10-1-1986

The Past and Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules

Michael L. Wells
University of Georgia School of Law, mwells@uga.edu

THE PAST AND THE FUTURE OF CONSTITUTIONAL TORTS: FROM STATUTORY INTERPRETATION TO COMMON LAW RULES*

*by Michael Wells***

The cause of action for damages to redress violations of constitutional rights is now firmly established in our law. As recently as 1960, such constitutional tort suits were rare and attracted little attention from scholars. Today, they are a major part of the work of the federal courts and the academic literature is constantly growing. This change can be partly attributed to the expansion of constitutional rights in the 1960s and 1970s, and partly to the 1961 case of *Monroe v. Pape*.[1] In *Monroe*, the Supreme Court revived a long-neglected, ninety-year-old statute, 42 U.S.C. § 1983,[2] making it the vehicle for a broad cause of action to remedy constitutional violations.

In the years since *Monroe*, the Court has devoted considerable attention to defining the contours of this new tort remedy.[3] In so doing, it

---

* This article is the fourth in a series by myself and my colleague, Thomas Eaton. For discussions of other aspects of constitutional tort doctrine, see Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443 (1982); Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1 (1982); Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

** Associate Professor, University of Georgia School of Law. B.A., J.D., University of Virginia. I wish to thank William D. Iverson, Julian McDonald and Professor Eaton for their comments on an earlier draft.

1. 365 U.S. 167 (1961). The classic article on *Monroe*, its antecedents, and its early progeny is Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV 277 (1965). *See also* P. SCHUCK, SUING GOVERNMENT 47-51 (1983). *Monroe* combined with the general expansion of constitutional rights to vastly increase the constitutional tort litigation in the federal courts. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 504-15 (1982); Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 213-15 (1979); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 12-14 (1980).

2. 42 U.S.C. § 1983 (1979).

3. Among other things, the Court has identified the persons and entities who may be sued, determined the scope of the defense of official immunity, and decided what kinds of damages may be recovered. *See infra* notes 10-32 and accompanying text.

has generally viewed its task as a search for the intent of the framers of section 1983.[4] It has also relied at times on such tort-law policy considerations as the deterrence of wrongdoing, the vindication of rights, and the spreading of losses.[5] The Court has referred to this approach as a "two-part" test for adjudicating constitutional tort claims.[6]

This article argues that the Court's approach is deeply flawed.[7] The so-called two-part test is not a set of standards for making rules, but a device by which the Court can often rationalize whatever result it desires in a given case. In fact, the two parts of the test—legislative intent and tort-law policy considerations—are frequently at odds with each other. Unless one or the other of these premises is abandoned, the rules generated from them will inevitably reflect the conflict between them.

Although it has been the more prominent rationale in the opinions, the Court should discard legislative intent as an analytic tool for adjudicating constitutional tort claims. First, quite apart from the conflict between tort policy and legislative intent, many glaring inconsistencies exist among the cases that purport to rely on legislative intent. One suspects, therefore, that the Court has not turned to the historical materials for guidance so much as it has manipulated them to achieve desired results. Second, even if the Court were sincere in its efforts to uncover legislative intent, the quest is doomed to failure. The framers

---

4. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 34 (1983); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981); Owen v. City of Independence, 445 U.S. 622, 635 (1980); Monell v. Department of Social Servs., 436 U.S. 658, 664 & n.8, 691 (1978).

5. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 651-52 (1980); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Carey v. Piphus, 435 U.S. 247, 253-57 (1978).

6. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981) (noting that "[s]ince *Monell* was decided . . . the Court has applied this two-part approach when scrutinizing a claim of immunity proffered by a municipality").

7. Many commentators have accepted the Court's approach, even when they dispute its conclusions. *See, e.g.*, Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979) (relying on both legislative intent and tort policy in expanding constitutional tort damages); Schnapper, *supra* note 1 (employing legislative history to resolve constitutional tort issues); Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985) (employing a similar approach as Schnapper, but reaching different results); Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979) (similarly using both legislative intent and policy considerations). Others have rejected the Court's approach, but rather than demonstrating why it lacks merit on its own terms, they have simply ignored it. *See, e.g.*, P. SCHUCK, *supra* note 1; Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981); Epstein, *Private Law Models for Official Immunity*, 42 LAW & CONTEMP. PROBS., Winter 1978, at 53. For an exception to this generalization, see Eisenberg, *supra* note 1 (distinguishing between "historical" and "functional" conceptions of § 1983).

of section 1983 did not and could not have formed any intent with regard to the issues that arise in modern constitutional tort law. By contrast, although the Court has sometimes invoked tort principles and policies in constitutional tort cases, it has never carefully and consistently developed the implications of such an approach. Rather, its references to tort concepts have been sporadic and superficial. Given the unsatisfactory state of the law under section 1983, this article argues that the Court should abandon the statute as the foundation for constitutional tort law. Instead, the Court should rely exclusively on tort principles and policies in developing its doctrine. This new species of constitutional tort would fit comfortably within a remedial tradition that stretches back to the dawn of the common law. This conception of the cause of action would describe the doctrine more accurately, allow issues to be framed more realistically, and provide a more convincing rationale than does the Court's current statutory approach. A tort perspective also suggests that some of the Court's major decisions in this area are simply wrong, as they cannot be persuasively defended in terms of traditional tort-law principles.

I. Section 1983: Basic Doctrine

In 1871, the forty-second Congress passed a statute that is now codified at section 1983 of Title 42 of the United States Code. In the statute, Congress provided that:

> Every person who, under color of any statute . . . custom, or usage of any State . . . subjects . . . any . . . person . . . 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.[8]

For many years, federal courts limited the reach of this statute through a narrow construction of the "under color of" provision. Courts consistently held that the statute permitted an action for damages for constitutional violations only when the offending conduct was authorized under state law and when state law itself provided no remedy.[9]

In *Monroe v. Pape*, the Supreme Court held that "under color of" should be read more liberally to provide a cause of action whenever the defendant has acted under pretense of official authority, even if his con-

8. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).
9. *See* Shapo, *supra* note 1, at 279-87.

duct is formally prohibited by state law.[10] In the years since *Monroe*, the Court has decided a number of important issues related to the scope of this new tort action. For example, *Monroe* had limited liability to individual officers.[11] Seventeen years later, however, in *Monell v. Department of Social Services*,[12] the Court overruled that part of *Monroe* and held that municipalities are persons subject to suit under section 1983.[13] A year later, in *Quern v. Jordan*,[14] the Court held that state governments are not "persons" under section 1983, and therefore are not subject to suit.[15]

The principal defense available to a government defendant once a constitutional violation is established is official immunity. The origin of this defense can be found in the common law of governmental torts, which developed before the growth of constitutional tort law.[16] The Court has carried this defense over into constitutional tort law, holding that judges,[17] prosecutors,[18] witnesses,[19] legislators,[20] and the president[21] are absolutely immune from suit for their official actions. It accords other governmental officials, from policemen[22] to governors[23] and cabinet officers,[24] a qualified immunity from suit, "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[25]

---

10. 365 U.S. at 183-87.
11. *Id.* at 187.
12. 436 U.S. 658 (1978).
13. *Id.* at 664-65, 690. The liability of municipalities under *Monell* is limited to injuries caused by their official policies and customs. *Id.* at 691. *See also*, City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985); Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984); Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979). *See generally* Schnapper, *supra* note 1, at 215-40; Note, *Municipal Liability Under Section 1983: The Meaning of Policy or Custom*, 79 COLUM. L. REV. 304 (1979).
14. 440 U.S. 332 (1979).
15. *Id.* at 341-43.
16. *See* Barr v. Matteo, 360 U.S. 564 (1959); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949). *See generally* P. SCHUCK, *supra* note 1, at 29-41 (1983).
17. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547, 554-55 (1967).
18. Imbler v. Pachtman, 424 U.S. 409, 420-31 (1976).
19. Briscoe v. LaHue, 460 U.S. 325 (1983).
20. Tenney v. Brandhove, 341 U.S. 367 (1951).
21. Nixon v. Fitzgerald, 457 U.S. 731 (1982).
22. Pierson v. Ray, 386 U.S. 547 (1967).
23. Scheuer v. Rhodes, 416 U.S. 232 (1974).
24. Mitchell v. Forsyth, 105 S.Ct. 2806, 2813-14 (1985); Butz v. Economou, 438 U.S. 478, 507-08 (1978).
25. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Under this test, for example, liability will be imposed on a policeman who searches a house without a warrant, if he knows or should have known that a warrant is constitutionally required. But the officer who obtains a warrant on infor-

One question left open by *Monell* was the extent to which local governmental units could claim immunity. Two years after *Monell*, the Court held in *Owen v. City of Independence*[26] that municipalities are entitled to no immunity whatsoever, explaining that common law immunity extended only to officers.[27] As a result, a city can be held liable even if it had no reason to believe its conduct was illegal at the time it acted.[28]

As is the case with common law torts, victorious plaintiffs in constitutional tort cases may recover medical expenses, lost income, and rehabilitation costs for their physical injuries. Recovery is also available for pain and suffering associated with physical injuries, and for emotional distress when there is no physical harm.[29] In many constitutional torts that involve injury to such rights as free speech or due process, however, the harm is intangible. At least with respect to an unconstitutional denial of due process, a plaintiff may not recover general damages without proving actual injury.[30] With respect to punitive damages, the Court draws a distinction between individual defendants and municipalities. It permits awards of punitive damages against individuals on a showing of egregious misconduct,[31] but has rejected such awards against municipalities.[32]

II. Weaknesses in the Court's Approach

A. *The Court's Two-Part Test*

In justifying its holdings under section 1983, the Court has sometimes relied only on its exegesis of the legislative intent of the statute's

---

mation he reasonably believes is adequate will not be liable even if the courts find the information unreliable or vague. *See* Malley v. Briggs, 106 S. Ct. 1092 (1986).

26. 445 U.S. 622 (1980).

27. *Id.* at 638.

28. In *Owen*, for example, the city was held liable for firing its police chief without due process protections. The city acted two months before the Supreme Court first held that the due process clause requires such safeguards. *See* 445 U.S. at 630-32 & n.10 (citing Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972)).

29. *See* Carey v. Piphus, 435 U.S. 247, 257-64 (1978).

30. For example, in Carey v. Piphus, 435 U.S. 247 (1978), the plaintiffs were students suspended from school without the procedural safeguards required by the fourteenth amendment's due process clause. They sought to recover presumed, general damages without proving any actual injury, *id.* at 252-54, but the Court rejected recovery. *Id.* at 262-64. It restricted its ruling to due process cases, *id.* at 258-59, 264-65, leaving open the question whether violations of other intangible rights would be treated similarly.

31. Smith v. Wade, 461 U.S. 30 (1983).

32. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

framers.[33] It has less often relied on tort policy alone.[34] Recently, in an apparent effort to reconcile these two lines of cases, it has explained that its analytical framework is a "two-part" test, inquiring into both legislative intent and tort policy.[35] But its practice does not support its claim. Instead, in cases where legislative history and tort policy would lead to different results, the Court often chooses one of the two and ignores the other. In *Monell v. Department of Social Services*,[36] for example, the Court relied exclusively on its reading of legislative intent in rejecting respondeat superior liability for governments,[37] in spite of strong tort policy arguments to the contrary.[38] Similarly, the Court often approaches immunity questions from the premise that the intent of the 1871 legislature should govern their resolution. It then decides that the 1871 Congress intended that the statute be construed against the background of then-prevailing common-law standards.[39] Thus, the Court recently denied absolute immunity to public defenders, explaining that no such immunity was available to attorneys and barristers in the common law of 1871.[40]

In other immunity cases, however, the Court has not adhered to this focus on legislative intent. In *Owen v. City of Independence*,[41] it rejected an immunity defense for municipal governments, explaining that such a defense would seriously interfere with the vindication of constitutional rights and the deterrence of wrongdoing.[42] The Court acknowledged that in 1871 municipalities were generally immune for their governmental acts,[43] but permitted tort policy considerations to overshadow this bit of history.[44] The Court nonetheless insisted that it

---

33. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978); Monroe v. Pape, 365 U.S. 167 (1961).

34. *See, e.g.*, Carey v. Piphus, 435 U.S. 247 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974).

35. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981).

36. 436 U.S. 658 (1978).

37. *Id.* at 690-95.

38. *See* Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 952-55 (1979) [hereinafter Note, *Municipal Liability*].

39. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 635-38 (1980); Eisenberg, *supra* note 1, at 491-504.

40. Tower v. Glover, 467 U.S. 914, 920-23 (1984). The Court has also looked to history in granting absolute immunity to judges and legislators. *See* Pierson v. Ray, 386 U.S. 547, 553-55 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

41. 445 U.S. 622 (1980).

42. *Id.* at 650-52.

43. *Id.* at 644-47.

44. *Id.* at 651-53.

was acting in accordance with the legislative intent.[45]

Similarly, in *Scheuer v. Rhodes*,[46] the Court relied heavily on tort policy in holding that high-ranking state officials enjoy only a qualified immunity,[47] although its own investigation of nineteenth-century tort law showed that such officers were granted absolute immunity under the common law.[48] And in *Imbler v. Pachtman*,[49] the Court granted absolute immunity to prosecutors,[50] even though the first common-law cause on the issue was not decided until 1896, twenty-five years after the enactment of section 1983.[51] Again, it relied on a policy argument; specifically, that immunity is necessary to permit prosecutors to do their work without fear of lawsuits.[52]

These two inquiries reflect fundamentally different premises about the nature and scope of constitutional torts. Either constitutional tort rules should reflect the intent of the framers of section 1983 in 1871, or they should implement modern tort policy goals of optimum deterrence, spreading of losses, and vindication of rights. In the former case, the source materials for resolving such issues would be the debates of the 1871 Congress and the tort-law background against which that Congress acted. In the latter, constitutional torts would become a part of modern tort law, and the economic tools and principles of fairness that courts have long used to resolve other tort issues could be brought to bear on these problems. The Court, however, moves from one premise to the other, and back again, at will. It has not settled, or even recog-

---

45. *Id.* at 650.
46. 416 U.S. 232 (1974).
47. *Id.* at 247-48.
48. *Id.* at 246 n.8.
49. 424 U.S. 409 (1976).
50. *Id.* at 427.
51. *Id.* at 421.
52. *Id.* at 421-29. At times, the Court appears to have abandoned legislative intent entirely in the immunity area. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), it restated the immunity defense in objective terms, dropping a subjective "good faith" element found in earlier cases. *See id.* at 815-19. *Harlow* was a suit against a federal official under the federal common-law cause of action developed in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). *See Harlow*, 457 U.S. at 805. The Court defended its new test on tort policy grounds. *Id.* at 813-19. Yet the Court strongly suggested that the standard would be applied in § 1983 cases as well. *Id.* at 818 n.30. Lower courts have interpreted the Court's holding in this way. *See, e.g.*, Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982) (en banc); Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U.L.Q. 221, 245 & n.141 (1984). This suggests that the Court no longer wishes to pretend that legislative intent matters on immunity issues. On the other hand, in some cases after *Harlow* the Court has explained its immunity holdings in terms of legislative intent. *See* Tower v. Glover, 467 U.S. 914, 920-21 (1984); Briscoe v. LaHue, 460 U.S. 325, 341 (1983).

nized, this basic conflict in its constitutional tort law. As a result, its doctrine rests on a constantly shifting foundation that will never stabilize until the Court commits itself to one of these premises and abandons the other.

B. *Manipulating Legislative Intent*

The Court does not seriously undertake to discover the intent of the forty-second Congress. Rather, it employs the rhetoric of legislative intent to rationalize results reached for other, unarticulated reasons. Sometimes the real reasons are tort principles and policies; sometimes they represent a political compromise among members of the Court. Sometimes the Court may simply be responding to an intuitive feeling that cannot be expressed in words or rationally defended. Whatever the reasons, many inconsistencies appear when the Court's opinions are subjected to close scrutiny. A few disparities in these opinions would not be sufficient to warrant rejecting the Court's assertions about its method, for no one expects the Court to be fully consistent in any area. The sheer number of the inconsistencies, however, casts serious doubt on the Court's claim that it attempts to find legislative intent in such cases.

Three of the Court's most important decisions under section 1983 are *Monroe v. Pape*,[53] *Monell v. Department of Social Services*,[54] and *Owen v. City of Independence*.[55] In each of these cases, the Court made use of legislative intent, and in each instance its reasoning is open to serious question. In *Monroe*, the Court considered whether the "under color of" state law provision in the statute is satisfied whenever a state official acts in the course of his duties, or only when his conduct is authorized by state law. The Court viewed this as a question of legislative intent.[56] After quoting from debates on the legislation, the Court concluded that Congress did intend to grant a remedy even when a state official acted without express authorization.[57]

In reaching this result, the Court in *Monroe* violated the principle that historical context must be considered in determining legislative in-

53. 365 U.S. 167 (1961).
54. 436 U.S. 658 (1978).
55. 445 U.S. 622 (1980).
56. The Court stated the issue to be decided as "whether Congress . . . meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position." 365 U.S. 167, 172 (1961).
57. *See id.* at 172-83.

tent.[58] The Court acknowledged that the legislation was passed to deal with the conditions in the South after the Civil War, and that the inadequacy of state remedies was a central concern.[59] This historical context suggests that the "under color of" provision was intended to cover situations where state law failed to provide an adequate remedy, and this view is consistent with statements made by supporters of the legislation.[60] The Court, however, said the broad language of section 1983 should be given great weight, and the historical background none at all.[61]

The Court in *Monroe* also ignored its general rule that statements made by opponents of legislation should receive little weight in construing it.[62] Of the Court's many references to legislative history, those

---

58. *See, e.g.*, United States v. Witkovich, 353 U.S. 194, 199 (1957); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 386 (1948); Puerto Rico v. Shell Co., 302 U.S. 253, 258 (1937); McCulloch v. Maryland, 17 U.S. 316, 413-15 (1819). *See also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947). The legislators who enacted § 1983 were familiar with this canon of construction. *See* CONG. GLOBE, 42d Cong., 1st Sess. 505 (1871) [hereinafter GLOBE] ("Every rule, organic or legislative, has its origin in some existing evil which made it necessary. It is to be interpreted in the light of the cause which produced it.") (Sen. Pratt).

59. *See* 365 U.S. at 172-80. Newly freed blacks of that era were subjected to harsh legal restrictions on their liberty and police and courts often provided them with little or no protection against private violence. *See, e.g.*, GLOBE, *supra* note 58, at 320-21 (Rep. Stoughton); *id.* at 374-75 (Rep. Lowe); *id.* at 441-48 (Rep. Butler); *id.* at 604-07 (Sen. Pool).

60. *See* GLOBE, *supra* note 58, at 334 (Rep. Hoar); *id.* at 481-82 (Rep. Wilson); *id.* at 501 (Sen. Frelinghuysen); *id.* at 505-06 (Sen. Pratt); *id.* at 514 (Rep. Poland); *id.* at 577-79 (Sen Trumbull); *id.* at 608 (Sen. Pool); *id.* app. at 68-69 (Rep. Shellabarger); *id.* app. at 153 (Rep. Garfield). None of these statements, nor any of those quoted by the *Monroe* court, speak directly to the meaning of "under color of law." Rather, they address the general aims of the legislation, and indicate that it was directed at violations that the state authorized or condoned, or was helpless to remedy. The comments of Senator Trumbull are typical: "While I believe, as a general rule, the liberties of the individual are safest when trusted to the locality, a case may occur where a particular locality oppresses a portion of its inhabitants, and, where you have a general authority to correct it, I say do it, just as was done in this country with slavery in certain states." *Id.* at 579.

61. The Court in *Monroe* remarked:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

365 U.S. at 183. In dealing with other constitutional tort issues, however, the Court has emphasized the importance of historical context. *See infra* note 77 and accompanying text.

62. *See, e.g.*, NLRB v. Fruit Packers Local 760, 377 U.S. 58, 66 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). *See also* Carlson v. Green, 446 U.S. 14, 40 n.7 (1980) (Rehnquist, J., dissenting).

supporting its holding are taken from speeches by opponents,[63] whose motive was not to illuminate the provisions of the bill, but to exaggerate its impact.[64] At the same time, the Court ignored many statements by supporters of the measure adopting the narrower construction rejected by the Court.[65] It appears that the Warren Court, having embarked on a broad campaign to extend constitutional protections, viewed the statute as a convenient vehicle for a federal remedy for violations of the new rights.[66] Perhaps the Court wished to place the responsibility for the new remedy on Congress in order to defend itself against charges of judicial lawmaking. To achieve these ends it had to ignore traditional rules of statutory construction and distort legislative history.[67]

In *Monell v. Department of Social Services*, the Court held that the language and legislative history of section 1983 demonstrated that Congress did not intend municipalities to be held liable for constitutional torts unless the injury was caused by an official municipal policy.[68] Although the Court had already held that municipalities were "persons,"[69] it stated that the language of section 1983 "cannot be easily read to impose liability vicariously on governing bodies" for the constitutional torts of their employees.[70] If the statutory language is viewed in isolation, this is a plausible conclusion. But in other areas the Court has not been content to examine statutory language alone, looking also to the common law of torts as it stood in 1871.[71] Had the Court employed a similar analysis in *Monell*, it would have found that municipalities in 1871 were frequently held liable on a respondeat su-

---

63. 365 U.S. at 178-80.

64. *See* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1491-92 (1969) [hereinafter Note, *Limiting Section 1983*].

65. 355 U.S. at 175-78. *See also Monroe*, 365 U.S. at 211-58 (Frankfurter, J., dissenting); Note, *Limiting Section 1983*, *supra* note 64, at 1491.

66. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 87-92 (1973); Eisenberg, *supra* note 1, at 488.

67. For more elaborate analyses of the *Monroe* decision, see Zagrans, *supra* note 7, at 525-60. Eisenberg, *supra* note 1, at 504-15.

68. 436 U.S. 658, 691 (1978). As originally passed, the statute provided liability against "any person who . . . shall subject or cause to be subjected any person . . . to the deprivation of [constitutional rights]." Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).

69. 436 U.S. at 663.

70. *Id.* at 692.

71. For example, the statute itself says nothing about official immunity, but the Court has crafted an elaborate set of immunity rules, based in large measure on its investigation of 1871 tort law. *See, e.g.*, Tower v. Glover, 467 U.S. 914, 920-21 (1984).

perior basis.[72] Accordingly, the imposition of vicarious liability for the torts of municipal employees would be fully consistent with the historical context of the statute.

The Court did not rest its ruling in *Monell* solely on the language of the statute, but relied also on legislative history. It noted that Congress had rejected an amendment to the legislation that would have made municipalities liable for terrorist acts by private persons, and drew an analogy between that kind of vicarious liability and respondeat superior.[73] The rejection of the broad liability of the amendment, however, provides only tenuous support at best for the Court's conclusion that Congress intended to reject the much narrower liability of respondeat superior as well. Liability under respondeat superior and the vicarious liability for private acts that Congress rejected are significantly different. Furthermore, Congress's reasons for rejecting the Sherman amendment would not apply to respondeat superior. The lawmakers worried that it would be unconstitutional, or at least unfair, for the federal government to require local governments to maintain police forces to keep the peace, or to make them liable for actions over which they had no control, or where no state action or constitutional wrong had taken place.[74] Respondeat superior, however, "imposes liability only . . . for the acts of those who are already employees,"[75] and, in the context of section 1983, only for breaches of constitutional rights.

In *Owen v. City of Independence*, the Court held that municipalities, unlike private actors, are not entitled to assert an immunity defense when they reasonably, but mistakenly, believe their policies and customs are constitutional. In explaining its holding, the Court stated that "the scope of a municipality's immunity from liability under section 1983 is essentially one of statutory construction."[76] Noting that in its earlier immunity cases it had looked to the common law of 1871, the Court concluded that the legislative intent could not be accurately

---

72. *See* Note, *Municipal Liability, supra* note 38, at 955-61 (1979). Respondeat superior liability was often rationalized under the fiction "he who acts through another, acts himself." *Id.* at 940.

73. 436 U.S. at 691-94 & n.57.

74. *See, e.g.*, GLOBE *supra* note 58, at 791 ("We should never impose an obligation on a community when we do not and cannot give that community the power to discharge that obligation. We should not require a county or a city to protect persons in their lives or property until we confer also upon them the power to furnish that protection.") (Rep. Willard). *See also* Note, *Municipal Liability, supra* note 38, at 945-46.

75. Note, *Municipal Liability, supra* note 38, at 946. *See also* GLOBE, *supra* note 58, at 761-63, 771, 776-79 (focus of the debate was on liability for acts of private persons).

76. 445 U.S. 622, 635 (1980).

ascertained outside the historical context in which the statute was passed.[77] The Court in *Owen* found that municipalities in the nineteenth century were indeed often immune from suit for their "governmental" functions.[78] Yet the Court denied that this doctrine had any significance in construing the statute, concluding that any governmental immunity would "obviously" be abrogated by a statute making the sovereign amenable to suit.[79]

Although the result in *Owen* is not necessarily wrong, the Court's reasoning is internally inconsistent. The avowed aim of any inquiry into historical background is to discover the legislative intent of the framers. One only looks into the immunity issue after determining that the defendant would otherwise be subject to liability. Rejecting the immunity because of the broad language of the statute undercuts the whole purpose of the historical inquiry. The opinion begins by stating that historical context is relevant, yet ultimately concludes by declaring that it is not.

The internal confusion of *Owen* mirrors a similar inconsistency between *Owen* and other immunity cases. If the reasoning of *Owen* that the broad language of the statute should overcome the common law in statutory construction is accepted, then the same reasoning should preclude immunity for individual officials as well. Yet with respect to such officials, the Court has invariably found that the broad language of section 1983 must be qualified by the common law rules.[80] The official immunity cases can be divided into two groups. When the Court has wished to accord absolute immunity, it has often relied on history to explain the result. When it has wished to grant only qualified immunity, it has invoked tort policy considerations.[81] In this way it has avoided explaining why some officials should receive one kind of immu-

---

77. *Id.* at 637-38.

78. *Id.* at 644.

79. *Id.* at 647.

80. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 421 (1976); Wood v. Strickland, 420 U.S. 308, 316-18 (1975). Note also subtle differences in the ways the opinions describe the role of the common law. According to *Owen,* the common law immunity must have been "well-established" in 1871 to warrant respect. 445 U.S. at 638. In *Imbler,* prosecutors were granted absolute immunity even though the first American case in the area did not arise until 1896. 424 U.S. at 421. *See also* Tower v. Glover, 467 U.S. 914, 920-21 (1984) (denying absolute immunity to public defenders because no immunity existed for analogous actors in 1871).

81. *Compare* Pierson v. Ray, 386 U.S. 547 (1967) *and* Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for judges and legislators based in the common law) *with* Wood v. Strickland, 420 U.S. 308 (1975) *and* Scheuer v. Rhodes, 416 U.S. 232 (1974) (immunity defense available only upon showing of reasonable belief in constitutionality of action).

nity and some another.[82]

C. *The Futile Search for Legislative Intent*

Even if the Court was sincere in its efforts to divine legislative intent, it could not ever reasonably hope to establish Congress's intent in 1871 with respect to contemporary constitutional tort issues. The 1871 Congress did not and could not have formed any intent on how those issues should be resolved. Consider the circumstances attending the enactment of the Civil Rights Act of 1871.[83] A bitter civil war had ended in victory for the Union, but many southern whites remained unwilling to extend fundamental rights to the newly freed blacks. Terrorist groups such as the Ku Klux Klan intimidated, whipped, and killed blacks and their white supporters, and local authorities did nothing to stop them.[84] This state of affairs "require[d] extraordinary legis-

---

82. A comparison of other cases relying on legislative history further illustrates the inadequacy of such history as a tool for adjudication. For example, the Court in *Monroe* ignored the long history of case law stretching back to the 1870s, in which "under color of" was read narrowly. *See* 365 U.S. 167, 212-16 (1961) (Frankfurter, J., dissenting). Yet, in *Monell*, the Court specifically noted a single district court decision in the 1870s in support of its holding that cities could be sued under § 1983. 436 U.S. 658, 689 (1978) (citing Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393 (C.C.N.D. Ill. 1873) (No. 10,336). In *Monroe*, the Court relied heavily on statements by opponents, who read the "under color of" provision very broadly. *See supra* notes 63-65 and accompanying text. In the immunity cases, however, it ignored similar statements by opponents suggesting that the statute would abrogate legislative and judicial immunity. *See* GLOBE, *supra* note 58, at 365-66 (Rep. Arthur); *id.* at 385 (Rep. Lewis); *id.* app. at 217 (Sen. Thurman). These charges were apparently not answered by the proponents of the legislation. In *Monell*, the Court relied on the Dictionary Act, § 2, 16 Stat. 431 (1871), a statute enacted shortly before § 1983 that defined the term "person" in federal legislation as generally including governmental bodies. 436 U.S. at 688-89. A year later, in Quern v. Jordan, 440 U.S. 332 (1979), the Court rejected an argument that state governments were persons amenable to suit under § 1983. It relegated the Dictionary Act to a footnote and denigrated its significance. *Id.* at 341 & n.11 (1979). The Court has given similar treatment to some general statements in legislative history that provide that § 1983 should be construed broadly to protect constitutional rights. These statements are, of course, trotted out when the Court makes an expansive ruling on liability, *see, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 684 (1978); Monroe v. Pape, 365 U.S. 167, 178-80 (1961); Owen v. City of Independence, 445 U.S. 622, 636 (1980); and noted only by dissenters when the majority adopts a narrower reading. *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325, 348-49 (1983) (Marshall, J., dissenting); Allen v. McCurry, 449 U.S. 90, 109 & n.8 (1980) (Blackmun, J., dissenting); Quern v. Jordan, 440 U.S. 332, 357-65 (1979) (Brennan, J., concurring). For more examples of the manipulative tendency discussed in this section, see Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 604-11 (1985).

83. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871). For the text of the statute, see *supra* text accompanying note 8.

84. A leading supporter of the Civil Rights Act of 1871 declared that "[t]he whole South . . . [was] rapidly drifting into a state of anarchy and bloodshed," where there was "no security for

lation for its suppression."[85] Section 1 of the 1871 Act, which is now codified as 42 U.S.C. § 1983, provided a civil remedy for constitutional violations committed under color of state law.[86]

Although there were lengthy debates on the measure, section 1 received little attention and was passed without amendment.[87] As noted earlier, the 1871 Congress appears to have intended the "under color of" provision of what is now section 1983 to cover only violations of federal rights encouraged or condoned by state law, or where state courts could provide no remedy.[88] Quite apart from this narrow issue, it is evident from the historical context and the legislative history that Congress did not have in mind today's modern constitutional tort remedy. The debates contain little or no discussion of such modern tort-law questions as the definition of "persons" subject to suit, respondeat superior, and immunities.[89] Instead, the debates contain extended discussion of conditions in the South, the breakdown of law and order, the acquiescence of Southern authorities, Klan terrorism against blacks and Republicans, and the consequent need for federal action.[90] With re-

---

life, liberty, person, or property," and "[s]tate authorities and local courts [were] unwilling or unable to check the evil or punish the criminals." GLOBE, *supra* note 58, at 321 (Rep. Stoughton).

85. GLOBE, *supra* note 58, at 322 (Rep. Stoughton).

86. Section 2 of the 1871 Act created new federal criminal provisions aimed at Ku Klux Klan-style terrorism. Section 3 permitted the president to use the armed forces to suppress massive outbreaks of Klan violence, and section 4 permitted the president to suspend the writ of habeas corpus in certain circumstances. *See* GLOBE, *supra* note 58, at 317 (Rep. Shellabarger).

87. *See* Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978). Representative Dawes characterized the debate on the bill as a whole as "unexampled in duration and exhaustive in its character." GLOBE, *supra* note 58, at 475.

88. *See supra* notes 59-60 and accompanying text.

89. There are three references to immunity, *see supra* note 82, all of which contradict the Court's position. There are no references to any of the other issues.

90. *See, e.g.*, GLOBE, *supra* note 58, at 320-21 (Rep. Stoughton); *id.* at 368 (Rep. Sheldon); *id.* at 374-75 (Rep. Lowe); *id.* at 390-92 (Rep. Elliott); *id.* at 412-15 (Rep. Roberts); *id.* at 425-27 (Rep. McKee); *id.* at 436-39 (Rep. Cobb); *id.* at 441-48 (Rep. Butler); *id.* at 457-59 (Rep. Coburn); *id.* at 486-87 (Rep. Tyner); *id.* at 502-04 (Sen. Pratt); *id.* at 511 (Rep. Perce); *id.* at 516-19 (Rep. Shellabarger); *id.* at 604-07 (Sen. Pool); *id.* at 650 (Sen. Sumner); *id.* at 653-54 (Sen. Osborne); *id.* at 830-31 (Sen. Stewart); *id.* app. at 73 (Rep. Blair); *id.* app. at 78 (Rep. Perry). Opponents of the measure challenged the validity of such accounts of southern lawlessness and questioned the need for the legislation. *See, e.g., id.* at 415-18 (Rep. Biggs); *id.* at 418-20 (Rep. Bright); *id.* at 470-80 (Rep. Leach); *id.* at 511 (Rep. Eldridge); *id.* at 658 (Sen. Blair); *id.* at 805 (Rep. Kerr); *id.* app. at 14 (Sen. Bayard); *id.* app. at 119 (Sen. Blair). They claimed that crimes were committed everywhere, *id.* at 387 (Rep. Wood); *id.* app. at 21 (Sen. Bayard); *id.* app. at 91 (Rep. Duke); and that the bill was motivated by partisan political considerations. *Id.* at 424 (Rep. Winchester); *id.* at 451 (Rep. Cox); *id.* at 478-79 (Rep. Leach); *id.* at 573 (Rep. Stockton); *id.* at 603-04 (Sen. Saulsbury); *id.* app. at 77 (Rep. Wood). Republicans responded that the Klan was a tool of the Democratic party. *See, e.g., id.* at 436-39 (Rep. Cobb); *id.* at 443 (Rep. Butler); *id.* at 460 (Rep. Coburn); *id.* at 517 (Rep. Shellabarger); *id.* app. at 78 (Rep. Perry). Opponents

spect to the substance of the legislation, the discussion focused primarily on other, more controversial provisions of the original 1871 Act.[91]

The enactment of what is now section 1983 received so little attention for several reasons. First, southerners were more frightened of the United States Army than they were of the federal courts, so they directed their efforts at trying to block a provision allowing military intervention.[92] This tactical choice, however, cannot explain why the bill's advocates, in their general discussions of the legislation and its implications, did not say more about section 1983. The bill's supporters were all committed to preserving the gains won for blacks in the war. Thus, they agreed that the privileges and immunities and equal protection clauses of the fourteenth amendment prohibited discrimination against blacks with respect to the rights of citizenship and enforcement of the law.[93] Given their determination to ensure that blacks were treated fairly, and their desire for an effective remedy toward that end, it is likely that they did not discuss immunity or other limits on liability because they did not intend that there be any limits in this context.[94]

---

argued that the South's main problem was Republican interference in its affairs. *See, e.g., id.* at 418-20 (Rep. Bright); *id.* at 421-24 (Rep. Winchester); *id.* at 511 (Rep. Eldridge); *id.* app. at 22 (Sen. Bayard); *id.* app. at 90-91 (Rep. Duke); *id.* app. at 155 (Rep. Young); *id.* app. at 179-80 (Rep. Voorhees).

91. Specifically, debate centered on §§ 3 and 4 of the Act, *see supra* note 86, empowering the president to use the armed forces and suspend the writ of habeas corpus in certain instances. *See, e.g.*, GLOBE, *supra* note 58, at 427-28 (Rep. Beatty); *id.* at 430-31 (Rep. McHenry); *id.* at 449-50 (Rep. Butler); *id.* at 462 (Rep. Roberts); *id.* at 476-77 (Rep. Dawes); *id.* at 479 (Rep. Leach); *id.* at 482 (Rep. Wilson); *id.* at 510 (Rep. Eldridge); *id.* at 572-73 (Sen. Stockton); *id.* at 581 (Sen. Trumbull); *id.* at 645-48 (Sen. Davis); *id.* at 698 (Sen. Edmunds); *id.* app. at 49 (Rep. Kerr); *id.* app. at 74-77 (Rep. Wood).

92. *See supra* notes 86 & 91 and accompanying text.

93. *See, e.g.*, GLOBE, *supra* note 58, at 476 (Rep. Dawes); *id.* at 500 (Sen. Freylinghausen); *id.* at 504-05 (Sen. Pratt); *id.* at 575-76 (Sen. Trumbull); *id.* at 607-08 (Sen. Pool); *id.* app. at 69 (Rep. Shellabarger); *id.* app. at 84 (Rep. Bingham); *id.* app. at 152-53 (Rep. Garfield).

94. *See* Eisenberg, *supra* note 1, at 484-522. Aside from assuring equal treatment for blacks, some Republicans thought that the fourteenth amendment applied the Bill of Rights to the states. *See, e.g.*, GLOBE, *supra* note 58, at 476 (Rep. Dawes); *id.* app. at 84 (Rep. Bingham); *id.* app. at 310 (Rep. Maynard). Others construed it much more narrowly. *Id.* at 501 (Sen. Freylinghausen, declaring that the privileges and immunities of citizens include rights to life, liberty, property, equal protection, and the pursuit of happiness); *id.* at 575-77 (Sen. Trumbull, maintaining that the fourteenth amendment extends citizenship to blacks but that "the protection which the Government affords to American citizens under the Constitution as it was originally formed is precisely the protection it affords to American citizens under the constitution as it now exists. The fourteenth amendment has not extended the rights and privileges of citizenship one iota. They are right where they always were."); *id.* at 607-08 (Sen. Pool stating that the fourteenth amendment protects common law rights to personal liberty, personal security, and private property, and that the due process clause is directed to the judicary and the equal protection clause to the executive branch); *id.* app. at 69 (Rep. Shellabarger, explaining that the rights protected by the fourteenth

Whatever the intent of the members of Congress of 1871, none of them could have foreseen the vast expansion of constitutional rights in the twentieth century. The legislators could not have formed any view as to whether, in the circumstances of the late twentieth century, cities and states should be subject to suit, whether respondeat superior should apply, whether punitive damages should be available, or what the scope of immunity should be. If asked these questions, they likely would have responded that twentieth century courts should use their good judgment in resolving the issues as they arise. The members of Congress would be astonished to find today's Supreme Court combing the skimpy legislative history of section 1983 and examining the fine points of nineteenth century tort law to answer these questions. In short, the Supreme Court's search for legislative intent in the area of constitutional torts is a fine example of the ahistorical use of historical materials—taking those materials out of their context and applying them to a different set of problems not contemplated by the historical actors.[95]

III. THE FUTURE OF CONSTITUTIONAL TORTS

In spite of its fatal flaws as a true source of solutions to problems, it is not hard to understand why the Supreme Court has found the rhetoric of legislative intent an agreeable means of rationalizing decisions. Twenty-five years ago the Court began making constitutional tort law virtually from scratch. Critics could attack the resulting new remedy both for its substantive impact on governmental defendants and for the Court's role in developing it. Basing the doctrine on legislative intent enabled the Court to deflect at least some of the responsibility and criticism away from itself and onto Congress. An equally important factor in the Court's reliance on legislative intent is the difficulty in

---

amendment include "protection by the government, the enjoyment of life and liberty with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.") (citing Corfield v. Coryel, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230)); *id.* app. at 115-16 (Rep. Farnsworth, disputing the incorporationist view of the fourteenth amendment); *id.* app. at 152-53 (Rep. Garfield, disputing the incorporationist view and stating that due process is procedural). Some simply professed not to know what the fourteenth amendment meant. *See, e.g., id.* at 485 (Rep. Cook).

95. *See* Gordon, *Historicism and Legal Scholarship*, 90 YALE L.J. 1017, 1020-21 (1981); *cf.* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 218-21 (1980) (discussing constitutional interpretation). *See also* Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1302 & n.1 (1986) (Stevens, J., concurring) (construction of the term "policy" in § 1983 is "a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States").

making and rationalizing any new legal rule. Relying on legislative intent, and using that reliance to borrow (or pretend to borrow) from nineteenth century tort law, was doubtless easier than struggling with the difficult policy issues involved. The latter approach would have required the justices to articulate and consciously choose among policy goals and to try to reach agreement among themselves concerning not only the results of cases but the real reasons for them.

Perhaps this was a necessary first step in developing a whole new field of doctrine and enabling the new remedy to take root. Crude fictions often have marked the beginnings of change in the common law.[96] Doctrine, however, cannot rest forever on such a shaky foundation as the Court's incoherent mixture of legislative intent and sporadic references to tort policy. The better approach would be to abandon the search for legislative intent, and instead focus on tort principles and policies in attempting to resolve constitutional tort issues. However, simply grafting common law rules into the present constitutional tort context would not be feasible. First, with respect to some issues, there is no generally-accepted rule of common law tort. On the contrary, sharp conflicts exist among competing tort policy goals, and common-law courts often make different choices and hence develop different rules. Making constitutional tort law requires the same deliberate selection among competing policy goals. Second, even to the extent common-law courts agree on how a given issue should be resolved, it would be wrong for a court considering an issue of constitutional torts to unthinkingly borrow a common-law rule without first considering its impact. Constitutional and common-law torts are radically different. The range of interests covered by constitutional torts is narrower than those protected by the common law, and the constitutional nature of such interests justifies according them stronger protection than the common law of torts provides.[97] Even so, the traditional tort law is certainly a useful starting point.

A. *Tort Policy and Constitutional Torts*

Contemporary tort law pursues three broad goals: (1) compensation of the injured while spreading the injured's loss among a large number of people; (2) deterrence of wrongful conduct; and (3) vindica-

96. *See generally* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981).

97. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 11 (1974).

tion of individual rights.[98] Starting from these three common-law tort policies, one can identify the distinctive features of constitutional tort law that require special attention or rules. In this fashion, it is possible to construct a more mature law of constitutional tort. Although each of the aims of common-law tort policy has been attacked as unworthy or even incoherent,[99] questions regarding their value or legitimacy are not the focus here. Rather, my purpose is to illuminate the tort policy questions that courts must ask and the choices they must make in fashioning constitutional tort doctrine.[100]

1. Compensation and Loss-Spreading

The goal of compensation and loss-spreading requires a rule that would impose liability on a defendant able to pay damages to the injured plaintiff and thereby spread the loss to those able to bear it. In the case of a government defendant in a constitutional tort suit, the loss would ultimately be spread to taxpayers, regardless of whether the injuries involved were due to constitutional violations or not.[101] The only problem presented by the compensation and loss-spreading goal in the context of constitutional torts is with respect to damages. Loss-spreading generally focuses on compensating the plaintiff's out-of-pocket costs and lost income due to physical injuries,[102] and therefore may not attach much importance to awarding damages for the non-monetary injuries to individual dignity often suffered in constitutional tort cases. Oth-

---

98. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5-6, § 4, at 20, 24-26 (5th ed. 1984); R. POSNER, TORT LAW—CASES AND ECONOMIC ANALYSIS 45-46 (1982). The Supreme Court has from time to time referred to each of these policies in making constitutional tort rules, but has not thoroughly examined or explained any of them. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982); Gomez v. Toledo, 446 U.S. 635, 638-39 (1980); Carlson v. Green, 446 U.S. 14, 21 (1980); Owen v. City of Independence, 445 U.S. 622, 651-52 (1980); Butz v. Economou, 438 U.S. 478, 504-05 (1978); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Carey v. Piphus, 435 U.S. 247, 254 (1978).

99. *See, e.g.*, Henderson, *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981) (criticizing New Zealand no-fault liability system that emphasizes the loss-spreading goal); Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980) (criticizing a loss-spreading and economic efficiency approach to modern tort theory); Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27 (1980) (criticizing both the economic efficiency and vindication approaches).

100. For a more elaborate discussion of this dilemma, see P. SCHUCK, *supra* note 1, at 16-25 (1983).

101. Pushed to its logical end, of course, the compensation and loss-spreading goal argues for a broad insurance system.

102. *See* Blum & Kalven, *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341, 347 n.11.

erwise, it is a force for breaking down all barriers to recovery.[103]

2. Deterrence and Overdeterrence

Deterrence is the use of liability to create incentives against undesired conduct.[104] In traditional tort law, the deterrence problem is chiefly one of determining which of two or more actors should be held liable, and hence feel an incentive to take precautions to avoid injury. In the typical tort case, however, no one may have intentionally injured another or even have acted negligently, thus making the task of choosing whom to deter a difficult one.[105] The task in constitutional torts is somewhat easier. The plaintiff is generally the passive victim of harm committed by a governmental actor, who is often acting intentionally. If anyone should be deterred, it will generally be the defendant.[106] The nature of the plaintiff's conduct, however, is often important in determining whether the governmental defendant has committed a constitutional violation. Some employee speech, for instance, is protected but some can be grounds for dismissal.[107] And a policeman can use more force against a recalcitrant suspect than an obedient one.

The more interesting issue raised by the deterrence goal in constitutional torts arises not from the constitutional nature of the injury, but from the fact that the defendant is a government officer. While the threat of paying damages will generally deter both governmental and private actors from conduct that might lead to liability, the impact of such a threat is different for governmental and private actors. Liability may have a greater deterrent effect on government officers, inhibiting not only inappropriate, but also beneficial conduct. In deciding how many risks of harm to impose on others, private actors will generally consider the impact of tort liability, but they will also respond to powerful countervailing incentives.[108] Unlike private actors, government of-

103. For example, the Court relied in part on this policy when it denied any immunity defense to municipal governments. Owen v. City of Independence, 445 U.S. 622, 655 (1980).

104. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112-13 (1983) (where injunctive relief is inappropriate, damages suits are the only means for deterring constitutional violations).

105. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1056-67 (1972).

106. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 119-22 (2d ed. 1977) (discussing intentional torts).

107. *See, e.g.*, Connich v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

108. A traveling salesman, for example, must determine how many risks to create as he drives from one appointment to another. If he takes too many, he may generate accidents for which he will be liable. On the other hand, if he takes too few, he will be late arriving and will lose sales

ficers cannot readily capture the benefits of their actions, because government is not a profit-making enterprise. As a result they face different incentives. The threat of liability will have a stronger influence on their behavior than the benefit to society of bold and decisive action. The result will be the "overdeterrence" of beneficial government actions.[109] If government officers face personal liability for mistakes, the police officer who suspects a crime will often fail to make an arrest in a close case; the school board will be more reluctant to fire a seemingly incompetent teacher; and the health and safety inspector may decide against shutting down an apparently unsanitary restaurant.

Because deterrence is served by holding officials liable while overdeterrence can be avoided only by limiting their liability, the goals of deterrence and avoiding overdeterrence are in constant tension in the constitutional tort context.[110] The ultimate aim of liability rules, from the economic point of view, is not to eliminate constitutional violations; rather, it is to reduce them to a level at which the costs of reducing them further, in terms of effective law enforcement, outweigh the benefits of more constitutional protection.

3. Corrective Justice and Vindication of Rights

Some courts and commentators have maintained that individuals are vested with certain rights not to be harmed by others and that these rights should not be reduced to economic or other utilitarian calculations.[111] Proponents of this view, which I share, believe that the principal goal of constitutional tort law should not be to provide incentives for achieving the optimal number of constitutional breaches, but to vindicate constitutional rights. Of course, constitutional rights may be vindicated without recourse to a tort suit. They can sometimes be asserted as defenses to pending civil or criminal charges, as when a newspaper

---

and profits. Since he is pulled in two directions at once, he will only take those precautions that achieve a net reduction in the costs of accidents and accident avoidance. *See* Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1162-63 (1981).

109. *See* P. SHUCK, *supra* note 1, at 59-81; Cass, *supra* note 108, at 1135-38, 1153-59; Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS., Winter 1978, at 26-27; Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 65.

110. *See* Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 347.

111. *See, e.g.*, LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 350 (1914); P. SCHUCK, *supra* note 1, at 111-12 (quoting ARISTOTLE, NICHOMACHEAN ETHICS, at 1132a (W. Ross trans. 1915)); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

asserts the first amendment as a defense to a libel suit. In other cases, constitutional rights can provide grounds for prospective relief, as when a group of black parents obtains an injunction against segregated schools. These remedies, however, operate only against present and future violations of rights. When the violation has already taken place, such as the use of excessive force by police or the firing of a teacher for protected speech, only an award of money damages can make the plaintiff whole. In such circumstances, the principle of corrective justice requires that the responsible party pay damages in order to vindicate those rights.

A significant difference between vindication and deterrence is that rules based on deterrence can be justified only if defendants respond to the incentives created by such liability rules. The vindication goal does not depend on this premise, nor is it concerned with achieving an optimal level of violations.[112] Rather, its thrust is that *any* injury to an individual's rights deserves to be vindicated.

In common-law torts, identifying the source of the rights to recover limits the force of the vindication theory. Abstract ethical considerations, such as the unfairness of permitting one who does injury to escape liability, may be weak support for establishing a right to recover damages when there are economic or other utilitarian reasons to reject recovery.[113] When the the source of the rights at stake is the Constitution, however, the vindication goal stands on firm ground.

B. *The Foundations of the Cause of Action*

The first task in rebuilding constitutional tort doctrine is to justify the existence of the cause of action. One possibility is simply to continue to rely on section 1983, for its plain language grants a right to sue to redress constitutional violations. Yet, however plain the language seems, it is clear that the framers in fact intended to create a much narrower cause of action.[114] Perhaps the statute, which is very broadly worded, could be viewed as a general authorization by Congress to the courts to use it as they see fit to enforce constitutional rights. As cir-

---

112. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 407-08 (1971) (Harlan, J., concurring).

113. *See* Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 465-74 (1979). Judge Posner is one commentator who, however, appears to believe that optimum deterrence of wrongdoing is the aim of tort liability even with respect to some kinds of constitutional violations. *See* Posner, *supra* note 106, at 54-57. *See also* Cass, *supra* note 108.

114. *See supra* notes 59-60 and accompanying text.

cumstances change from one era to another and as the Supreme Court responds to contemporary notions of tort policy in determining the rules to govern constitutional torts at any given time, the Court's perceptions of the proper scope of this damage remedy might also change. In this way, the Court could recognize a cause of action without having to depend on the unconvincing reading of 1871 legislative history in *Monroe v. Pape*.[115] I have difficulty believing, however, that the 1871 Congress meant to have its statute treated like a blank check.

The best alternative is to abandon the statute entirely and to approach the problem from the perspective of tort law alone. In terms of tort principles and policies, courts should have little difficulty justifying this cause of action. The vindication of constitutional rights, breached by the past conduct of a state official, often cannot be achieved in any other way than by an action for damages. Injunctive relief can only stop future violations of rights, and invoking the Constitution defensively as a shield against criminal or civil liability only works when the individual is on trial. Vindication is the most obvious but not the only reason to permit a cause of action. Deterring future violations also justifies a constitutional tort cause of action because injunctive relief may at times be inappropriate.[116] In such cases, a damage remedy is essential to adequate deterrence.[117]

Although the tort policy justifications for such a cause of action are straightforward enough, there is another doctrinal obstacle that must be overcome. It must be determined whether the judiciary has the power to create the cause of action, or whether such power rests exclusively with Congress. At the time it decided *Monroe* in 1961, the Supreme Court had no clearly-established precedent for the judicial creation of causes of action to recover damages for constitutional violations. The Court had occasionally allowed such suits without addressing their propriety or even explicitly recognizing that they posed any special problems.[118] Ten years after *Monroe*, however, the Court in *Bivens v.*

---

115. *See supra* notes 56-67 and accompanying text.

116. For example, random acts of violence by the police cannot be enjoined. A plaintiff cannot show that he will be a victim in the future or that any given officer will violate his rights. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Unless superiors ordered or condoned the violations, they cannot be enjoined either. *See* Rizzo v. Goode, 423 U.S. 362 (1976).

117. Indeed, the Supreme Court has stressed the availability of damages as a justification for denying injunctive relief in cases where the plaintiff cannot show a likelihood that he himself will be harmed in the future. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

118. *See* Wiley v. Sinkler, 179 U.S. 58 (1900). *See also* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1147 & n.165 (1969).

Six Unknown Federal Narcotics Agents[119] recognized its authority to create such a constitutional cause of action. Like *Monroe*, *Bivens* was a suit for illegal search and seizure by government officers.[120] Since the defendants in *Bivens* were federal agents acting under federal law, section 1983 did not apply to their conduct and there was no other applicable federal statute.[121] The Court held that it had the power to imply a tort remedy directly from the fourth amendment, and that vindicating constitutional rights was a sufficient reason to do so.[122] In the years since *Bivens*, the Court has permitted such suits under the fifth amendment for sex discrimination in federal employment[123] and under the eighth amendment for cruel and unusual punishment by neglecting the medical needs of a federal prisoner.[124]

The Court has indicated that it will not automatically exercise its power to create such a remedy, noting in *Bivens* itself that a given case may present "special factors counseling hesitation."[125] In *Bush v. Lucas*,[126] for example, the Court denied an implied constitutional cause of action for a civil service employee who charged that he was demoted for exercising his first amendment rights, noting the availability of effective statutory remedies for aggrieved employees under the civil service laws. It concluded that recognizing an implied cause of action would unnecessarily interfere with the smooth operation of those procedures.[127] Similarly, in *Chappell v. Wallace*,[128] the Court denied an implied cause of action to military personnel who sought to sue their officers for racially discriminatory treatment.[129] It pointed out that other remedies were available through the military command structure and stressed the special need for discipline in the military, as well as the harmful effects lawsuits could have on efforts to maintain that discipline.[130]

---

119. 403 U.S. 388 (1971). For scholarly defenses of this proposition, see Hill, *supra* note 118; Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968).

120. *Bivens*, at 389-90.

121. *Id.* at 390.

122. *Id.* at 397. *See also id.* at 408-10 (Harlan, J., concurring).

123. Davis v. Passman, 442 U.S. 228 (1979).

124. Carlson v. Green, 446 U.S. 14 (1980).

125. 403 U.S. at 396.

126. 462 U.S. 367, 380-90 (1983).

127. *Id.* at 388-90.

128. 462 U.S. 296, 299-304 (1983).

129. *Id.* at 305.

130. *Id.* at 302-04.

Neither of these cases presents a threat to the recognition of a common-law cause of action to recover damages for constitutional violations by state officers. Both cases turn largely on the availability of statutory remedies, and, apart from the Court's questionable reading of section 1983, no other statutory remedies for most constitutional violations by state officers are available to civilian plaintiffs.[131] If section 1983 were read narrowly, as it should be, then the implied cause of action for constitutional torts by state officers would exist entirely independent of the statute and would be clearly within the power of the Court.[132]

C. *Amenability to Suit*

Even assuming the existence of a cause of action in tort to remedy constitutional violations, the issue of who may be sued for such violations raises distinct considerations. The goals of deterrence, vindication of rights, and spreading of losses all clearly dictate that there must be

---

131. In addition, *Chappell* was based in part on the special status of the military. It is one of a long line of cases in which the Court has held that the demands of military discipline require different rules of constitutional law than those available to civilians. *Id.* at 298-304.

132. Professor Zagrans disagrees with my conclusion that an implied cause of action in federal court would be appropriate if "under color of" were read more narrowly. In his view, "[b]ecause Congress has enacted an express private federal civil remedy for constitutional violations in § 1983, an implied right of action directly under the Constitution is redundant and doctrinally indefensible." Zagrans, *supra* note 7, at 591 n.472 (citations omitted). But such an implied cause of action would hardly be redundant once § 1983 was narrowed to exclude coverage of these torts. The cases Professor Zagrans cites in support of his argument are inapposite. They were decided under the present regime, where the implied cause of action is truly redundant. Were the statute read more narrowly, the propriety of an implied cause of action would be a different issue, over which these cases would exert little, if any, authority. *See also* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 22 (1985) (arguing that given *Bivens*, "it might well be that federal courts would feel obliged to assume the authority to remedy constitutional violations by state officials even without an imposed statutory remedy").

If Congress were to pass a statute that nullified § 1983 and forbade the Supreme Court to create any implied cause of action to recover damages for constitutional violations, such a statute would present a difficult constitutional issue. As Congress has never attempted to do this, the Court has never spoken directly to the question. *Cf.* Bush v. Lucas, 462 U.S. 367, 378 n.14 (1983) (maintaining that the issue need not be reached in *Bush* since "existing civil service remedies . . . are clearly constitutionally adequate"). The resolution of this question would hinge on a straightforward, albeit difficult, value choice. The Court would have to decide whether it attaches more importance to congressional prerogatives and the democratic principles that counsel deference to Congress, or to the individual's claim to effective enforcement of constitutional rights in circumstances where they cannot be otherwise adequately protected. *Compare* Hill, *supra* note 118, at 1160 (arguing that damage remedies have a constitutional basis) *with* Carlson v. Green, 446 U.S. 14, 31-54 (1980) (Rehnquist, J., dissenting) (contending that the Court should not create implied causes of action for damages).

respondeat superior liability in any scheme of constitutional tort law. Many individuals, including government employees, are simply unable to pay large tort judgments. For this reason, individual liability alone would not compensate a plaintiff as well as governmental liability would.[133] A judgment-proof government employee would not be deterred by a liability rule under which he is clearly unable to pay the damages.[134] Governmental liability would provide governments with a strong incentive to take care in hiring, training, and supervising their employees.[135] To the extent that government officers are unable to pay damage awards, the plaintiff's rights would not be fully vindicated, and governmental liability would fill the gap. In addition, governments could easily spread losses by insuring or increasing their taxes.

Although making government pay for the unauthorized torts of its officers might appear unfair, the common law has long recognized that the employer, who obtains the benefits of his employee's actions, should in turn pay the costs the employee generates, including costs arising from torts in the course of employment.[136] Moreover, government clothes the officer with the authority under which he commits the violation and hence should share responsibility for it, even if the violation itself is contrary to the government's policy.[137] Finally, no strong countervailing tort policy supports rejection of respondeat superior. Although the policy against overdeterrence can be asserted in favor of any limit on liability, the Supreme Court itself has found that overdeterrence is not a significant obstacle when liability is imposed on governmental units rather than on individual officers.[138]

---

133. *See* Note, *Municipal Liability*, *supra* note 38, at 953-54.

134. *Id.* at 954 n.89.

135. *Id.* at 954. *See also* R. POSNER, *supra* note 98, at 21-22.

136. *See, e.g.*, Cardot v. Barney, 63 N.Y. 281, 287 (1875); R. EPSTEIN, C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 816 (4th ed. 1984); Note, *Municipal Liability*, *supra* note 38, at 955.

137. Note, *Municipal Liability*, *supra* note 38, at 955. *See also* Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455-56 (1923) (maintaining that in a master-servant relationship it is more efficient to spread the losses among society).

138. This is the explicit premise of the Court's holding in *Owen v. City of Independence* denying governments any immunity defense. 445 U.S. at 653-56. *See also* Cass, *supra* note 108, at 1174-78 (arguing that enterprise liability, as opposed to official liability, could lead to underdeterrence, not overdeterrence); Schuck, *supra* note 110, at 347-48 (maintaining that broader governmental liability will bring about the optimal level of deterrence because only the government agency responsible can balance deterrence with vigorous decisionmaking). Perhaps this is also why the Court in *Monell v. Department of Social Services* relied exclusively on a rather superficial reading of legislative history to support its decision. *See supra* text accompanying notes 68-75. Because the vicarious liability ruling in *Monell* cannot be credibly explained either in terms of

D. *Immunity*

One of the most difficult problems in forging constitutional tort doctrine is determining the appropriate scope of immunity for governmental officials who have committed constitutional violations. Here, overdeterrence is a major concern. The threat of liability could lead officials to abstain from any questionable action whatsoever and even to avoid proper actions that could lead to expensive lawsuits. This problem can be overcome by providing government officers with relief from liability through immunity rules. On the other hand, the goals of vindication and deterrence are both at odds with any immunity defense. Even a qualified immunity will interfere with deterrence by giving the defendant reason to believe that he might escape liability. Immunity defenses will also obstruct the goal of vindication, shielding the officer from paying for even conceded violations of constitutional rights.

Courts have often adopted immunity rules for nonconstitutional government torts. In *Barr v. Matteo,*[139] for example, the Supreme Court accorded government officers an absolute immunity against common law defamation. Yet the Court refused the invitation to apply this immunity in constitutional tort cases as well in *Butz v. Economou.*[140] The Court recognized that the plaintiff's interest in recovery was different and stronger in a constitutional case. In constitutional cases, the Court has instead chosen to attempt to fashion rules that accommodate all of the competing concerns at once. The Court's decisions in *Monroe,* recognizing a cause of action,[141] in *Monell,* ruling that municipalities are "persons" subject to liability,[142] and in *Owen,* holding that municipalities are entitled to no immunity defense,[143] all serve the tort policies of deterrence, vindication, and loss-spreading. The Court's official im-

---

legislative intent or of tort policy, the case may best be viewed as a political compromise. Before *Monell,* local governments could not be sued at all under § 1983. The Court's decision to make them liable for any of their constitutional torts was a dramatic and unexpected expansion of the statute's coverage. Perhaps the votes necessary to reach that holding could only be obtained by limiting their liability to unconstitutional policies and customs. In support of this thesis, note that the Court set forth its respondeat superior rule with the authority and finality of a holding, despite the fact that it was unnecessary to the disposition of the plaintiff's claim. *Monell,* 436 U.S. at 694. The case was a challenge to New York City's unconstitutional policy requiring that pregnant workers take leave from their city jobs, and presented no respondeat superior issue.

139. 360 U.S. 564 (1959).

140. 438 U.S. 478, 494-95 (1978). *See also* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (stating that only a qualified immunity is available).

141. *See supra* note 10 and accompanying text.

142. *See supra* note 13 and accompanying text.

143. *See supra* note 27 and accompanying text.

munity doctrine reflects an effort to serve these values while also taking account of the overdeterrence problem. Although judges, legislators, and prosecutors are absolutely immune,[144] executive officials receive only a qualified immunity because, as the Court has explained, the need to protect them must be balanced against the plaintiff's interest in recovery.[145]

Some commentators have argued that the Court's immunity rules give too little weight to the need to avoid overdeterrence, and that executive officers ought to be accorded a stronger immunity.[146] Others have argued that the absolute immunity of judges and others places too much emphasis on avoiding overdeterrence and not enough emphasis on vindication and deterrence.[147] In part, these differences of opinion reflect disputes about values that analysis can identify but not resolve. In part, they are the result of differences in judgment as to how much a given actor will be deterred or overdeterred by a given liability or immunity rule. These disagreements cannot easily be resolved, because we

---

144. *See supra* notes 17, 18, 20 and accompanying text.

145. *See* Butz v. Economou, 438 U.S. 478, 506 (1978).

146. *See, e.g.*, Cass, *supra* note 108, at 1174-84; Schuck, *supra* note 110, at 320-30, 345-61. Both of these authors would couple official immunity with broad governmental liability.

147. *See, e.g.*, Rosenberg, Stump & Sparkman, *The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833 (1978); Note, *Absolute Immunity for Prosecutors: Too Broad a Protection:* Imbler v. Pachtman, 10 SW. U.L. REV. 305 (1978). Still other commentators have argued that the qualified immunity granted executive officers may be too broad. They say juries are unsympathetic toward plaintiffs in most of these cases, and damage awards are often small. These factors, combined with the qualified immunity, leave the government officer with little incentive to avoid constitutional violations. *See, e.g.*, Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U.L.Q. 221 (1984); Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1225-27 (1977); Special Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979). It has often been suggested that the best solution to these problems would be to allow suit against the municipality. *See, e.g.*, Hundt, *Suing Municipalities Directly Under The Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 455-58 (1978); Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 HARV. L. REV. 922 (1976). The Court could accomplish this by a common law rule overturning the vicarious liability ruling in *Monell*. A problem arises, however, when the officer's employer is a state government. Then the eleventh amendment prohibits imposition of liability on the state in federal court absent Congressional authorization, and the Court has held that Congress did not authorize such suits in enacting section 1983. *See* Quern v. Jordan, 440 U.S. 332 (1979). Unless Congress changes the law, or the Court repudiates *Quern*, victims of constitutional violations by state governmental employees can be blocked from any recovery by immunity defenses. Another possibility is a suit brought in state court on constitutional grounds. Whether the state could assert its sovereign immunity in such a case is an issue the Supreme Court has yet to resolve. *See* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981) (arguing that sovereign immunity must fall before the constitutional claim in such a case).

cannot accurately measure the effects of different rules on official behavior.[148]

An analysis of the problem need not end with an acknowledgement that its resolution hinges on value choices and empirical guesses. All sides in this controversy begin by accepting the premise that courts should consider overdeterrence in determining the scope of liability for constitutional torts. Although this utilitarian premise has gone unchallenged both by the Court and the commentators, it is nevertheless open to attack.[149]

Corrective justice, and not utilitarian balancing, ought to serve as the premise for constitutional tort rules when the two conflict. From the perspective of corrective justice, the official who commits a constitutional wrong is obliged to make his victim whole, whether or not he thought he acted properly, and regardless of the impact of immunity on effective government. If the consequences of this uncompromising position were to undermine vigorous decisionmaking, then perhaps it would be necessary to accept some utilitarian modification of it.[150] But the policy of avoiding timid official behavior can be served without curtailment of the plaintiff's right to recover for his injuries. Government can mitigate or entirely eliminate the effect of overdeterrence by indemnifying its officers when they are held liable.[151]

---

148. *See* Schuck, *supra* note 110, at 307.

149. Professor Cass maintains that optimum deterrence does not require the imposition of liability on judges and legislators, even if overdeterrence were not a problem. *See supra* Cass, note 108, at 1137-50. Perhaps he is right. However, he considers the problem of liability of government officers solely from an economic point of view. *Id.* at 1134-35. If vindication of rights is also a goal of constitutional tort law, and the Court has recognized that it is, *see, e.g., Butz*, 438 U.S. at 504 (1978), then liability can be justified whether or not it will deter violations. Professor Epstein argues that official immunity rules should be based on private law analogues. Thus, the driver of a government vehicle who causes a traffic accident should be liable by the same terms as a private actor, while a judge should receive the immunity accorded private arbitrators. *See* Epstein, *Private Law Models for Official Immunity*, 42 LAW & CONTEMP. PROBS., Winter 1978, at 53. On closer examination, however, his justification for such immunity is the fear of overdeterrence. *Id.* at 61-62. Even in the case of prosecutors, where Epstein finds no private law analogues, absolute immunity is required because of the possibility of "accused criminals bringing tort actions against prosecutors as a routine part of their defenses." *Id.* at 62. Similarly, absolute immunity is required for teachers because qualified immunity "hinders the efforts of teachers and administrators to protect other students from threats to their personal security. . . ." *Id.* at 63. This is just another way of expressing the policy of preventing overdeterrence.

150. *Cf.* Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1978) (arguing that, in nuisance cases, utilitarian concerns must temper the principles based on corrective justice).

151. *See* Cleavinger v. Saxner, 106 S. Ct. 496, 504-05 (1985). Such a statute or ordinance could be drafted either to provide complete indemnity to all officials or it could distinguish, as do current laws, between executive officers and judicial or legislative ones, providing indemnity to the

Avoiding overdeterrence and promoting effective government is a worthy social goal, but, as with most worthy goals, it has its costs. Current doctrine imposes these costs on individuals who have suffered constitutional wrongs. Instead, these costs should be placed where they fairly belong—on the taxpayers who reap the benefits of the better government that is produced by limiting official accountability. Abolishing immunity also requires government leaders, and the voters who elect them, to consider just how much bold and effective government they are willing to pay for, rather than asking courts to create and enforce broad immunity rules at no cost to governments or the citizens who benefit from them.[152]

E. *Damages*

1. Compensatory Damages

Recoverable damages in tort law typically include medical expenses, lost income, and other costs resulting from the injury.[153] These damages not only further the goal of compensation, but also promote vindication and deterrence. Compensation deters wrongdoing by forcing the defendant to feel the true cost of the wrong, and vindicates rights by making the plaintiff whole at the expense of the responsible party.

If a constitutional tort plaintiff can offer adequate proof of tangible injuries, he will encounter no difficulty in obtaining compensatory

---

former only where they act with no reason to know that they are committing constitutional violations. Now, current indemnification programs are often incomplete in their coverage. Professor Schuck, a proponent of official immunity, thinks this demonstrates that the idea does not work. *See* P. SCHUCK, *supra* note 1, at 82-88. Perhaps it suggests only that the executives and legislators who run government are not as impressed with the problem of overdeterrence as the law professors who write about it. Schuck's claim that current indemnity programs do not work well in practice is also open to question, particularly in view of Eisenberg's as-yet-unpublished empirical research. Eisenberg found that over a one-year period in the central district of California, not one individual defendant actually paid a judgement. Interview with Theodore Eisenberg, Professor of Law, Cornell University School of Law (Jan. 5, 1986). *See also Justice Department to Repay Aides for Damages in Rights Suits*, N.Y. Times, Aug. 17, 1986, at 1, col. 4.

152. My proposal to abolish immunity may seem out of touch with reality. I do not expect it will convince legislators or judges to give up their protection from damage awards. Rather, the main thrust of the argument is that immunity rules are anomalous to constitutional tort law, a law whose basic purpose is to protect the individual's rights from wrongful injury. Any immunity or proposed extension of immunity should, therefore, be viewed skeptically in the development of constitutional tort law.

153. *See generally* R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 136, at 742-77 (discussing recoverable elments of damages).

damages. Such is not the case, however, when the plaintiff suffers a loss that cannot be reduced to a monetary value or proven with physical evidence.[154] In *Carey v. Piphus*,[155] the Court held that a plaintiff could not recover damages without proof of injury when the constitutional breach is a violation of the procedural guarantees of the due process clause.[156] The Court explicitly limited its requirement of proof to procedural due process claims, leaving open the question of whether this rule will be applied to other intangible harms.[157]

In *Carey*, the Court relied more heavily on tort policy considerations than it has in some other areas, yet still reached a questionable result. The problem lies in the flawed analogy the Court drew between constitutional and common law torts. Compensation is the major aim of damages in accident cases, but other objectives are equally important in other kinds of common law torts. For instance, courts routinely permit awards far beyond damages the plaintiff can prove for torts such as false imprisonment, assault, and battery. This reflects a judgment that the dignitary interests protected by such tort causes of action deserve greater protection than can be provided by provable compensatory damages alone.[158] Torts against individual dignity, like constitutional

---

154. If, for example, the police wrongly break up a demonstration but do not injure or arrest anyone, or students are suspended from school for justifiable reasons but without the required due process hearing, the harm is intangible and the plaintiffs cannot readily prove compensatory damages.

155. 435 U.S. 247 (1978).

156. In *Carey*, school officials suspended two students from school for violations of school rules. The suspensions violated the students' procedural due process rights. They claimed they were entitled to recover general damages, even if the suspensions could be justified on the merits, simply because the administrators had violated their right to due process. They argued that they should be entitled to recovery without proof of actual injury. The Court concluded that the framers of § 1983 "intended to 'create a species of tort liability,'" *id.* at 253 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)), and that in 1871, as today, "damages are designed to compensate persons for injuries caused by the deprivation of rights. . . ." 435 U.S. at 255. Accordingly, "the basic purpose of section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. . . ." *Id.* at 254. In support of these propositions, the Court quoted the section of the Harper and James treatise on torts that deals with accidental injuries. *Id.* at 255 (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956)). Having identified compensation as the sole aim of damage awards, the Court went on to hold that some proof of compensable injury was required to support an award. 435 U.S. at 264.

157. *Id.* at 258-59, 264-65. *See generally* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966, 967 (1980) [hereinafter Note, *Damage Awards*] (arguing that "the purpose of section 1983 remedies is not merely compensation for the consequential injuries that accompany a constitutional violation but more fundamentally, redress for the abridgement of the constitutional right itself").

158. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135-36, 528-31 (1978). As Professor

torts, infringe upon important, but intangible, personal interests that cannot be easily expressed in monetary terms. Focusing on pure compensation and requiring proof of harm to sustain an award will tend to undervalue the rights at stake in such cases and will provide too little deterrence against injury.[159]

Whether the Supreme Court will insist that compensation for provable harm is the sole aim of non-punitive constitutional tort damages remains uncertain.[160] Common-law courts often make the same

---

Love has explained, these torts against individual dignity provide better guidance regarding the measure of damages in constitutional torts than do the remedies in typical accident situations. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF L. REV. 1242, 1261 (1979). Love relies on the pre-*Carey* analysis of Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1371-79 (1976). Almost sixty years ago, the Court itself implicitly endorsed this approach when it upheld a complaint that sought $5,000 damages for denial of the right to vote. Nixon v. Herndon, 273 U.S. 536 (1927). *See also* Note, *Damage Awards*, *supra* note 157, at 969 (stating that the deprivation of the right to vote has been recognized as justifying significant damages without the need for proof of actual injury).

159. *See* Yudof, *supra*, note 158, at 1379 & n.209.

160. In the recent case, Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986), the Court reiterated that "punitive damages aside, damages in tort cases are designed to provide '*compensation* for the injury caused to plaintiff by defendant's breach of duty.'" *Id.* at 2542-43 (footnote omitted) (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956)). But it left unanswered the question whether proof of harm would be required to support an award of compensatory damages for the violation of substantive constitutional rights. In *Stachura*, a teacher had been suspended, with pay, for using teaching methods that the lower courts held were protected by the first amendment, and the jury awarded $275,000 in compensatory damages. The district court had instructed the jury on compensatory and punitive damages, and then had given other instructions permitting an award of damages for the "value" of constitutional rights, as measured by

> the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

Id. at 2541. All members of the Court agreed the instruction was improper. The instruction could not be read as authorizing punitive damages because it required no "finding of malice or ill will." *Id.* at 2543 n.9. Nor did it authorize compensatory damages because the factors it cited "focus, not on compensation for proveable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter." *Id.* at 2544.

The important question for the future of constitutional tort is whether proof of harm, beyond the deprivation itself, will be required in order to justify awards of compensatory damages. If not, then calling such damages compensatory will not prevent large awards to vindicate the rights themselves and to deter violation of them. The Court discussed two possible ways of recovering damages without proof in spite of the premise that damages must be compensatory, but did not tip its hand as to the propriety of either of them. One method is to treat constitutional torts like many common law dignitary torts and permit awards of "presumed damages" for their violation. The Court characterized presumed damages as "both compensatory in nature and traditionally part of the range of tort remedies." *Id.* at 2545. While rejecting plaintiff's claim that this instruction on the abstract value of constitutional rights could be defended in these terms, it said that presumed

claim, but then uphold awards that seem implausible under a purely compensatory view of damages.[161] Some courts have justified substantial noncompensatory constitutional tort awards by limiting *Carey* to procedural due process claims,[162] in spite of the Court's declaration that compensation is the aim of damages for all constitutional violations.[163]

---

damages "may possibly be appropriate" in cases where "a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish. . . ." *Id.* On the other hand, it also said that the instruction on compensatory damages, which spoke only of the "mental anguish or emotional distress" as appropriate nonmonetary damages, *id.* at 2540, was sufficient to cover nonmonetary harm in this case. *Id.* at 2545-46. In any event, the Court stopped short of either endorsing or rejecting use of presumed damages in constitutional tort cases.

The other possibility is to follow Nixon v. Herndon, 273 U.S. 536 (1927), and view the violation of constitutional rights as a compensable injury. This was the position taken by Justice Marshall in *Stachura* in a concurring opinion joined by three other justices. He stated that "the violation of a constitutional right, in proper cases, may itself constititute a compensable injury." 106 S. Ct. at 2546 (Marshall, J., concurring). The majority opinion did not address this proposition directly. In a footnote, the majority said that *Nixon* did not support the challenged instructions, because *Nixon* and similar cases awarded damages for the plaintiff's particular injury and not "the 'value' of the right to vote as an abstract matter." *Id.* at 2545 n.14. Again, however, the Court stopped short of endorsing this approach, noting only that "whatever the wisdom of these decisions . . . they do not support awards of noncompensatory damages such as those authorized in this case." *Id.*

161. D. DOBBS, *supra* note 158, at 136. Some lower federal courts have recently adopted a similar practice in the constitutional tort context. *See, e.g.*, Levka v. City of Chicago, 748 F.2d 421, 426-27 (7th Cir. 1984) (permitting $25,000 award for illegal strip search, even though there were no aggravating circumstances); Trezevant v. City of Tampa, 741 F.2d 336, 341 (11th Cir. 1984) (permitting $25,000 award for illegal 23 minute incarceration); Clark v. Beville, 730 F.2d 739, 741 (11th Cir. 1984) ($40,000 for minor injuries and emotional distress resulting from illegal arrest).

162. *See generally* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1410-12 (10th Cir. 1985) (awarding compensatory damages for a violation of first amendment rights without requiring proof of consequential harm).

163. *See* 435 U.S. at 254-57. Another damages issue still unresolved by the Court is whether an injured person's close relatives can recover for loss of companionship. *Compare* Tuttle v. City of Oklahoma City, 728 F.2d 456, 461 (10th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 2427 (1985) (permitting recovery without discussion) *with* Lopez v. Ruhl, 584 F. Supp. 639, 650 (W.D. Mich. 1984) (denying recovery). This issue illustrates the difference between a tort policy approach to constitutional tort and a statutory approach. In *Lopez v. Ruhl*, the court explained its denial of relief on the grounds that § 1983 grants a cause of action only to persons whose constitutional rights have been violated. The court said no constitutional rights of the spouse would be violated if the spouse was not injured. From a tort policy perspective, the loss of companionship is a real cost of the defendant's conduct and should be taken into account whether the premise of the rules is to vindicate rights by making the victims whole for the violation or to deter constitutional violations.

2. Punitive Damages

In *Smith v. Wade*,[164] the Supreme Court held that punitive damages are available "when the defendant's conduct is shown to be motivated by evil motive or intent," or involves "reckless or callous indifference to the federally protected rights of others."[165] However, in *City of Newport v. Fact Concerts, Inc.*,[166] the Court denied such recoveries against municipal governments.[167] The Court defended this distinction in its usual manner, by a mixture of modern tort policy, legislative history, and nineteenth century tort doctrine.[168] With respect to tort policy, the Court in *Newport* noted that punitive damages are not aimed at the compensation of the plaintiff, but rather at deterrence and punishment of wrongdoers.[169] The goal of deterrence, the Court said, is adequately served by punitive damages against individual defendants but not by awards against cities.[170] Such awards would be paid not by the officers who have committed the egregious violation of the plaintiff's rights, but by the municipality's taxpayers, who had nothing to do with the violation.[171]

My objection to the Court's doctrine is that its analysis of tort policy is not sufficiently thorough; the Court refers to tort policy only sporadically and not as a comprehensive approach to constitutional tort issues. In conventional tort liability, compensation is achieved without any allowance for punitive damages. Similarly, the goals of deterrence and vindication are generally met. However, the unique features of constitutional torts must be taken into account before concluding that punitive damages cannot be justified in that context. If, for instance, the Court adheres to and expands upon its holding in *Carey* that compensation for injury is the sole aim of non-punitive damages and that

---

164. 461 U.S. 30 (1983).

165. *Id.* at 56.

166. 453 U.S. 247 (1981).

167. *Id.* at 271.

168. In *Smith*, the Court noted that in "the latter part of the last century" punitive damages were "accepted as settled law by nearly all state and federal courts, including this Court," and that "individual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants." 461 U.S. at 35. In *Newport*, it stated that in 1871 there was no tradition of punitive damages against a municipality, 453 U.S. at 259-60, and it found "no evidence [in the legislative history] that Congress intended to disturb the settled common law immunity. . . ." *Id.* at 266. The Court went on to consider "whether considerations of public policy dictate a contrary result," *id.*, and concluded that they did not.

169. 453 U.S. at 266.

170. *Id.* at 268-70.

171. *Id.* at 267, 270.

the plaintiff must introduce proof of injury in order to recover these, it will become obvious that compensatory damages by themselves provide neither an adequate deterrent to constitutional violations, nor sufficient vindication of the plaintiff's rights. The allowance of punitive damages could therefore furnish a crude way of making up for some of the damage done in *Carey* to the goals of deterrence and vindication.

As the Court noted in *Newport* and *Smith*, the traditional function of punitive damages in tort law is punishment. Punishment is distinct from vindication in that it focuses on the defendant's conduct rather than on the plaintiff's injury. Economists view punitive damages as a sort of super-deterrent for use in situations where the defendant might escape detection or where his conduct is clearly culpable.[172] Punishment, however, can be similarly distinguished from deterrence. The underlying premise of deterrence is that the threat of liability will affect the actor's conduct. Punitive damages in the egregious cases to which the *Smith* standard is directed can be justified on the ground that the defendant's conduct is so severe that it should be censured, whether or not the censure will affect future behavior.

The dissents in *Smith* claimed that punitive damages are inappropriate on account of the countervailing policy of avoiding overdeterrence.[173] In their view, the threat of punitive damages will exacerbate the official's tendency toward caution. The threat of overdeterrence, however, should not undercut the appropriateness of punitive damages in constitutional tort suits. First, the concern about overdeterrence should not play a role in constitutional tort.[174] Moreover, even if it should be given some weight, the proper place for such concern is the immunity phase of a constitutional tort case. No official is ever liable unless he knows or should know that his conduct is unconstitutional. Under *Smith*, liability for punitive damages requires even greater culpability. The plaintiff must show that the government officer acted with an "evil motive or intent," or that he showed "reckless or callous indifference to the federally protected rights of others."[175] The overdeterrence argument against punitive damages is persuasive only if an officer will be deterred from acting responsibly by the possibility that a jury will mistakenly find that he has acted recklessly, callously, or with a

172. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 143 (2d ed. 1977); R. POSNER, TORT LAW—CASES AND ECONOMIC ANALYSIS 33-36 (1982).

173. 461 U.S. at 88 (Rehnquist, J., dissenting); *id.* at 93-94 (O'Connor, J., dissenting).

174. *See supra* notes 149-52 and accompanying text.

175. 461 U.S. at 56.

bad motive. Given the difficulty of proving such a level of culpability, I find this argument implausible.

This analysis also has some interesting implications for the Court's distinction between individual and municipal defendants. The Court justifies that distinction on the ground that punishment is the aim of punitive damages and that only individuals can act egregiously. The Court's rationale ignores the potential post-*Carey* use of punitive damages to deter misconduct and vindicate rights as well as to punish outrageous acts. These two functions would be served by imposing punitive damages on municipal governments even if governments never merit punishment.[176] Assuming that the overdeterrence argument against punitive damages against individuals is correct,[177] and assuming that the Court extends its holding in *Carey* beyond procedural due process, the Court must still accommodate vindication and deterrence on the one hand and avoiding overdeterrence on the other. The Court stated in *Owen v. City of Independence*, and economic analysis confirms, that overdeterrence is not a major problem when liability is imposed on governments and not individuals.[178] The task of accommodation might best be achieved by reversing the current arrangement and holding municipalities, but not individuals, liable for punitive damages. Depending on the future of *Carey*, this is an idea whose time may yet come.

CONCLUSION

The chaotic state of constitutional tort doctrine is not attributable to some insuperable difficulty in crafting rules. Rather, the explanation lies in the rapid growth of this new cause of action, in the difficulty of the value choices that must be made in adjudication, and in the uncertainty that often accompanies the development of new doctrine. Faced with the task of deciding many difficult questions over a short period of time, the Court unsurprisingly has fallen into error. In establishing the basis of its cause of action, and in deciding the numerous issues that have inevitably accompanied that step, the Court has resorted to strained analyses of legislative intent, sometimes combined with sporadic references to tort policy.

This may seem a safe way to justify results, allowing the Court to

176. One might also question the Court's premise that governments, and the majority of citizens for whom they act, never deserve punishment. *See, e.g.*, Webster v. City of Houston, 735 F.2d 838, 842-60 (5th Cir. 1984) (Williams, J., dissenting).

177. *See supra* note 173 and accompanying text.

178. *See supra* note 138 and accompanying text.

deflect responsibility and criticism for the resulting rules to Congress or to the authors of torts treatises. In the long run, however, this strategy could prove unwise, for the Court's statutory approach cannot withstand analytical criticism. The Court should straightforwardly acknowledge that it is engaged in common-law decisionmaking and should justify its rules in terms of traditional tort-law principles and policies. Those principles and policies could be systematically developed and modified to reflect the obvious and significant difference between constitutional torts and other torts. In this fashion, the Court could recognize that constitutional rights warrant more protection than the interests at stake in ordinary tort law. Such an approach provides more defensible explanations for the rules governing constitutional torts and exposes the flaws in many of the Court's current rules under section 1983.