suggesting that the emphasis on litigation for social change may be misplaced. Some of the more influential studies, like Gerald Rosenberg's *The Hollow Hope*, focus primarily on institutional reform litigation, rather than damages claims for unauthorized executive action, and so may not be as relevant to the method of upholding the rule of law I am focusing on here. However, there is another literature examining success rates in litigation, derived from Marc Galanter's famous study, "Why the 'Haves' Come Out Ahead," which should raise separate concerns regarding citizen plaintiffs' prospects for success.¹⁰⁴

Because most citizen plaintiffs are "one-shotters" suing the greatest "repeat player" of all, the government, Galanter's work suggests that they will have a more difficult time in the litigation process. For example, Galanter predicted that repeat players will consider their long-term interests and "play for the rules," by seeking settlements in closer cases and proceeding to trial in cases for which there is a reasonable chance of producing favorable precedents that will advantage them in the future. Repeat players, especially the government, have a built-in, extremely experienced support structure; there are thus far fewer start-up costs when defending itself in court. After Galanter wrote his study, some positive development occurred. The Civil Rights Attorneys Fees statute made it much more likely – at least until *Buckhannon* – that citizen plaintiffs would find capable attorneys to assist them. The development of informal networks among § 1983 plaintiffs' attorneys meant that they could begin thinking in

¹⁰⁴ Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

terms of a repeat players' strategy, if they could persuade their clients to agree to focus on these considerations. Despite these developments, Galanter's general predictions have been confirmed by empirical studies on the success rates of citizen plaintiffs in § 1983 claims filed in federal district courts.¹⁰⁵ Other studies show that government defendants maintain their advantage in appeals.¹⁰⁶

Should we take from these studies the more general conclusion that citizen enforcement of the rule of law therefore a futile ambition? I would like to develop these thoughts more systematically, but my initial impression is that the greatest difficulty confronting citizen plaintiffs today is due to the *doctrinal structure* of § 1983, which is an enormously complicated set of rules offering the government every possible opportunity to defend itself against charges of unconstitutional conduct – through the qualified immunity defense, the formalistic standard for municipal liability, state sovereign immunity doctrines, etc. Many of these advantages could be moderated or even erased, if Congress sought to revise the § 1983 statutory provisions.¹⁰⁷

Even today, without the benefit of these changes, citizen plaintiffs' efforts are not entirely futile. The process of starting the process of litigation, of formally charging the government with misconduct, can have benefits of its own, especially by publicizing the

¹⁰⁵ See, e.g., *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988).

¹⁰⁶ Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?* in *IN LITIGATION: DO THE 'HAVES' STILL COME OUT AHEAD?* (Herbert Kritzer and Susan Silbey eds.) Ch. 11 (2003).

¹⁰⁷ The Supreme Court, if new appointees are so motivated, could also modify those elements of the current doctrinal framework for constitutional torts preventing citizen plaintiffs from using § 1983 to enforce the rule of law. 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, the prospects for doctrinal reform are not entirely out of reach.

abuses.¹⁰⁸ The process of discovery can be an enormously powerful “weapon of the weak”: citizen plaintiffs can use it to determine exactly what the officers did and why, to uncover information about the governments’ hiring, training, and supervision policies, and much else. If the rule of law requires that government must be held accountable in some way for its unauthorized conduct, then this kind of publicity can promote it by allowing political forms of accountability, in cases where other citizens are persuaded to take action during the next election. The prospect of such an outcome can serve as its own kind of deterrent, regardless of the outcome of the litigation itself.

The second concern regarding constitutional torts is that damages remedies may create unintended negative consequences. For example, one leading constitutional torts scholar, John Jeffries defends gaps between rights and remedies¹⁰⁹ on the grounds that they serve the larger public interest in promoting the evolution of constitutional doctrines.¹¹⁰ He questions, for example, whether the Warren Court would have issued its ruling in *Brown v. Board of Education* if its only remedial option was to impose large

¹⁰⁸ For a similar argument, see Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, LAW & SOC. INQ. 897 (1998).

¹⁰⁹ The idea that every violation of a right must be remedied was once a key element of the American rule of law ideal. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”) For a rare contemporary endorsement of the importance of full remediation, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that, when government officials violate the Constitution, they “must in some way undo the violation by ensuring that victim is made whole”).

¹¹⁰ For example, allowing a doctrine of qualified immunity to shield individual officers from liability will prevent aggrieved citizens from receiving a remedy for violations of their constitutional rights. Although such a result may not comply with the ideal of corrective justice, Jeffries argues that it will likely encourage judges to be more innovative in their approach to constitutional adjudication. John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 97 (1999) (suggesting that “doctrines that deny full individual remediation reduce the cost of innovation, thereby advancing the growth and development of constitutional law”); but see Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1101-02 (arguing instead that qualified immunity will reduce the incentives for plaintiffs bring cases that may raise those issues leading to the expansion of constitutional rights).

monetary penalties on the school board.¹¹¹ Although his argument is thoughtful and well developed, Jeffries offers no empirical support. His conjectures are somewhat in tension with claims in political science scholarship suggesting that many judges are more hesitant to craft structural reform injunctions or other invasive methods of equitable relief that require the court to engage in policymaking and to enlist the support of the branches of government who will be asked to implement the decree.¹¹²

There is, however, another important reason to question whether citizen suits for damages are the optimal method for securing the rule of law. Although the deterrent effect of monetary damages for constitutional torts has long been presumed, empirical studies verifying that presumption are quite few in number. One challenge is that the current Court's § 1983 doctrine is not formulated in a way that maximizes its deterrent effect. There are, for example quite logical reasons for assuming the deterrent effect of municipal liability incorporating a respondeat superior theory would be much greater than the existing scheme emphasizing individual officer liability, because the former would give high-ranking supervisors more of an incentive to introduce measures reducing their exposure to liability.¹¹³

Legal scholar Daryl Levinson recently has produced a series of influential articles using a law and economics framework to challenge the "orthodoxy" among constitutional

¹¹¹ John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 100-103 (1999).

¹¹² See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 14(1983) (developing a "scale of remedial intrusiveness" with damages falling at the low end of the scale and structural injunctions at the high end).

¹¹³ In Chapter Four of my dissertation, I develop a number of criticisms of the Court's current § 1983 doctrine, including its rejection of respondeat superior liability and its embrace of qualified immunity and sovereign immunity defenses. See Lynda G. Dodd, *Securing the Blessings of Liberty: The History and Politics of Constitutional Torts Litigation* (2004) (unpublished PhD Dissertation, Princeton University).

torts scholars that assumes damages do deter government officials.¹¹⁴ The economic theories underlying private tort law assume that, with perfect information, optimal deterrence can be achieved by estimating in advance how a rational economic actor will respond to the cost of continuing to commit a harm while also trying to maintain the highest level of benefit at the same time. For government harms, Levinson argues, none of the assumptions underlying this sort of optimal deterrence analysis apply. How can one measure the “benefit” government officials receive for doing their jobs well? It is not as easily identifiable as considering the profit motives of private firms.

Moreover, it is not clear that government officials internalize the costs of their misbehavior in the same manner as private firms would. Are government officials deterred by the prospect of large damages awards? Levinson acknowledges that government officials are always concerned about budget pressures, but he estimates that the most important “coin of the realm” in government is not money, but other forms of political capital. Because there is no exchange mechanism by which to translate political capital into a more measurable form of economic currency, the legal economists’ optimal deterrence analysis is impossible to perform.¹¹⁵

In addition, because much of Levinson’s analysis draws from the example of constitutional torts arising from illegal searches and seizures, he surmises that compliance by municipal governments will be unlikely because “the benefits to society

¹¹⁴ Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 350-7 (2000).

¹¹⁵ *Id.* at 357. Even if it were possible to perform such an analysis, Levinson concludes that the analogy to the private firm model would ultimately still fail because of the unique agency structure of most governmental agencies. Because of civil service protections, even if the policy-making supervisors internalized the costs, it is not likely that street-level officers’ behavior would be significantly altered. *Id.* at 347-8, 352.

outweigh the immediate costs to the victim.”¹¹⁶ The cost of the constitutional violation is “efficient” in the sense that spreading the costs of the violation through compensation will not cause majoritarian pressure for the government agency to alter its policing policies.¹¹⁷ There are many other categories of claims for which this analysis does not apply, however, so it may be that Levinson is overgeneralizing from one category of constitutional torts.¹¹⁸

Levinson draws enormously pessimistic conclusions from governments’ presumed inability to rely on an economic model of incentives.¹¹⁹ Without more information about the effects of these doctrines, he argues, imposing constitutional tort remedies is simply a matter of faith.¹²⁰ These challenges have raised awareness among constitutional torts scholars in the legal academy that more empirical work is needed to identify the ways in which damage awards structure the incentives of governments and officials. In political science scholarship, interesting empirical work addressing this issue is already underway. Charles Epp’s recent study found that the prospect of paying

¹¹⁶ *Id.* at 367-8.

¹¹⁷ *Id.*

¹¹⁸ To take just one example, although it may be true that the average citizen is less concerned about police practices resulting in illegal searches, there have been in recent years vocal and sometimes violent protest in reaction to police brutality cases, and this criticism has extended far beyond the inner-city communities typically affected more directly by such cases of police misconduct. The public protests are not based on a utilitarian assessment of the social benefits of the use of excessive force, but rather the fundamental unfairness of using unnecessary, violent methods of subduing suspects. *But cf. id.* at 371 (suggesting that excessive use of force incidents are per se inefficient, because, being excessive, they are unnecessary means to achieve the ultimate social benefit of crime control). Levinson, moreover, suggests that his efficiency hypothesis comparing compensation costs and social benefits would likely apply to a variety of constitutional torts claims. *Id.* at 369 (mentioning “procedural due process claims in a variety of settings, Eight Amendment and free exercise claims by prisoners, and free speech claims in the context of government employment.”)

¹¹⁹ See, e.g. Miriam Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001)(criticizing Levinson for failing to distinguish between optimal deterrence and simple deterrence).

¹²⁰ Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348 (2000).

damages does deter government officials.¹²¹ Drawing on survey responses from 838 police departments, Epp concluded that the threat of lawsuits has a significant effect on the development of policies governing the use of force by police officers.

These findings are important, but much more empirical work needs to be done to explain the current role of citizen plaintiffs in enforcing the rule of law, especially through constitutional tort actions for damages. Perhaps the most basic and crucial task for future scholarship is to highlight the public purposes served by these suits, lest they become entirely undermined by current anti-litigation forces. Drawing more explicit links between § 1983 and debates concerning the rule of law may help improve the image of constitutional torts suits. But the effort to defend must not suggest that all is well in the law of § 1983. It will also be important to think about ways the law of § 1983 can be reformed – by leveling the playing field between citizens and the government, and by optimizing the deterrent effect of damages claims – in order to improve a system of litigated checks and balances that has become such a crucial component of implementing the rule of law.

¹²¹ Charles Epp, *Do Rights Matter? Exploring The Impact of Legal Liability on Administrative Policies*. Presented at the Annual Meeting of the American Political Science Association (2001).