ARTICLES

RESHAPING SECTION 1983'S ASYMMETRY

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INTRODUCTION

In his work on "fractals," the mathematician Benoit Mandelbrot devises a language that gives structure to seemingly chaotic
natural configurations. Under magnification, fractal shapes like clouds or mountains reveal a "self-similarity" whereby a small sample displays the structural characteristics of the whole. This concept gives rise to the hope, perhaps vain but sought to be realized in this Article, that there are identifiable fractal qualities in the shards of federal civil rights jurisprudence under 42 U.S.C. § 1983\(^2\) that may be recomposed to construct a coherent whole.

Two broad propositions, dependent upon the identity of the defendant, could lend such coherence through an asymmetrical approach to liability. First, when the agent of a government entity acts under the principal's express, implied, or apparent authority\(^3\) and causes a person to be deprived of a right secured by the Constitution or laws of the United States, the entity should bear civil liability for damages regardless of the agent's state of mind, status in the entity's hierarchy, or role in the formulation of its policies. Second, and in contrast, wrongful state of mind should be the sole determinative factor in assessing the liability of the individual government agent. The agent should share the entity's damage exposure if, and only if, she acts with intent to harm or knows with substantial certainty that her conduct will injure the plaintiff.\(^4\)

These premises are derived from the late Justice Harlan's observation thirty years ago in the seminal case of *Monroe v. Pape*:\(^5\) the deprivation of a federally guaranteed right by government action is uniquely damaging and therefore demands remedies of

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\(^2\) 42 U.S.C. § 1983 (1988). This section states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* The statute was originally passed as § 1 of the Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871), and titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

\(^3\) See Restatement (Second) of Agency §§ 7-8 (1957); *infra* notes 312-13 and accompanying text.

\(^4\) See Restatement (Second) of Torts § 8A (1965); *infra* notes 355-59 and accompanying text.

potent deterrent impact. In fact, the scheme suggested goes further, serving the additional purposes of assuring a generally available make-whole compensatory remedy and permitting the dynamic evolution of American constitutional law, without chilling the discretion necessary to the conduct of well-intentioned, vigorous government actors.

Section 1983 as interpreted today takes a strikingly different, though equally asymmetrical, shape. The statute's text simply provides for the liability of defendants who "cause [a plaintiff] to be subjected" to the loss of a federally secured right. In adumbrating this causation requirement, however, the Supreme Court places an additional obstacle in the path of a plaintiff who sues the government. An entity's liability is restricted to conduct of its agents that implements entity "policy," defined as "a deliberate choice to follow a course of action ... from among various alternatives." In the typical case, the agent who inflicts the injury does not act pursuant to a formal ordinance or written administrative directive; yet, satisfying this requirement demands a showing that an official with "final" discretionary authority under positive state law specifically authorized or ratified the agent's injury-producing act. Alternatively, the policy element may be met by evidence that the agent's act was consistent with a settled entity custom. Last, if injury results from an agent's omission, policy may be found in the entity's "deliberate indifference" to a frequently recurring circumstance. Still, if the plaintiff can satisfy any of these formidable policy hurdles, she recovers from an entity defendant even if the federal right violated had not been judicially recognized before the incident that caused the harm. The case against the entity can therefore still serve as a staging ground for dialogue about the creation of new constitutional protections.

Measured against the statute's overriding purpose of restraining federally unlawful conduct "under color of ... State" law,

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6 See id. at 196 (Harlan, J., concurring).
7 42 U.S.C. § 1983. For the complete text of the statute, see supra note 2.
12 See infra text accompanying notes 194-200 & 228-33.
13 Here we point to the language of the statute and the systemic congressional purposes identified by Justice Douglas in Monroe v. Pape, 365 U.S. 167, 173-74
current entity defendant doctrine makes formal sense but in practice falls short of its animating ideal. In the abstract, the Court's reaffirmation of the statute's federal lawmaking potential has intuitive appeal. If, as the Court has acknowledged, "the public as a whole has an interest" that is served by government conduct in conformity with federal law, and if constraining local government conduct within federal norms is the statute's signal aim, then preserving entity litigation as a crucible for the vindication of evolving constitutional standards seems appropriate and necessary. In the concrete world of litigation, however, the "policy" barrier has proven overly protective of local government and its fisc.

By contrast, the prima facie case against a government official is far less exacting. Whenever an individual agent causes a recognized constitutional harm, she is prima facie liable even if the entity approved her conduct and she had a blameless state of mind. Nevertheless, the Court, prompted by concerns about litigation floodgates, federalism, and judicial interference with discretionary government decisions, has crafted an expansive affirmative defense that more than offsets the laxity of the prima facie requirements. Government agents, including those whose positions make them most likely to inflict injury on ordinary citizens, escape liability for damages by grace of qualified immunity


16 Beginning in 1976, the Court began to take seriously its concern that absent significant restraints § 1983 would become "a font of tort law." Paul v. Davis, 424 U.S. 693, 701 (1976); see also Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 646-47 (1987) (arguing that the Court's efforts to curb procedural due process litigation are rooted in a desire to stem a flood of litigation). Eisenberg and Schwab conclude, however, that the growth in civil rights litigation has not been as explosive as commonly assumed. See id. at 693-95. Paul also evinces the fear that § 1983 litigation will become a mechanism for federal trenching on state prerogatives. See Paul, 424 U.S. at 700-01; see also infra text accompanying notes 209-14 (discussing Paul).
unless the right violated was previously recognized by judicial precedent of unmistakable application and clarity.\footnote{17}

One consequence of this broad immunity for government agents is a distinctly diluted role for claims against individual defendants; in contrast to the situation for entity actions, § 1983's potential for dynamic lawmaking in actions against individuals is virtually nonexistent.\footnote{18} A second, counterintuitive consequence is that the vicious official who intends to harm a citizen is usually absolved of any § 1983 liability. This happens either if the right the plaintiff asserts is not judicially recognized to the requisite degree of specificity, or if, despite the settled nature of the right, the factfinder concludes that the defendant could not reasonably have realized that her contemplated conduct would violate it.

There is some foundation for the Court's oft-stated concern about chilling the initiative of individual government agents by saddling them with damage liability when they are guilty only of failing to predict the vagaries of constitutional doctrine.\footnote{19} Additionally, it is unfair for that individual to face liability, as she does under the Court's regime, when she acts without some degree of certainty that her conduct may cause harm or when she attempts, however clumsily, to serve the best interests of her employer. Thus


\footnote{18} Except for absolute legislative immunity, which extends beyond damages to declaratory and injunctive relief, see Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 730-34 (1980), other immunities, qualified or absolute, ordinarily insulate only against damages. See Pulliam v. Allen, 466 U.S. 522, 541-44 (1984) (holding that judges, absolutely immune from damages, are subject to injunctive relief and attorneys' fees). We suspect, however, that relatively few plaintiffs other than institutional civil rights litigants will sue individual government officials for prospective relief alone. Those who do are likely to encounter such obstacles as standing, abstention, or comity-driven nonintervention doctrines that might preclude litigation in federal court. See, e.g., City of L.A. v. Lyons, 461 U.S. 95, 111 (1983) (holding that an individual had no standing to request injunctive relief from police use of chokeholds because he was not in immediate danger of sustaining another direct injury); Rizzo v. Goode, 423 U.S. 362, 371-73 (1976) (stating that individuals had no standing to request an injunction compelling the police to adopt new procedures where their alleged injury was too speculative to satisfy Article III's "case or controversy" requirement); Younger v. Harris, 401 U.S. 37, 49, 54 (1971) (holding that federal court in § 1983 action may not enjoin pending state criminal proceeding in which the federal issue could be raised as a defense, and should dismiss); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (holding that federal court § 1983 action for injunction against state-sanctioned conduct should be stayed to enable a state tribunal to interpret unsettled state law if a narrowing interpretation might obviate the need to decide a federal question).

the Court's immunity doctrines, first announced at a time when only the individual agent was a cognizable "person" subject to § 1983 damage liability, are at once too generous and too stingy. If the agent acts with intent to harm, the deterrence and compensation goals of § 1983 are ill-served by letting her escape liability merely because a court later concludes that the particular federal right at issue was only dimly established at the time of the violation. If, in contrast, an individual agent acting without an intent to harm impairs a right that has been "recognized" to the Court's satisfaction there is little need to use the agent as an incremental source of remedy. The goals of facilitating government restraint, deterrence, compensation, and dynamic lawmaking are better served on balance by restricting liability to the government unit.

In the pages that follow we state the case for a new asymmetry. Part I sketches a justification for dynamically reconstructing a statute that the Court itself has radically reconstructed beginning with its landmark 1961 decision in Monroe. As it stands today, § 1983 is almost entirely a judicial construct. Its open-textured language is as immune to self-definition as that of the Fourteenth Amendment, whose enforcement it was passed to ensure. We suggest borrowing from contemporary tort law to flesh out not only ancillary procedural and remedial gaps but also the statute's most basic standards of liability and defense.

In Parts II and III we turn to the substance of the judicially constructed doctrine in the individual and entity cases, respectively. After the Court's most recent ministrations, this historic statute of sweeping potential application yields an odd and desiccated residue. On the one hand, there are yawning gaps in both entity and individual defendant liability. Only in a formal sense does the entity suit serve the original Reconstructors' goal of bringing local governments to heel; in practice, the difficulty of demonstrating "policy" or "custom" provides the entity an expansive exemption from liability. At the same time, the individual defendant's qualified immunity absolves him from liability for an intentionally inflicted constitutional harm not clearly foreshadowed by a prior decision. On the other hand, the Court has shown a remarkable willingness of late to expand the scope of § 1983 to redress the deprivation of rights created by federal statute. This stands as

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20 The title to the original Klan Act went beyond enforcement of the Fourteenth Amendment to include "other Purposes." See supra note 2.

21 See Henry P. Monaghan, Federal Statutory Review Under Section 1983 and the APA,
a pointed and puzzling contrast to the Court's crabbed approach to the definition and enforcement of the fundamental constitutional rights that lie at § 1983's core.

Part IV considers the consequences of the Court's asymmetry and the concerns that have animated its development. The Court's intuition in treating the entity case as a vessel for the development of constitutional law is consonant with history and apparent congressional purpose. But the particularized rules it has devised to govern those actions erode § 1983's force as a bulwark against state-sponsored conduct that lacks the formal approval of law. The current asymmetry, we conclude, cannot be explained either as a device to achieve mirror-image parity between entity and individual actions or as an expedient crafted to reduce federal calendar congestion.

Part V explores new liability configurations for actions involving each type of defendant. We begin by assaying scholarly proposals that posit the unitary legislative goals of compensation or deterrence. We then advance our own multiple premises about statutory purpose as the foundation of a competing proposal. Our suggestions are designed principally to foster entity accountability and to further the subsidiary goals of compensating victims and facilitating the dynamic declaration of federal rights.

In pursuit of these ends, we argue for a modified species of respondeat superior to govern the liability of local government entities. Acknowledging that this part of the proposal creates liability without fault, we defend it against the criticism that money damages for constitutional violations should be confined to the restrictive, Aristotelian concept of "corrective justice." This fault-based approach unduly sacrifices entity accountability, particularly given existing limits on standing to secure injunctive relief.

By contrast, we propose having fault control on the liability of § 1983 individual defendants. In our design, an individual defendant would be liable for all federally unlawful conduct undertaken with intent to harm, provided she acted with the express, implied, or apparent authorization of the governing entity. Thus the entity would be liable when the individual is, and also, frequently, when the individual is not. In theory, this aspect of the proposal cuts back on the open-ended amenability of individual officials that was approved by *Monroe*. We are thus forced to respond to the criticism

that allowing individuals to avoid liability for "faultless" unlawful conduct authorized by their entities affronts the Nuremberg principle. Our chief reply, apart from observing that the conduct at issue in most nonintentional § 1983 situations would seldom be morally reprehensible, is that our refashioned scheme of entity liability would work its own indirect but powerful deterrence of individual misbehavior.

Finally, we stress that in each of the new liability configurations, pertaining to entities and individuals alike, the settledness of the constitutional right on the eve of injury, currently the key to qualified immunity for the individual, would be irrelevant.22 Shining through the reshaped asymmetry, then, are at least two, and in practical terms three,23 fractal roles for § 1983: a guarantor of local government restraint respecting all federally unlawful conduct, whatever the vintage of the violation; a reliable source of victim compensation; and a vehicle for dynamism in the declaration of federal rights.

I. JUDICIAL DYNAMISM AND SECTION 1983

A preliminary word about the judicial tradition of fleshing out the contours of § 1983 is in order. In recent years other commentators have proposed fundamental alterations to the statute's liability standards in a search for coherence.24 Like ours, their prescriptions are largely dictated by a particular premise about some overriding statutory goal.25 All such commentary, including ours,

22 As we explain later in the Article, the status of the right may be relevant to the amount of damages. See infra note 372.
23 It could be argued that victim compensation is not an invariable fractal element in our scheme, since we would relieve individuals of liability for defined, unintentional federal law violations under some circumstances that would deny the plaintiff remedy from the entity as well. Such circumstances would be extremely rare, however, and would be more than counterbalanced in aggregate compensatory terms by the vastly increased range of entity liability. See infra text accompanying notes 310-26.
25 See infra text accompanying notes 272-86 (discussing the deterrence rationale
is fairly critiqued as illegitimate social engineering unless the federal courts have some warrant for realigning the terms of liability. Whether they do depends on the degree to which more sure-footed answers are supplied by statutory text, legislative history, or the Court's own recent refashioning of § 1983.

The text and legislative history are remarkably opaque on the standards governing the critical liability and defense issues with which the Court has grappled during the last thirty years. History generally fails to provide answers on most adjudicated issues that matter; it is not an instrumental device. Despite the Court's fondness for historical answers to questions about § 1983's new applications, the statute is fairly characterized as impervious to determinate historical analysis. The question we have asked, therefore, is not whether the legislative history demands one or another approach, but whether is forecloses an approach.

A tepid defense of our own suggestions is that they are not manifestly unfaithful to legislative intent. Although these proposals are unapologetically put forward as present-oriented, they are firmly rooted in the phrase "under color of... State" law. Unable to find legislative support for any concrete application of those words, we revert to a more abstract level of intention. As Professor Alexander observes, there is no good reason, when concrete and abstract intentions diverge, for choosing one level of abstraction over another. Conceding a priori the desirability of subscribing to the drafters' intent given some semblance of agreement as to its

of Kramer and Sykes); infra text accompanying notes 289-95 (discussing the compensation rationale of Brown).


content, when the coalescence of text and legislative history yield no confident resolution, abstract intention is all that remains.

Finally, as will appear more clearly in this Article, one cannot reconcile the Court's contemporary reworkings of § 1983 liability standards and defenses with transparent legislative history or some static notion of the common law. Despite occasional protestations to the contrary, the Court has regularly resorted to a dynamic lawmaking methodology in devising the qualified immunity doctrine, the major limitation on the liability of individuals. In the most general terms, the Court tells us that § 1983 should be "read against the background of tort liability." If the Court means that the 1871 Congress intended to freeze in place the then-prevailing common law rules, we could not account for its most recent expansion of official qualified immunity. The Court

30 See, e.g., Cass R. Sunstein, Principles, Not Fictions, 57 U. CHI. L. REV. 1247, 1249 (1990) (explaining that the judicial role demands that courts act as "faithful agents of the legislature whenever possible").
31 See Kramer & Sykes, supra note 24, at 265 nn.62-63 (citing cases).
32 Although the Court has stated flatly that "[t]here is no federal general common law," Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938), and that it would create common law in suits between individuals only when there existed "a significant conflict between some federal policy ... and the use of state law," Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (refusing to resolve a contract dispute between claimants subject to the Mineral Leasing Act of 1920 by recourse to federal common law), in fact the Court has at times created federal common law, and done so in statutory actions sounding in tort. See Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 361 (1952) (holding that the validity of a release under the Federal Employers' Liability Act was a question of federal law); see also Kramer & Sykes, supra note 24, at 265-67 (citing other cases in which the Court betrayed its willingness to make federal common law).
34 Laura Oren has traced the Court's recent departures from the nineteenth century common law of government officials' qualified immunity. She also notes how the Court, on the entity-defendant side of the equation, has overlooked the evolving
launched that effort without even purporting to locate the new rules in the common law tradition, fashioning them instead out of whole cloth in order to relieve discretion-wielding officials of the burdens of discovery and trial.35

Similarly, neither the language nor legislative history of § 1983 support the Court's "policy" barrier to the liability of local entities. Rather, the requirement has its origin in a raw ipse dixit announced in dictum, seemingly a product of bench politics.36 At a minimum, it is difficult to understand the cramped "policy" prerequisite as an application of common law; in the decision that announced the requirement, the justices divided sharply on the existence and nature of the nineteenth century understanding about the amenability of those entities on any terms.37

The Court has explicitly rejected the notion that it is locked into the century old common law conception. When, in Smith v. Wade,38 the Court was forced to fill a gap in text, it expressly disclaimed that the common law of 1871 "is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general tort law had changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate now-obsolete doctrine."39 The Court specifically rejected the idea "that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve."40

The proponents of the statute were apparently content to establish a general federal remedy for injuries resulting from the denial of federally protected rights under color of state law.41


35 See infra text accompanying notes 107-21.
36 See infra text accompanying notes 142-57.
39 Id. at 34 n.2.
40 Id.
41 See Kramer & Sykes, supra note 24, at 257-59.
Congress conferred on the federal courts the power not only to develop such interstitial procedural matters as prerequisites to suit,\textsuperscript{42} limitations,\textsuperscript{43} and remedies,\textsuperscript{44} but also to fence off the basic boundaries of individual and entity liability.\textsuperscript{45} The statute was passed during the heyday of \textit{Swift v. Tyson},\textsuperscript{46} when "the existence of an evolving common law and of federal judicial power to share in its development was a given."\textsuperscript{47} The strident disagreement among today's Justices about the scope of entity liability, even as they enlarge beyond recognition the common law immunity of individual officials, offers powerful testimony that on these fundamental issues the common law of 1871 provides no real guidance.\textsuperscript{48}

The only sound alternative is to "turn to the policies underlying § 1983 to determine which rule best accords" with them.\textsuperscript{49} Indeed, even when the Court has examined the common law and discovered a reasonably determinate answer, it has sometimes asked the further question "whether considerations of public policy dictate a [result] contrary" to the original common law.\textsuperscript{50} Such a question would be superfluous unless the Court had reserved for itself the power to shape rules of liability and defense as a matter of federal common law.\textsuperscript{51}


\textsuperscript{44} See, e.g., 42 U.S.C. § 1988 (1988) (stating that "the court, in its discretion, may allow . . . a reasonable attorney's fee as part of the costs"); Smith, 461 U.S. at 56 (approving punitive damages against a state officer); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (disapproving punitive damages against municipalities absent highly unusual circumstances); \textit{infra} text accompanying note 325.

\textsuperscript{45} See \textit{Kramer & Sykes, supra} note 24, at 264-65.

\textsuperscript{46} 41 U.S. (16 Pet.) 1 (1842).

\textsuperscript{47} See \textit{Kramer & Sykes, supra} note 24, at 264.

\textsuperscript{48} See id. at 266. \textit{See generally} Jack M. Beermann, \textit{A Critical Approach to Section 1983 with Special Attention to Sources of Law}, 42 STAN. L. REV. 51 (1989) (arguing that when the Court purports to use the common law of 1871, it typically uses modern principles of tort law and effectively creates new federal common law).

\textsuperscript{49} \textit{Smith}, 461 U.S. at 93 (O'Connor, J., dissenting).

\textsuperscript{50} City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266 (1981); \textit{see also} Kramer & Sykes, \textit{supra} note 24, at 266 (characterizing the Court's questioning as "whether the considerations supporting the common law rule likewise warrant immunity under § 1983").

\textsuperscript{51} If we are wrong about this—if, for example, entity liability must be shaped as the common law had it in 1871—our argument for respondeat superior is seriously
That the statutory text and legislative history are at best impenetrable, and that the Court has at times claimed the authority to redraw § 1983 by dipping into the palette of an evolving common law, are descriptive matters that leave unanswered the basic normative question about the desirability of a dynamic interpretation. Professor Eskridge has observed that recourse to "evolutive" interpretation makes the most sense when statutory text is unclear and "original legislative expectations have been overtaken by subsequent changes in society and law." Under those conditions, courts asked to interpret a statute frequently have little other choice, notwithstanding rhetorical professions of fidelity to text.

Section 1983 fits Eskridge's description. The judicial evolution of the statute underscores the societal transformations that have necessitated the dynamic tradition. In 1978, for example, in *Monell v. Department of Social Services*, the Court, in declaring that § 1983 reaches government entities, sustained an equal protection challenge to a municipal employment rule requiring pregnant women to take a predetermined period of pregnancy leave. The *Slaughter-House Cases*, decided in 1873, two years after the Klan Act was passed, illustrates by contrast the sea change in constitutional thinking that occurred during the intervening years. The Court then "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes ... [would] ever be held to come within the purview" of the Equal Protection Clause.

Although the doctrine was then current and applied to municipal corporations, courts carved out a notable exception for the corporation's "governmental," as distinct from "proprietary," functions. The "vast majority of § 1983 claims" concern functions of a type that courts then considered "governmental." Kramer & Sykes, supra note 24, at 262-63 (citing Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 Geo. L.J. 1483, 1521 n.156 (1977)).
Roe v. Wade,58 brought in part under § 1983,59 illustrates the problem more distinctly. The very constitutional right the action was brought to enforce, the newly emerging right of privacy, was one of which the Fourteenth Amendment's framers could scarcely have conceived. Similarly, Maine v. Thiboutot,60 which held that the statute's “and laws” language61 permits actions for the unlawful denial of federal statutory entitlements, arose in a welfare state society that the framers would not even recognize.

These and countless other legal and social transformations of comparable magnitude suggest the necessity of an evolutive interpretation of the statute in order to afford any meaningful enforcement of underlying federal guarantees. On a canon of construction no more exotic than the imperative to give every statute some operative meaning, the Court has had no genuine alternative to dynamism.

Our proposed restructuring of § 1983 borrows from developing tort law.62 We think this sensible for two reasons, each implied by the Court.63 First, there are few other substantive sources to consult for guidance about noncontractual civil interactions between government and its citizens. Second, the contemporary common law of torts “reflects the accumulated wisdom of incremental judicial doctrine-building in a related field.”64 The selective infusion of contemporary common tort law into § 1983 doctrine can therefore be defended not only as a necessary default, but also because tort law brings with it a valuable tradition born of the same necessities that impel dynamic interpretation.

58 410 U.S. 113 (1973).
60 448 U.S. 1 (1980).
61 For the full statute, see supra note 2 (stating that the statute provides redress for the loss of rights guaranteed by the “Constitution and laws” of the United States).
62 See infra part V.C.
63 See Smith v. Wade, 461 U.S. 30, 34 (1983) (stating that where there is no legislative history concerning damages recoverable under § 1983 the Court will modify or adapt existing common law of torts).
64 Eskridge, supra note 52, at 1488; see also Seth F. Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. PA. L. REV. 601, 611 (1985) (noting that the Supreme Court has used modern common law in § 1983 interpretations).
II. THE CASE AGAINST INDIVIDUAL STATE ACTORS

We turn now to the residue of the Court's dynamism, the asymmetric shape of § 1983 actions against individuals and entities. In the past thirty years, the jurisprudence of this statute in its historic sphere—the redress of constitutional violations—has been molded by an almost self-canceling dialectic: bursts of expansion in scope, followed by equally striking doctrinal contractions.

A. The Prima Facie Case

By its terms, § 1983 liability attaches to "[e]very person" who causes the loss of rights secured by the Constitution and laws of the United States. Thus an individual state actor is unexceptionably within the statute's reach. It is not altogether surprising, therefore, that the Court in *Monroe v. Pape* would carve out an expansive prima facie case in actions against such defendants.

The invasion of the Monroes' home by Chicago's finest in violation of the Fourth Amendment and the laws of Illinois furnished the occasion for the Court to construe the § 1983 requirement that the defendant inflict the injury "under color of" state law. The Court linked this requirement of the statute to the long-settled interpretation of state action for purposes of the Fourteenth Amendment, which § 1983 was passed to enforce.

66 Section 1983 creates an action at law or suit in equity against (1) every "person" who (2) "under color of" state legislation, custom, or usage (3) "subjects, or causes [another] to be subjected" (4) to the deprivation of rights secured by the federal "Constitution and laws." 42 U.S.C. § 1983 (1988).
67 See *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 287-94 (1913). The municipal defendant argued in *Home Tel.* that a claim alleging it had imposed confiscatory telephone rates in violation of due process failed for want of state action because no state court had yet sustained the rate under the state's own due process clause. Only when a state court so ruled, defendant's counsel urged, would state authorization occur, and only then would there be the state action requisite for a Fourteenth Amendment violation. See id. at 282; see also *The Civil Rights Cases*, 109 U.S. 3 (1883) (restricting the reach of the Fourteenth Amendment to acts under state authority). The Court held to the contrary that the Fourteenth Amendment could be violated either when the state in its sovereign capacity commits acts that conflict with the amendment, or simply when "state powers [are] abused by those who possessed them." *Home Tel.*, 227 U.S. at 288. It is now settled that Fourteenth Amendment constructions of "state action" are authoritative of § 1983's "under color of" language as well. See *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 935 (1982).
68 See *Monroe*, 365 U.S. at 171 (holding that the purpose of the statute is, as its title states, "to enforce the Provisions of the Fourteenth Amendment").
Justice Douglas' opinion for the Court concluded that § 1983 reaches federally unlawful conduct carried out by individual defendants under the badge of or clothed in state authority, irrespective of state approval. The Court reached this result despite indications that state law could provide relief at least as complete as federal law and absent any allegation that the state had discriminatorily denied such relief on other occasions. The special nature of the violation also had implications for remedy and forum. "It is no answer," Justice Douglas wrote, "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."

The apparent availability of a remedy under Illinois law, however, casts doubt on whether any of the purposes of § 1983 identified by the majority supports the Monroe result. Justice Douglas wrote that the legislation had "three main aims": to override certain state laws; to provide a federal remedy not provided by state law; and to provide such a remedy "where the state remedy, though adequate in theory, was not available in practice." None of these purposes would have been advanced by upholding the legal sufficiency of Monroe's claim. Accordingly, on these facts, the ratio decidendi with greater explanatory power is the conclusion of Justice Harlan's concurrence, drawn from the "flavor of the legislative history." He wrote that Congress sought to provide a supplementary remedy because "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

Justice Harlan, an ardent proponent of federalism, viewed the State and its law as the dominant regulators of "primary private

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69 See id. at 183-85.

70 Justice Frankfurter pointed out that Illinois decisions had found similar police intrusions unlawful and that the complaint lacked concrete allegations of Illinois's unwillingness to enforce those decisions. See id. at 224-25 & nn.33-34 (Frankfurter, J., dissenting in part).

71 Id. at 183. The Court found support for its decision in two opinions that had examined the criminal counterpart to § 1983. See Screws v. United States, 325 U.S. 91, 108 (1945); United States v. Classic, 313 U.S. 299, 326-27 & n.10 (1941). In both cases, individuals were held criminally liable for conduct that violated not only federal law, but state law as well.

72 Monroe, 365 U.S. at 173-74.

73 Id. at 196 (Harlan, J., concurring).
activity."\textsuperscript{74} He fervently believed that state courts are ordinarily as competent and trustworthy as federal courts to uphold federally guaranteed constitutional rights.\textsuperscript{75} Moreover, he located the support for this claim directly in the Constitution.\textsuperscript{76} Nevertheless, he would not subscribe to the view of dissenting Justice Frankfurter that conduct could be considered under color of state law only upon proof that the state authorized or approved its agent's act.\textsuperscript{77} For Justice Harlan, the mere allegation that a federal right was violated created an entitlement to a federal remedy in a federal court.\textsuperscript{78}

\textsuperscript{74} Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). Justice Harlan began his Monroe concurrence by noting that the issue was "very close indeed," but that he felt constrained, in part, by precedent construing § 1983's criminal counterpart statute. \textit{See Monroe}, 365 U.S. at 192 (Harlan, J., concurring).

\textsuperscript{75} For example, Justice Harlan did not insist on an independent federal forum if providing one threatened to undermine the state's ability to enforce its criminal laws. In his dissent in Dombrowski v. Pfister, 380 U.S. 479 (1965), Harlan argued that no independent federal forum is necessary if a § 1983 plaintiff can raise a claim as a defendant in an ongoing state criminal proceeding. \textit{See id. at} 498-99 (Harlan, J., dissenting). By joining Justice Stewart's concurring opinion in \textit{Younger v. Harris}, 401 U.S. 37, 54-56 (1971), rather than subscribing to Justice Black's far broader opinion for the majority, Justice Harlan in effect reiterated that his support for a judicially crafted ban on federal injunctive interference with state judicial proceedings was limited to the case of criminal prosecutions. In Justice Stewart's words, the offense to state interests arising from a federal injunction "is likely to be less in a civil proceeding." \textit{Id. at} 55 n.2 (Stewart, J., concurring).

\textsuperscript{76} \textit{See Hanna}, 380 U.S. at 474-75 (Harlan, J., concurring) (noting that the Court had already "recognized that the scheme of our Constitution envisions an allocation . . . between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers").


\textsuperscript{78} \textit{See Monroe}, 365 U.S. at 194-98 (Harlan, J., concurring). According to Justice Frankfurter, if the state actor's behavior was authorized by the state a § 1983 action would lie; if unauthorized, a remedy lay in state law or not at all. As interpreted by Justice Frankfurter, the state approval requirement was a device for allocating jurisdiction between federal and state trial courts. \textit{See id. at} 236-37 (Frankfurter, J., dissenting). Although he could hypothesize two legislative reasons to support Justice Frankfurter's interpretation of the statute's state action requirement, Justice Harlan found the hypotheticals unpersuasive. \textit{See id. at} 193-94 (Harlan, J., concurring).
Justice Harlan's reminder that government-perpetrated harms are different is central, not only to the Monroe result but also conceptually. Organic theories describing the formation and maintenance of government characteristically posit mutual defense and protection as bedrock moving causes.\(^7\) Laying aside the contemporary events that inspired the original Klan Act,\(^8\) citizens have the right to expect and demand that the entity to which they turn for defense will not itself become the perpetrator of harm. Constraining government actors who violate that basic understanding, and providing meaningful redress for the victims of such activity, vindicate the very purpose of government, symbolically\(^9\)

The first rested on Congress's fear that state courts would be unwilling to find that a state official had state authority to violate an individual's constitutional rights. Justice Harlan found no support in the legislative history, however, for "congressional concern about the burdens of litigation placed upon the victims of 'authorized' ... contrasted to the victims of unauthorized violations." \(^{Id.}\) at 195-96.

A second hypothesis fared no better. Justice Harlan suggested that the Reconstruction Congress might have concluded that state approved violations of constitutional rights were more offensive than unauthorized violations. \(^{See id.}\) at 198. This potential explanation failed for a number of reasons. Perhaps most important, virtually no deprivation of due process could ever receive ultimate state approval because all states had their own due process clauses. One Senator speaking in the debates "indicated a complete overlap in every State." \(^{Id.}\) (quoting Senator Trumbull). Justice Harlan found it impossible to believe that Congress would enact § 1983, given self-executing Fourteenth Amendment protections, but then limit its availability when states had constitutional counterparts similar to the amendment.

One could imagine, he continued, that despite the state law counterpart, state courts would still find the conduct unauthorized, \(^{See id.}\) at 198-99, thus funneling the case into state court under Justice Frankfurter's reading. Such speculation created its own anomaly. If the state actor is denied a federal forum for defense through removal because the state court would find his conduct unauthorized, thereby undermining the need for a federal § 1983 forum altogether, "it is difficult to contend that it is the added harmfulness of state approval that justifies a different remedy for authorized than for unauthorized actions of state officers." \(^{Id.}\) at 199. The states could be counted on to redress constitutional rights without the need for § 1983 relief. In the end, there was no legislative history to support this potential explanation. \(^{See id.}\)


\(^{8}\) See supra note 2.

\(^{9}\) On the symbolic importance of a federal remedy, see Christina Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 21-25 (1980). Justice Harlan's recognition of this symbolism is also evident from his concurring opinion in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), a context analogous to § 1983 where the defendants are federal agents. \(^{See infra note 107}\). There he wrote that it would be "at least anomalous" to conclude that the federal judiciary was "powerless to accord a damages remedy to vindicate social policies which, by virtue
as well as in practice. Complaints that § 1983 actions intrude too often or too deeply into local government decision-making ring rather hollow if the statute's purpose is to assure that such entities abide by the organic law. As the Supreme Court has sometimes recalled, the Union did not fight the Civil War to vindicate state sovereignty.82

The Monroe Court's willingness to expose individual defendants to federal damages liability for conduct punishable under state law is all the more remarkable because § 1983 claims then lay only against individual state actors, not against their employing entities. The amenability of states to damages at that time was merely assumed, and not yet decided;83 in Monroe itself, the Court rejected the imposition of liability on municipalities,84 a holding later understood to shield other local government entities as well.85 Furthermore, excepting those cases in which the defendant was a legislative or judicial official,86 individual defendants then enjoyed only the most general form of common law qualified immunity,

of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." Id. at 403-04 (Harlan, J., concurring). Accordingly, he found no impediment to the Court's implying a private right of action against federal agents for constitutional violations despite Congress's silence on the subject, a silence sharply contrasting with its express § 1983 remedy for similar violations under color of state law. See id. at 405.

82 Justice Stewart had this point firmly within his grasp when he wrote for a majority of the Court that § 1983 was an expressly authorized exception to the Anti-Injunction Act, 22 U.S.C. § 2283 (1988). Following a discussion of changes in American society wrought by the Civil War, he wrote:

Section 1983 was ... a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people ... to protect the people from unconstitutional action under color of state law ... .

Mitchum v. Foster, 407 U.S. 225, 242 (1972). But see Younger v. Harris, 401 U.S. 37, 44 (1971) (cautioning against undue interference "with the legitimate activities of the state" by the federal government even when the federal government seeks to "vindicate and protect federal rights and federal interests"); supra notes 18 & 75 (discussing Younger).

83 See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that the state qua state is not a "person" for purposes of civil liability under § 1983).

84 See Monroe, 365 U.S. at 187.


defeasible either by objectively unreasonable conduct or malicious intent.87 Re却ion of government misconduct was therefore achieved entirely through the liability of individual state actors, whom the Court placed substantially at risk for acts their government principals had authorized or ordained. Yet individual liability seemed to a majority of the Monroe Court the necessary price of effectuating Justice Harlan’s insight: constitutional violations are qualitatively different.88

B. Individual Defendant Immunity89

Not long after Monroe’s expansive statement of individual liability, the Court began to embrace an immunity doctrine calculated to counter its generous prima facie case. The early history of immunity reflects the Court’s effort to apply a transplanted common law doctrine to the particular circumstances of varied § 1983 defendants. This approach found support in the language of 42 U.S.C. § 1988,90 which counsels courts to fill § 1983 cracks with spackle from state common law.91 The Court’s early grappling with qualified immunity for individual defendants—Tenney v.

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87 See infra text accompanying notes 91-98.
88 This is not to suggest that the Court, then or since, has ever fully realized Justice Harlan’s companion suggestion that § 1983 violations warrant not just an alternative forum but also more generous remedies than a state affords at common law. See Monroe, 365 U.S. at 196 n.5. (Harlan, J., concurring); see also infra text accompanying note 221 (discussing Harlan’s position, and the Court’s failure to adhere to it).
89 A comprehensive history of § 1983 immunities is well beyond the scope of this Article. As a starting point, see PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 89-93, 203-05 (1983).
91 Section 1988 directs in part that state common law, to the extent that it is not inconsistent with federal law, shall apply “in all cases [for the protection of civil rights] where [federal laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies.” Id. Some of the interpretive difficulties with this provision are explored by Beermann, supra note 48, at 58-75. He also concludes that the common law to which § 1988 directs the courts is not the common law the courts have followed. See id. at 61-63.
Brandhove,92 Pierson v. Ray,93 Imbler v. Pachtman,94 and Scheuer v. Rhodes—were obedient to this task of infusing an open-textured liability standard with common law learning.96

In Scheuer, for example, the Court relied on two customary rationales for executive immunity: the injustice of holding an official liable in the absence of bad faith (which we term "fairness"), and the fear of deterring and interfering with the functions of state government ("federalism").97 Objective "reasonableness" and subjective "good faith" elements of qualified immunity were to be measured by the totality of the circumstances confronting the official at the time of the challenged conduct, considered in light of the scope of the officer's discretion.98 A year later, however, in Wood v. Strickland,99 the Court departed from this traditional approach, the first step on a march to the avowedly policy-based test it ultimately announced in Harlow v. Fitzgerald100 and Anderson v. Creighton.101

92 341 U.S. 367, 379 (1951) (creating absolute immunity for state legislators' activity).
96 See Mashaw, supra note 95, at 14-16 (arguing that executive immunity, as distinguished from sovereign and probably judicial immunity, is a relatively recent development).
97 See Scheuer, 416 U.S. at 240.
98 See id. at 247-48. While the Court did not purport to premise its search for the existence of immunities on § 1988, it clearly did rest its finding on common law understandings. See id. at 238-48 & n.4. Moreover, the Court's result was consistent with contemporary common law understanding. See RESTATEMENT (SECOND) OF TORTS § 895D (1979).
100 457 U.S. 800, 818 (1982) (holding that discovery should not be permitted until the court answers the threshold question "whether [the] law was clearly established at the time an action occurred").
101 483 U.S. 695, 699-41 (1987) (applying the qualified immunity doctrine to the execution of a search warrant, and holding that Harlow eliminated an inquiry into the subjective intent of the official and that the trial court should test the "objective legal reasonableness" of the challenged conduct against "clearly established" law). This departure from the immunity formula received from the common law rested "solely
Wood introduced a new variable into the qualified immunity calculus by specifying that the "objective" prong of immunity identified in Scheuer required the defendant to demonstrate the reasonableness of her conduct in relation to the content of "settled, indisputable law." Immunity attached only if defendants proved two conditions: (1) that the act was objectively reasonable in light of settled law and (2) that the conduct was motivated by subjective good faith. Justices Powell and Rehnquist, two of the four dissenters from this part of the opinion, would later take leading roles in forging more generous immunities. They referred to the majority's description of the objective branch as a "harsh standard, requiring [defendants to have] knowledge of what is characterized as 'settled, indisputable law' [and accordingly leaving] little substance to the doctrine of qualified immunity." That standard, they argued, would impose damage liability even if the administrator, acting in good faith, was ignorant of the law. Under such conditions, liability would rest on "an unwarranted assumption as to what school
officials know or can know about the law and constitutional rights.” The problem, Justice Powell predicted, was that “[t]hese officials [would] now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken.”

First, it was uncertain in 1975 that doctrinal “settledness” or the reasonableness of the official’s conduct would be questions for a jury. Not until Harlow and Anderson, respectively, were these questions addressed, and they were held generally to be questions for the Court. Second, as Justice Powell later realized, requiring the defendant to have knowledge of “settled, indisputable law” before subjecting her to liability in practice imposes a litigation hardship on the plaintiff rather than the defendant. See infra notes 107-12 and accompanying text.

Proving that law is indisputably settled appears to be a formidable task. In Wood itself, for example, the district court had made a specific finding, unchallenged on appeal, that the officials bore no ill will toward the students. See Wood, 420 U.S. at 314. Accordingly, defendants surmounted the subjective prong of the new test. The debate centered on the objective prong of the test and whether it was fair to charge the defendants with knowledge of the local status of the right to process before expulsion, or with knowledge of what constituted “settledness.” The right to process as a necessary procedural incident to a ten-day suspension from public school had been decided in Goss v. Lopez, 419 U.S. 565 (1975), earlier in the same term. In arguing against the majority’s “standard of required knowledge” in Wood, Justice Powell questioned whether school administrators could be expected to know that Goss was settled law. See Wood, 420 U.S. at 329 (Powell, J., concurring in part and dissenting in part).

Justice Powell’s doubt, in the specific context, is problematic for a number of reasons. First, the Wood majority did not purport to decide whether the law was “settled,” but simply remanded. Because it was not then clear whether the “settledness” issue raised a legal or factual question, the dissent’s concern was somewhat premature. Second, despite Powell’s claim that “most lawyers would have thought, prior to [Goss], that the law to the contrary was settled, indisputable and unquestioned,” id., the majority noted that the courts of appeals had uniformly held that process was due before dismissal from public school. See id. at 323 n.15. Perhaps more important, in Goss itself the Court listed ten lower court cases that had required process before expulsion and dozens of others requiring process before dismissals. See Goss, 419 U.S. at 576-78 n.8. Included within that list were district and appellate court decisions from the Eighth Circuit, which decided Wood.

Moreover, Justice Powell’s lament was somewhat disingenuous. He dissented in Goss, but he went to great lengths in that opinion to distinguish the need for procedural safeguards that would accompany an expulsion—the situation in Wood—from the absence of need in the context of a relatively short suspension—the context of Goss. See id. at 585, 589, 590, 591, 595 (Powell, J., dissenting) (distinguishing between relatively “routine” forms of discipline and more severe forms of school dismissals and punishment). He specifically noted that both historically and under the laws of the state where Goss arose, a hearing was required for the “incomparably more serious matter” of expulsion. Id. at 585 n.2; see also id. at 595 & n.14 (suggesting that the Court should not and need not interfere with traditional
His prediction proved ironic in *Harlow* when those same dissenters, now joining a majority, *confined* the inquiry to the factor they had once found illegitimate, the state of constitutional precedent on the eve of the challenged conduct. The new majority discarded the subjective prong and in the process effected a dramatic expansion of the affirmative defense. By declaring the new immunity forfeitable solely by reference to the state of the law, the Court turned its back on the common law tradition that tied immunity to lack of culpability and, in turn, deterrability. Instead, *Harlow*'s majority justified abandoning the good faith requirement largely as a response to the practical litigation burdens encountered by government officials accused of federal law violations when they attempted to establish their immunity.

The new majority must have realized on reflection that, from the defendant's perspective, the troublesome aspect of common law qualified immunity was the subjective prong, which entailed "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." To avoid such disciplinary schemes used in public schools, which included no hearing for "routine" suspensions. Finally, he agreed with the majority's suggestion that any "fair-minded school principal" would impose upon himself some minimum procedural safeguards prior to expulsion. *Id.* at 596 n.15 (quoting majority opinion). In short, there was clear legal and historical precedent for the majority's position; it was "indisputably settled" in this context, and there was no "harshness" involved.

*Harlow* and its successor, *Anderson v. Creighton*, were not under § 1983 but actions against federal agents that arose directly under the Constitution. See *Bivens v. Six Unknown Unnamed Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Court has held, however, that § 1983 and *Bivens* immunities are interchangeable. See, e.g., *Harlow*, 457 U.S. at 818 n.30; *Butz v. Economou*, 438 U.S. 478, 496-504 (1978). In *Butz*, this interchangeability worked to narrow the federal officials' immunity from the absolute immunity they were then afforded against ordinary, nonconstitutional torts under *Barr v. Matteo*, 360 U.S. 564 (1959), to the modest version of common law qualified immunity then prevalent under § 1983. See *Oren*, *supra* note 24, at 970-72. By contrast, in *Harlow*, the Court's reliance on the *Butz* interchangeability notion served to extend the generous qualified immunity the Court had granted federal officials in *Bivens* actions to § 1983 defendants as well.

See *Harlow*, 457 U.S. at 818 (holding that objective reasonableness of an official's conduct is to be "measured by reference to clearly established law . . . at the time an action occurred").

*See id.* at 806, 814-19. The new test was foreshadowed by the Court's decision in *Procunier v. Navarette*, 434 U.S. 555, 564 & n.11 (1978) (requiring a closeness between precedent and the right asserted). See also *Oren*, *supra* note 24, at 980-81 & n.195 (discussing *Procunier* and the fine distinctions that could make a precedent inadequate to establish an asserted right).

*Harlow*, 457 U.S. at 817 (footnotes omitted).
disruptions, the Court simply jettisoned the subjective standard, relying entirely on an inquiry into the official defendant's "presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" If, as a matter of law, the official could not have known about the existence of the right allegedly infringed, he escaped accountability. "Democracy in the jury box" was abandoned. Concomitantly, the individual defendant action lost its utility as a medium for expounding new constitutional rights, because only rights well settled by earlier decisions would be actionable.

Anderson extended Harlow's immunity standard to a lower-level official and expanded it in substance by conferring immunity unless the alleged federal law violation was established in a highly "particularized" way. Under this formulation, a right is clearly established only if it was announced in circumstances so closely analogous that a reasonable official in the defendant's position should realize the applicability of the settled precedent.

Anderson, an FBI agent, participated in an illegal search of the Creightons' home in an effort to find Mrs. Creighton's brother, a bank robbery suspect. The agents, pleading qualified immunity, admitted knowing that warrantless searches generally violated the Fourth Amendment but asserted that they could not have realized the illegality of their conduct on the facts in question. Justice

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111 Id. at 815 (quoting Wood, 420 U.S. at 322).
112 The phrase is borrowed from Aviam Soifer, Moral Ambition, Formalism, and the "Free World" of DeShaney, 57 GEO. WASH. L. REV. 1513, 1528 (1989).
113 See Anderson, 483 U.S. at 638-41. The Fourth Amendment setting brings to mind the Court's refusal to apply "new rules" of law in most federal habeas cases, further stifling the development of constitutional law in the realm of criminal procedure. See Teague v. Lane, 489 U.S. 288, 330 (1989) (Brennan, J., dissenting) (objecting to the plurality's "formidable new barrier to relief" in cases in which "a federal habeas petitioner's claim, if successful, would result in the announcement of a new rule of law"); Rudovsky, supra note 34, at 56 ("[T]he court has placed significant limits on the power of a federal habeas corpus court to articulate new constitutional law."). Professor Arkin believes that the potential of Teague to restrict the development of new rules may be overstated, principally because the majority of such claims already faced one or more of the procedural bars to habeas that the Court had erected in earlier decisions. See Marc M. Arkin, The Prisoner's Dilemma: Life In the Lower Federal Courts After Teague v. Lane, 69 N.C.L. REV. 371, 392 & n.166 (1991). Professor Rudovsky argues further that another potential arena for the development of criminal constitutional law, suppression hearings, has been largely closed off because the unlawful police conduct does not eventuate in arrest and prosecution or because of the operation of the good faith exception to the exclusionary rule. See Rudovsky, supra note 34, at 55-56 (citing United States v. Leon, 468 U.S. 897 (1984)).
Scalia, speaking for the majority, ruled that an officer could not be said to have unreasonably disregarded "clearly established" law unless authoritative constitutional precedent closely on point existed at the time of the alleged violation. This standard subtly shifts the settledness concept enunciated in Harlow. That opinion stripped the official of immunity whenever a court determines by an objective test that he should have been aware of the law declaring the plaintiff's right. Anderson, however, accords the immunity even on an official to whom awareness of the right-declaring law may fairly be imputed unless he also should reasonably understand that "what he is doing violates that right."

The Court justified this more lenient version of Harlow immunity as necessary to ward off the disruptiveness attendant upon litigation; Harlow would not sufficiently enable individual defendants to escape discovery unless the trial court applied the new doctrine with reference to a narrowly drawn conception of analogous precedent. Chief Justice Burger's common law approach in Scheuer—posing that the scope of the qualified immunity available to executive officers should vary with the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared . . . at the time and in light of all the circumstances"—was overridden by the desire of the emerging Rehnquist Court to relieve public officials of the burden of litigation.

114 See Anderson, 483 U.S. at 641.
115 Government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.
116 Anderson, 483 U.S. at 640. Thus the immunity is not forfeited unless it is "apparent" that "an official action" is unlawful when measured against pre-existing law. See id.
117 See id. at 638-41; see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (authorizing immediate appeals from denials of qualified immunity and stating that Harlow is designed to enable defendants who meet its minimum requirements to be dismissed from the action "before the commencement of discovery").
118 Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); see also Gary S. Gildin, Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald To Section 1983 Actions, 38 Emory L.J. 369, 374-79 (1989) (describing the traditional common law approach to qualified immunity and criticizing the Harlow Court's departure from it because "after Harlow, even if a federal officer intended to harm the plaintiff, he is immune if the constitutional interest in issue was not clearly established at the time of the violation"). This assertion may be slightly overstated. See supra note 101.
The resolution of the "settledness" question, which the Court advertises as part of an objective test, is in fact dependent at the threshold\textsuperscript{119} on a subjective\textsuperscript{120} characterization of law by trial and appellate judges. Indeed, when \textit{Harlow/Anderson} immunity is timely pleaded, the § 1983 plaintiff must demonstrate at a minimum the same probandum demanded in a \textit{criminal} civil rights prosecution: the deprivation of a "federal right made definite by decision or other rule of law."\textsuperscript{121} As this element was applied by the

\textsuperscript{119} Recent decisions reflect the federal courts' renewed determination to afford defendants an early resolution of that defense. See Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991) (holding on immediate "collateral order" appeal that "whether the constitutional right asserted is 'clearly established' at the time the defendant acted" should be decided before plaintiff is permitted to conduct discovery of the underlying claim); Gaines v. Davis, 928 F.2d 705, 707 (5th Cir. 1991) (holding on immediate "collateral order" appeal that district court's order was overly broad because it failed to limit the scope of depositions to the issue of qualified immunity). The lower courts have been moving to this position, treating the issue of qualified immunity as a threshold issue to be resolved in the early stages of a case. See, e.g., Finnegan v. Fountain, 915 F.2d 817, 820 (2d Cir. 1990) (stating that the application of qualified immunity is a question of law for the court and not the jury to decide); Bennett v. Parker, 898 F.2d 1530, 1534 (11th Cir. 1990) (stating that, when "faced with a motion for summary judgment based on a defense of qualified immunity, the district courts should first focus on whether the plaintiff has established a constitutional violation before determining whether material issues of fact are present"); Krause v. Bennett, 887 F.2d 362, 369 (2d Cir. 1989) (holding that when qualified immunity can be shown as a matter of law, defendants motion for judgment notwithstanding the verdict should be granted); Eng v. Coughlin, 858 F.2d 889, 895 (2d Cir. 1988) (remanding case to district court to rule on claims of qualified immunity that were not considered when ruling on motion for summary judgment).

\textsuperscript{120} We label the initial characterization process "subjective" for the following reason. The FBI agent who committed the alleged violation in \textit{Anderson} knew that the provision in question, the Fourth Amendment, demanded a warrant. See \textit{Anderson}, 483 U.S. at 641. The right was not clearly established, however, because the Court concluded that a question remained as to whether a reasonable police officer, despite the lack of probable cause, could have believed probable cause existed. See \textit{id}. This determination, in turn, required the trial court to make an appraisal of existing precedent on the eve of the alleged injury to determine its "closeness" to the facts that faced the defendant. See \textit{id}. at 646 n.6. The last step in the trial or reviewing court's determination, like the initial decision made by the police, is inherently subjective because ascertaining closeness requires subjective appraisal of the relationship between the conduct under scrutiny and the conduct described in prior constitutional cases.

\textsuperscript{121} Screws v. United States, 325 U.S. 91, 103 (1945) (construing 18 U.S.C. § 52 (codified as amended at 18 U.S.C. § 242 (1988))), the criminal counterpart to § 1983, as requiring proof of scienter, but noting that "bad purpose or evil intent alone may not be sufficient"). The "requisite bad purpose" of \textit{Screws} has been held satisfied if the evidence shows that the criminal defendant had the purpose to deprive the citizen of the "interests protected" by the violated federal right, even absent any consciousness of the unlawfulness of his conduct. See United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976). The § 1983 plaintiff, therefore, must demonstrate little
Anderson majority, the "settled" category may virtually evaporate for want of sufficiently apposite prior cases. At the extreme advocated by Anderson's dissenters, on the other hand, a right is clearly established if it fits within any of the generic descriptions that compose the Constitution's catalogue of rights. The upshot is that the settledness concept, as viewed by the several Justices in Anderson, is zero-sum, scarcely ever satisfied or so easily satisfied as to be meaningless. A majority adopted the strict view and as a consequence qualified immunity is now routinely invoked and almost as routinely upheld.122

Ironically, given the justifications for its creation, the new qualified immunity has proven difficult to administer; an increasingly complex jurisprudence of appellate jurisdiction consumes much of the same time and funds of officials that the doctrine sought to spare. In a number of contexts, circuit courts are unsure whether to accept jurisdiction over immediate appeals of pretrial orders denying qualified immunity.123 If an individual defendant must

less against an individual immunity-claiming government official than the government must show in a criminal prosecution for a violation of the same rights.

122 See, e.g., Johnson v. Moore, No. 89-35867, 1991 U.S. App. LEXIS 23244, at *5 (9th Cir. Oct. 9, 1991) (holding qualified immunity applies when the right alleged to have been violated is not sufficiently clear to the state official concerned); Johnson v. Boreani, 946 F.2d 67, 71 (8th Cir. 1991) (concluding that, under the facts, summary judgment is appropriate and necessary to achieve purposes of qualified immunity defense established in Anderson); Vaughan v. Ricketts, 859 F.2d 736, 739 (9th Cir. 1988) (entitling defendant to summary judgment and granting him qualified immunity if he can establish that it was reasonable to believe his act comported with the Constitution).

123 Compare Krohn v. United States, 742 F.2d 24, 28 (1st Cir. 1984) ("[T]he inhospitality [Harlow] evidenced towards groundless suits against officials, would best be effected by making denials of [qualified] immunity immediately appealable . . .") and McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982) ("[A]ppellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity if he can establish that it was reasonable to believe his act comported with the Constitution.") with Peppers v. Coates, 887 F.2d 1493, 1496-97 (11th Cir. 1989) (citing prior Eleventh Circuit authority and stating that the denial of summary judgment on the basis of qualified immunity "is reviewable after final adjudication of the case, and the collateral order doctrine cannot be invoked prematurely to confer immediate jurisdiction upon this court"). But see Hudgins v. City of Ashburn, 890 F.2d 396, 402-03 (11th Cir. 1989) (describing the "clearly established" test as an issue of law eligible for interlocutory decision). A recent panel decision of the Eleventh Circuit reviews in detail the contradictory holdings of its prior panels. The panel concluded that immediate appeal is available from the denial of summary judgment on the qualified immunity defense regardless of whether the decision below turns on the "legal" determination that the right at issue is clearly established or on the "factual" determination that a reasonable person in the defendant official's position should have understood that her conduct would
go to trial on a separate constitutional claim that he concedes does implicate a clearly established right, or on a claim for equitable relief, which is not barred by immunity, the lower appellate courts are understandably perplexed about whether the incremental burden of defending the damage claim warrants exceptional immediate review.

In the end, the test for individual immunity in § 1983 actions rests on an unnecessary fiction. The test is unnecessary because there are ways to determine immunity that are more faithful to the statute's purpose. It is fictional because the purportedly “objective” standard for determining qualified immunity rests on the fragile belief that the relatively low-level employee most likely to have actual citizen contact, the cop on the beat, for example, appreciates the current state of constitutional law. The delicacy of that premise is self-evident. In any event, after Anderson, Monroe's violation that right. See Howell v. Evans, 922 F.2d 712, 716-18 (11th Cir.), vacated on grant of reh'g, 931 F.2d 711 (11th Cir. 1991).

124 See Green v. Brantley, 895 F.2d 1387, 1394 (11th Cir.) (holding that the denial of a motion for partial summary judgment on the grounds of qualified immunity was not appealable if defendants would still be subject to trial on the issue of damages), reh'g granted and opinion vacated, 921 F.2d 1124 (11th Cir. 1990).

125 Most circuit courts permit the defendant's immediate appeal of the immunity denial notwithstanding pendency of trial on an equitable claim. See, e.g., DiMartini v. Ferrin, 889 F.2d 922, 924-25 (9th Cir. 1989) (citing cases), cert. denied, 111 S. Ct. 2796 (1991); Marx v. Gumbinner, 855 F.2d 783, 787-88 (11th Cir. 1988) (stating that “a defendant may immediately appeal a denial of official immunity”). The Third Circuit, however, has departed from this trend. See Prisco v. United States, 851 F.2d 93, 96 (3d Cir. 1988) (holding that a defendant may not appeal the denial of summary judgment on immunity if there are prospective relief claims pending), cert. denied, 490 U.S. 1089 (1989). That qualified immunity sometimes does not insulate the official from discovery or trial if equitable relief is sought demonstrates that even the Court’s extreme solicitude for the defense has not fully achieved the asserted goals behind its expansion. See infra note 242.


127 Ironically, Justice Powell, dissenting in Wood, which first articulated the “settled” standard, gave as one of his reasons for opposing that decision the very delicacy he later helped enshrine. See supra note 106 and accompanying text. An acute recent example of the problems related to the counterfactual premise of “settledness” is furnished by V-1 Oil Co. v. Wyoming, 902 F.2d 1482 (10th Cir.), cert. denied, 111 S. Ct. 295 (1990). A state environmental official conducted a warrantless search of a gas station under circumstances which, the Court acknowledged, violated a “clearly established” right of the station owner. See id. at 1488. Nevertheless, the Tenth Circuit concluded that the defendant deserved immunity under an “extraordinary circumstances” exception mentioned in Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982), available to defendants who “neither knew nor should have known of the relevant legal standard.” V-1 Oil Co., 902 F.2d at 1488. The Court of Appeals
broad sphere of individual defendant liability is now largely offset by a highly solicitous definition of official immunity.

III. THE CASE AGAINST ENTITY DEFENDANTS

*Monroe* approved a wide variety of claims against individual defendants for federal law violations their entity principals had not authorized. At the same time, however, it declared that local government entities lie wholly outside the ambit of § 1983. Although from a plain-meaning perspective everything such an entity does is surely “under color of” state law, the Court concluded that it simply was not a “person” civilly liable for that conduct. This conclusion was premised upon the significance the Court attached to the rejection of an amendment to the original statute, proposed by Senator Sherman, that would have made government entities liable to citizens injured by specific acts of violence committed by private citizens. The federal compulsion to monitor citizen conduct that would have been imposed on state entities under the amendment seemed to offend the prevailing theory of dual sovereignty, which forbade the national government from imposing duties or obligations on officers of the state or state instrumentalities.

explained that the defendant’s reliance on the contemporaneous advice of a fully briefed senior state assistant attorney general made the circumstances “extraordinary” even though, as a general rule, there is nothing “inherently extraordinary” about reliance on the advice of counsel. See *id.*

There is of course a long tradition of assuming, for purposes of civil as well as criminal liability, that litigants are aware of the requirements of prior decisions. See, e.g., *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (holding that defendants will be subject to a constitutionally adequate basis of personal jurisdiction if they are served with process in any state in which they are even transiently present). According to the Supreme Court, knowledge of the transient service rule was fairly imputable to potential civil defendants by virtue of a “continuing tradition,” see *id.* at 2118 (plurality opinion by Scalia, J.), or a “century of judicial practice,” see *id.* at 2124 (Brennan, J., concurring). Even granting that assumption, however, it may be a far greater stretch to assume that a low-level government official can identify which prior constitutional law decisions are sufficiently analogous to a real-life event to furnish “clearly established” precedent within the meaning of *Anderson*.


130 See *id.* at 190; see also *Monell*, 436 U.S. at 669-83 (surveying the drafting Congress’s debate over potential dual sovereignty limitations on their authority).
Seventeen years later, the Court gave a very different reading to that same history. Justice Brennan’s opinion in Monell v. Department of Social Services agreed that the 1871 Congress, in rejecting the Sherman Amendment, doubted its “‘constitutional power to impose . . . [civil liability] upon county and town organizations.” But the real vice of the Amendment, according to the revisionist view, was that the duty imposed on state polities was new; it was the federal imposition on the states of a fresh obligation that aroused the ire of the Amendment’s victorious opponents. Section 1983, the Monell Court observed, imposed no such new obligation on any state or local government. It merely subjected local government to civil liability for violating federal constitutional obligations already a part of the organic law of the land. This explains why several opponents of the Amendment nevertheless voted to enact § 1983 into law.

Having cleared away the constitutional objection stemming from the significance Monroe had ascribed to the rejection of the Sherman Amendment, the Monell majority was free to inquire whether the 1871 Congress intended to include local government entities as a species of “person” suable under § 1983. The Court relied principally on the Dictionary Act of 1871, passed only two months before the law that became § 1983. The Dictionary Act provided that “in all acts hereafter passed . . . the word “person” may extend . . . to bodies politic and corporate.” The majority concluded

132 Id. at 664 (quoting Monroe, 365 U.S. at 190).
133 See id. at 669-83. The Monell majority relied on history that illustrated how such preexisting constitutional duties were enforced civilly against municipalities during the reign of dual sovereignty. In effect, then, it drew a distinction between the legislative imposition of new obligations and the judicial declaration of rights discovered in extant text, with only the former offending dual sovereignty. The Court's attempt to reconcile opposition to the Sherman Amendment based on dual sovereignty with its application of § 1983 to local government entities encounters an additional difficulty after passage of § 1983. The statute's framers might well regard expansive constitutional constructions first announced after the statute's enactment, as well as the federal statutory obligations that now may be enforced against local government through § 1983 actions, see infra notes 258-70, as fresh obligations offensive to dual sovereignty. Mitigating this difficulty is the fairly rapid waning of dual sovereignty after enactment of § 1983, and the use of § 1983 to impose liability for violations of federal statutory rights is a fairly recent development. See Maine v. Thiboutot, 448 U.S. 1, 6-8 (1980) (defining the “and laws” language of § 1983 to apply to the deprivation of statutory benefits).
134 See Kramer & Sykes, supra note 24, at 260.
135 Monell, 436 U.S. at 688 (quoting Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (1871)).
in summary fashion that corporations, including municipal corporations, were customarily treated identically with natural persons for purposes of constitutional and statutory construction.\footnote{136 See id. at 688-89.}

The Monell retrospective on the 1871 Congress’s doubt about its power to subject local governments to civil liability is not controversial on its merits. Even Justice Rehnquist in dissent acknowledged the probable correctness of the majority’s conclusion on that point.\footnote{137 See id. at 723 (Rehnquist, J., dissenting) (stating that “it may well be that on the basis of this closer analysis . . . a conclusion contrary to . . . Monroe . . . could have been reached . . . 17 years ago”); see also id. at 722 (granting that the Court was “probably correct” in its analysis of the Sherman Amendment debates).}

What is remarkable is that the Court would tackle the issue only seventeen years after Monroe’s excursion through the same history, and in the same year the Senate held hearings on a bill that would have overturned the Monroe exclusion of municipal governments from the reach of § 1983.\footnote{138 See id. at 719.}

The majority itself recognized the awkwardness of the rapid return visit.\footnote{139 The majority labored to explain why stare decisis should not preclude it from overruling this portion of Monroe. The Monell overruling of the Monroe entity immunity holding in such a short time span is a striking early instance of the demise of statutory stare decisis, so decisively reaffirmed as late as 1938 in Justice Brandeis’s celebrated opinion in Erie R.R. v. Tompkins, 304 U.S. 64, 79-80 (1938). That demise is catalogued, almost defiantly, in the per curiam opinion of the Court that sua sponte called for rebriefing and reargument in Patterson v. McLean Credit Union, 485 U.S. 617, 618 (1988) (citing cases).}

Still, it is not surprising that the Court would strain so hard to sweep government entities within § 1983. The extant qualified immunity doctrine, while not yet overwhelmingly tilted in favor of the defendant, was tied to the concept of reasonableness and therefore made recovery against individual officers uncertain. Further, even if the plaintiff prevailed the officer was likely to be judgment-proof, and the practice of indemnification, although widespread, was equally uncertain and uneven. Some governments would not indemnify at all, and others only for conduct comporting with varying definitions of scope of authority.\footnote{140 The availability of indemnification then, as today, is not entirely clear. The Yale Project, sampling Connecticut district court filings from 1970-77, found that no costs were borne by police officers sued under federal statutes. See Project, Suing the Police in Federal Court, 88 YALE L.J. 781, 810-11 (1979) (noting that Connecticut required indemnification under CONN. GEN. STAT. § 7-465 (1977)). By the same token, one commentator writes that other municipalities were experiencing difficulty purchasing comprehensive liability insurance for employees and elected officials. See Martin J. Jaron, Jr., The Threat of Personal Liability Under the Federal Civil Rights Act:}
Thus did not assure the satisfaction of judgments in many cases embraced by Monroe's broad "under color of" umbrella.

Finally, the Court was influenced by the fundamental structural consideration that § 1983, itself constitutionally dependent upon state action, was specifically aimed at state-sponsored conduct. If local government officials and low-level employees could be reached precisely because they carried the badge of government authority, is it reasonable to suppose that the 1871 Congress intended to absolve the very governments who handed out the badges?\footnote{Indeed, Justice Powell noted the "oddness" of imposing liability on the agent but not the principal for whom the agent worked. See Monell, 436 U.S. at 705 (Powell, J., concurring). We deal subsequently with the oddness in our own proposal of imposing liability on the entity principal in circumstances where we would absolve its agent. See infra note 316.}

The Court in Monell, however, having stretched jurisprudential convention to arrive at a result consonant with constitutional history and pre-Monroe precedent, strained equally far, without any compulsion to do so from the facts or posture of the case, to narrow the terms of local government liability. This limitation is contained in a separate discussion discounted by Justice Stevens as "merely advisory" and "not necessary to explain the Court's decision."\footnote{Id. at 691.} The Court wrote that local government entities face § 1983 liability only if the conduct causing the constitutional violation is carried out "pursuant to official municipal policy of some nature."\footnote{Id. at 691-92 (quoting § 1983).}

How Justice Brennan derived the "policy" limitation is a source of wonder. He began the journey with the statute's text, noting that the defendant, to be liable, must "subject[, or cause[ a plaintiff] to be subjected" to the deprivation of federally secured rights.\footnote{Monell, 436 U.S. at 714 (Stevens, J., concurring in part).} That sparse language, he concluded, "cannot be easily read to impose liability vicariously on governing bodies . . . . [T]he fact that Does It Interfere with the Performance of State and Local Government?, 13 URB. LAW. 1 (1981), reprinted in SECTION 1983: SWORD AND SHIELD 309, 327-29 (Robert H. Freilich & Richard G. Carlisle eds., 1983); see also SCHUCK, supra note 89, at 85 (discussing self-insurance and the purchase of insurance by states, localities, and public officials). Most observers seem to agree that some form of indemnification was and is available, although the scope varies from jurisdiction to jurisdiction. See, e.g., id. at 86 (explaining that "[m]ost states provide some form of indemnification or other protection against adverse judgments or settlements, but some apparently provide it only in narrowly circumscribed situations" (citation omitted)); LOW & JEFFRIES, supra note 27, at 924 (pointing out that although most government employers choose to protect their employees against damage liability, the availability of such protection often depends on statutes, ordinances, and practices in each jurisdiction). There is little reason to believe that most states would make the "policy" limitation in light of the view that the framers of the Fourteenth Amendment intended municipalities to remain immune from suit. Id. at 707 (Powell, J., concurring).}
Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." In the absence of custom, only some deliberate act labelled "official policy" would show causation and thus create municipal liability.

Ascribing such independent, greater-than-boilerplate significance to causation language in a statute remediating constitutional torts is somewhat surprising, since causation is an invariable prerequisite of liability for civil harms. Additionally, the language Justice Brennan construed is susceptible to equally plausible alternative interpretations. One way an entity may "cause" a person to be subjected to a constitutional injury, for example, is simply to charge its agents to meet specified objectives without taking reasonable steps to prevent them from trampling on federally protected rights. No deliberative act on the part of the employer is required to "cause" deprivations in this fashion. Although this interpretation is perhaps dubious as applied to those predicate violations dependent upon an element of wrongful intent, no textual imperative extends such a limitation to the deprivation of other constitutional or statutory rights, or to the interpretation of § 1983 itself. In any case, if causation is really the issue, it is not apparent why the Court deems an injury to be caused by the entity when its agent acts pursuant to official policy, but not otherwise. Rather, it seems equally likely that "subjects, or causes to be subjected" refers not to the authorization inherent in a requirement of official policy but simply to differing degrees of proximity between the depriver and the deprived.

145 Id. at 692 (emphasis added).
146 See, e.g., Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (holding that the "intent" necessary to state a claim for denial of equal protection of the laws requires plaintiff to show that the decision was made "'because of,' not merely 'in spite of' its adverse effects"); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding that "deliberate indifference" is demanded to state an Eighth Amendment claim for deprivation of medical attention); see also infra note 362.
147 Virtually the same phrase first appears in § 2 of the Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified in scattered sections of 42 U.S.C.). Section 1 of that Act declared rights to contract and dispose of property free from racial discrimination. Section 2, described by Senator Trumbull, a sponsor, as "the valuable section of the bill so far as protecting the rights of freedmen is concerned," prescribe criminal punishments for any person who, under color of state law, "shall subject or cause to be subjected" any "inhabitant" to the deprivation of § 1 rights. 1 STATUTORY HISTORY OF THE UNITED STATES 112 (Bernard Schwartz ed., 1970). Senator Trumbull
No serious question of proximate causation can be resolved without recourse to extrinsic materials. Justice Brennan garnered support for his interpretation with an overinclusive argument resting on the premise that failure to require action pursuant to government "policy" would create a federal law of respondeat superior that "would have raised all the constitutional problems" implicated by the rejection of the Sherman Amendment. He reasoned that encumbering local governments with civil liability whenever their agents violate constitutional norms would be tantamount to federal imposition of an "obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." Many federal constitutional and statutory duties, however, are not tantamount to a "new" obligation to keep the peace. In this sense, Justice Brennan’s argument proves too much. For example, the challenged requirement in Monell—that pregnant city employees take unpaid leaves of absence while still medically able to work—violated equal protection or the then current "irrebuttable presumption" variation of due process. Even if an individu-

explains that ensuring the freedom of newly freed slaves requires criminal sanctions for "any person who [under color of law] shall deprive another of any right or subject him to any punishment in consequence of his . . . race." Id. Provided he acts under color of law, therefore, a putative defendant could himself immediately "subject" an inhabitant to the deprivation of a § 1 right, or could accomplish the same end by "causing" another to "subject" the inhabitant to the deprivation. Thus, a deputy sheriff could deny a § 1 right directly or prevail upon a fellow deputy or a private citizen to do so. Significantly, in none of these examples would the initiator-defendant be implementing any "policy" in the sense of a deliberative decision of his entity.

149 Monell, 436 U.S. at 693.

150 Id. The Court has continued to eschew efforts that would, in effect, obligate local governments or governmental units to keep the peace among civilians. Cf. DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189, 198-203 (1989) (holding that the failure of a county department of social services to provide a minor with adequate protection against his father’s violence did not violate that minor’s due process rights). For an unusual and provocative discussion of the interface between “private action” and the requirement of state action, see Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 103 Harv. L. Rev. 1, 8-13 (1989) (discussing DeShaney).

151 See Monell, 436 U.S. at 660-61.

152 See, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 643-48 (1974) (stating that a school board’s presumption that a woman five or more months pregnant is physically unfit to teach in a classroom is an “irrebuttable presumption” and thus suspect under the Due Process Clause); Stanley v. Illinois, 405 U.S. 645, 654 (1972) (ruling that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause).
al supervisor had imposed this requirement in an ad hoc manner that fell short of city policy or custom, imposing liability on the city would certainly not have burdened it with an obligation to keep the peace or any other "new" obligation not already mandated by the Constitution.\(^\text{153}\)

Particularly unfortunate, given the mischievous consequences the "policy" requirement would soon deliver, is that the entire discussion of entity attribution in *Monell* was unnecessary to the decision. The city's pregnancy leave requirement was adopted "as a matter of official policy," and the majority admitted that "this case unquestionably involve[d] official policy as a moving force of the constitutional violation."\(^\text{154}\) *Monell*, therefore, furnished no occasion to consider when unauthorized federal violations are sanctioned or tolerated by entity officials to the degree that § 1983 liability should extend beyond the agent to the entity.

Why would the Court blithely take away, with its policy requirement, so much of what it had labored mightily to give by overruling the restrictive *Monroe* definition of "person"? Despite authoring *Monell's* majority opinion, Justice Brennan's own enthusiasm for the dictum is in serious doubt. Seeking to limit the policy argument, Justice Brennan later described the requirement as intended merely to distinguish the municipality's acts from those of its employees.\(^\text{155}\) Eventually he would take sharp issue with decisions that found policy only in positive local legislation or a pattern amounting to "custom."\(^\text{156}\) Only two years after *Monell*, in the course of rejecting any form of entity immunity, he endorsed the very "loss-spreading" principle that *Monell* had found inadequate to justify

\(^{153}\) The obligation of state officials to obey the Constitution was not a "new" one offensive to the dual sovereignty conception of the Sherman Amendment opponents, who recognized as much in enacting § 1983. See *supra* text accompanying notes 130-33. In principle, vicarious municipal liability for the constitutional torts of a municipality's agents simply holds the municipality to the same preexisting constitutional standards incumbent on state officers. The distinction that the individual state officer need only answer for his own behavior, while the municipality must answer for that of its employee, is irrelevant to the "new obligation" objection that animated opposition to the Sherman Amendment. See Kramer & Sykes, *supra* note 24, at 259-60. Indeed respondeat superior was a well-established common law rule at the time. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835-39 (1985) (Stevens, J., dissenting).

\(^{154}\) *Monell*, 436 U.S. at 694.


subjecting entities to respondeat superior. The policy dictum may be the price that some Justices paid for their brethren's acquiescence in the overriding of stare decisis—the volte face from *Monroe*—that made it possible to reach entities at all.

Since first introduced in *Monell*, "policy" now embraces not only conduct formally adopted by the entity or enshrined in settled custom but also decisions of a final policy-making official who commits the federal law violation herself or ratifies the unlawful act of a delegate. The "policy" barrier thus echoes dissenting Justice Frankfurter's argument in *Monroe* that an agent's actions must have state authorization to occur "under color of" state law. In fact, "policy" circumscribes the scope of entity liability even more sharply than Justice Frankfurter would have curbed the liability of individual defendants in *Monroe*. Not only do entities, like their agents under Justice Frankfurter's view, escape liability for conduct undertaken without "authority"; under *Monell* and its progeny, the agents' authorized acts cannot be attributed to the entity unless the authorization stems from sources sufficiently high or formal to qualify as an aspect of official policy.

The requirement of a "final" policymaker emerged, again as dictum, in a plurality opinion in *Pembaur v. City of Cincinnati*. A county prosecutor and subordinate law enforcement officials authorized and executed, respectively, the service of capiases by breaking down the door of a private physician's office. All of the Justices agreed that the conduct that gave rise to the action violated the Constitution only if a Fourth Amendment precedent, *Steagald v. United States*, were to apply retroactively. The plurality allowed the action to proceed against the county because a state statute specifically authorized the county prosecutor to advise the local police on such matters as the lawfulness of entry.

The "final policymaker" requirement appears in response to dissenting Justice Powell's charge in *Pembaur* that the plurality had re-opened the door to respondeat superior. Justice Powell

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159 475 U.S. 469 (1986).


161 See Pembaur, 475 U.S. at 484-85.

162 See id. at 499 (Powell, J., dissenting). Within two years, Brennan attempted to disown, at least in part, the same requirement of finality. See City of St. Louis v.
argues convincingly that the off-hand, hasty decision of a harried assistant prosecutor, made during a telephone conversation while a horde of municipal police officers, axes poised, awaited his direction, does not amount to policy, if, as the plurality insisted, "policy" requires "a deliberate choice to follow a course of action . . . made from among various alternatives." Generally speaking, Justice Powell would have found "policy" only when a legislative body adopts a rule of universal applicability.

The underlying normative question, though, is whether absent formally or deliberately adopted "policy" the entity should be exonerated. In this regard we might speculate about the result on Pembaur's facts if Powell's analysis had carried the day. Exoneration of the municipal defendant would have left no one liable to the plaintiff for what the Court agreed was a constitutional violation. The individual defendants were absolved by Harlow's version of "clearly established" qualified immunity. Because their liability was premised on applying Steagald retroactively, the legal question was not resolved at the time the capias was served. These defendants did not, therefore, act in violation of clearly established law.

Consider a modification of the facts. Suppose the precedent on which the individual defendants' liability turned had been decided before the Pembaur events and was deemed sufficiently clearly established to satisfy Harlow and Anderson. Further suppose that there could still be no actionable entity policy as defined by Justice Powell, because no positive legislation or government pronouncement gave the prosecutor final authority to make policy respecting the service on Dr. Pembaur. In such a case, the Court would likely visit liability not upon the entity but upon the police officers


See Pembaur, 475 U.S. at 501 (Powell, J., dissenting).

Id. at 483 (plurality opinion).

See id. at 499-500 (Powell, J., dissenting).

See id. at 475 (plurality opinion). Whether the prosecutor, in contrast to the subordinate officers, would have been eligible for absolute immunity per Imbler v. Pachtman, 424 U.S. 409 (1976), turns on whether his advice concerning the capias service would be classified as intimately related to the prosecutor's role in the judicial system. Absolute immunity does not pertain to all conduct of judges, or, by extension, prosecutors, but depends on a functional characterization of the challenged conduct. See Forrester v. White, 484 U.S. 219, 227-29 (1988). As a recent decision of the Court illustrates, however, problems exist with a functional characterization process. See Burns v. Reed, 111 S. Ct. 1934, 1942-45 (1991) (holding that the prosecutor's advice to police that they could interview a suspect under hypnosis relates more to the prosecutor's investigative role and is not sufficiently connected to the judicial process to warrant absolute immunity).
alone, even though they had followed standard departmental operating procedure by calling the assistant prosecutor for instructions. The result works at cross-purposes with one of the traditional rationales for individual immunity, fairness.

The finality requirement extends the floodgates rationale to an unacceptable extreme, virtually foreclosing the accountability of a solvent entity. In *City of St. Louis v. Praprotnik*[^168^], the Court tightened the finality qualification by demanding ratification of delegates' decisions and rationales.[^169^] After reiterating that "the authority to make municipal policy is necessarily the authority to make final policy,"[^170^] the Court explained that the act of an individual that departs from the final policymaker's instructions is not the act of the municipality. Accordingly, when a policymaker delegates policymaking responsibility, entity liability attaches only if "the authorized policymakers approve a subordinate's decision and the basis for it."[^171^]

This demand, articulated without accompanying justification, creates a prima facie burden of Herculean proportions. First, it promises to have widespread application. Few citizens deal with "final policymakers" on a day-to-day basis; they deal more commonly with subordinates whose decisions require clearance. Second, the injury is seldom related to the "basis" of, or intent behind, the subordinate's policy choice, but more often results from the implementation of an earlier choice. Finally, the requirement ignores the reality that policy is made as policy is required, often with little thought about its broader implications.

The facts of *Praprotnik* illustrate the problem. Plaintiff complained that he was laid off from city employment in violation of the First Amendment because he was a whistle-blower. He was subjected to retaliation, the jury found, for appealing an adverse

[^167^]: The Court expressed no opinion on the availability of qualified immunity for the Pembaur prosecutor. See 475 U.S. at 474 n.2. It is now apparent that the prosecutor, if not eligible for absolute immunity with respect to the giving of advice concerning service of the capias would be eligible for qualified immunity under *Harlow*. See *Burns*, 111 S. Ct. at 1944.


[^170^]: *Praprotnik*, 485 U.S. at 127 (citing *Pembaur*, 475 U.S. at 481-84).

[^171^]: Id. The Court hastened to distinguish the case where "a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker." *Id.* at 130. One wonders how often that really happens.
personnel decision that, in turn, was the result of his public opposition to a controversial decision to purchase an expensive piece of sculpture. A majority of the Court agreed that the supervisor who discharged plaintiff lacked final personnel policymaking authority. A plurality offered several interrelated reasons for its conclusion: the superior who made the decision to lay off the plaintiff possessed only discretionary implementation authority under the policymaking aegis of the city's civil service commission; the superior's control fell short of full-fledged delegated authority with respect to personnel policy; and, the possibility that an official could make a personnel decision based on a retaliatory motive was at odds with the city charter provision that specified "merit and fitness" as the sole criteria. The Court concluded that the city had "enacted no ordinance designed to retaliate against respondent" and that the only "final" decisions were those of the Civil Service Commission.

Praprotnik's requirements pay excessive respect to federalism and raise a substantial question about fairness to individual defendants. Federalism concerns were actually implicated only tangentially, since imposing liability on the entity would not have intruded on the legitimate exercise of discretionary government authority. Prohibiting retaliation for exercising First Amendment rights is not meddlesome interference and requires no wholesale reordering of personnel decisionmaking. From the fairness perspective, Praprotnik sacrifices the subordinate who in good faith inadvertently violates a clearly established constitutional right. The Court would now fasten liability on the underling alone, despite the superior's approval of the injurious decision, so long as the superior does not also approve its basis.

The Court's general insistence on entity "policy," and the finality and ratification refinements in particular, are theoretically and practically flawed. At the theoretical level, any liability imposed upon government is necessarily vicarious because governments cannot operate except through human agency. Thus the Court's search for entity advertence in the form of deliberative policy, or,

172 See id. at 150-55 (Stevens, J., dissenting).
173 See id. at 131 (O'Connor, J., plurality opinion); id. at 137 (Brennan, J., concurring in judgment, writing for three Justices).
174 See id. at 124-30.
175 Id. at 128.
176 See id. at 129 (quoting ST. LOUIS CITY CHARTER, art. XVIII, § 2(a)).
if the injury is caused by omission, in the form of the “deliberate indifference” demanded by City of Canton v. Harris, is wholly quixotic. At the practical level, from the viewpoints of both the state actor who commits and the person who suffers the violation, the actor’s authority appears complete. Pembaur’s prosecutor and Praprotnik’s perpetrator both assumed they had authority to do what they did, their relevant subordinates assumed the same, and the victims suffered as a result. If the goal is establishing a reasonable causal nexus between the entity’s liability and its subordinates’ conduct at a cost that does not overvalue the Court’s concerns about fairness, federalism, and floodgates, the Court has gone too far.

Governmental liability now lingers only in the rare case where the entity broadcasts the unconstitutionality of its practice in a formal pronouncement, acts pursuant to its legislative body or positive state legislation, manifestly endorses subordinates’ discrete decisions through delegation or ratification at the highest administrative level, or inflicts the federal injury through an omission characterized by “deliberate indifference.” Further, in all but the last situation, the question will be one of state law ripe for pretrial decision by the trial judge.

177 489 U.S. 378, 392 (1989) (remanding the question whether a city’s failure adequately to train police officers to assess a detainee’s need for medical assistance stemmed from “deliberate indifference”). See infra note 183 and accompanying text (discussing City of Canton).


183 It is an irony of City of Canton that “deliberate indifference,” the Court’s surrogate test for “policy” in a case of constitutional violation by omission, is at once the most substantively difficult for the plaintiff to survive and yet appears to be determinable at trial by a jury. In contrast to the other entity-defendant opinions that refined the Monell notion of “policy,” Justice White’s opinion in City of Canton does not assert that the “deliberate indifference” issue is a preliminary question of law for the court. Indeed, the very description of the test—whether the need for entity action was “so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent,” id. at 390—reveals that its satisfaction is a question of degree and the ultimate question inherently one of fact. See infra note 200.

Justice White alludes to the jury function respecting a related aspect of the prima facie omissions case, causation. Deciding whether more or better training would have avoided the particular plaintiff’s injury “may not be an easy task,” he writes, but “judge and jury, doing their respective jobs, will be adequate to the task.” City of Canton, 489 U.S. at 391 (adopting a strict causation standard to avoid the possibility
The debate is over the increment to respondeat superior that suffices for entity liability: What should be required beyond challengeable conduct occurring within the scope of an entity agent's employment? Justice Powell, writing separately in *Pembaur*, would apparently have limited the actionable sphere to decisions made under rules of general applicability, much like the pregnancy policy at issue in *Monell*. Justice Brennan, for the *Pembaur* plurality, pushed the liability potential somewhat further, so that even particularized decisions may represent the entity's policy if "the decisionmaker possesses final authority to establish policy with respect to the action ordered."

The Court continues to recognize this latter version of "policy," though in somewhat more grudging terms that relegate the question of policymaking authority to the vagaries of local positive law. As a result, Justice Brennan's "final policymaker" approach relieves the entity of liability for a wide range of its employees' conduct; Justice Powell's approach restricts entity liability even further to conduct commanded by sweeping entity proclamations. The important point, as Professors Kramer and Sykes have observed, is

of the city realizing "unprecedented liability"). Justice O'Connor dissented from this point, stating that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell.*" *Id.* at 399 (O'Connor, J., concurring in part and dissenting in part).

Plaintiffs' lawyers might, therefore, be tempted to frame their complaints against entities, when possible, as omission rather than action cases. Although complaints of omission are substantively more difficult to prove, requiring as they do a showing of deliberate indifference, see, e.g., Rellergert v. Cape Girardeau County, Mo., 924 F.2d 794, 797 (8th Cir. 1991) (holding that a prison guard's actions, including letting a suicidal prisoner out of his sight, did not amount to deliberate indifference); Mateyko v. Felix, 913 F.2d 744, 746 (9th Cir. 1990), amended, 924 F.2d 824, 826 (9th Cir.) (stating that municipality's failure to train long enough for use of tazer gun at best establishes mere negligence), *cert. denied*, 112 S. Ct. 65 (1991), the prospect of having a jury determine the "policy" issue may entice some plaintiffs' lawyers to brave the risks of an omissions theory. Nevertheless, a parallel procedural development may drain this theoretical prospect of practical importance. Under the Supreme Court's recent solicitous treatment of summary judgment, entities can still achieve dismissal before trial by convincing the judge that no reasonable jury could find each of the distinct, demanding elements of deliberate indifference by a preponderance of the evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (noting in a First Amendment action that, in ruling on summary judgment under Federal Rule of Civil Procedure 56, a trial judge should consider "whether a reasonable factfinder could conclude . . . the plaintiff had shown actual malice with convincing clarity").

184 *See Pembaur*, 475 U.S. at 499-502 (Powell, J., dissenting).
185 *Id.* at 481.
186 *See Praprotnik*, 485 U.S. at 124-25; *supra* text accompanying notes 172-76; *infra* note 226.
that each of these principal paths to "policy," and hence to an actionable prima facie claim, is strewn with obstacles not presented by respondeat superior.\textsuperscript{187}

At the same time, the Court has denied entity defendants any affirmative defense comparable to the immunity enjoyed by defendant individuals. In \textit{Owen v. City of Independence},\textsuperscript{188} the Court denied municipalities a good faith immunity from suit under § 1983, discounting the likelihood that entity liability would chill the vigorous execution of government function. The majority questioned whether "the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties."\textsuperscript{189} Denying entities immunity appears to recognize the protection they enjoy from the restrictions that \textit{Monell} places upon the prima facie claim; seldom will an isolated entity act meet the rigors of "policy."\textsuperscript{190} The Court has since further protected public funds by precluding punitive damages even when an entity action lies.\textsuperscript{191}

Given the gratuitous origin of \textit{Monell}'s policy requirement and its more recent rigorous fortification, it is tempting to conclude that the Court's decision in \textit{Owen} to eschew developing a common law of immunity for entity defendants is largely an empty gesture. But there is operative and symbolic significance in the Court's refusal to confer on government entity defendants an immunity parallel to the one that it would soon confer unrestrainedly on their agents.

First, of course, plaintiffs who surmount the "policy" hurdles erected by \textit{Monell} and its progeny may proceed to trial, notwithstanding the possibility that the entity's policy may have been reasonable under the circumstances. These plaintiffs include those who can point to positive local law as the source of the federally violative conduct, to a pattern of entity behavior amounting to "custom," to a decision by someone having authority to make final

\textsuperscript{187} See Kramer & Sykes, \textit{supra} note 24, at 254.
\textsuperscript{188} 445 U.S. 622 (1980).
\textsuperscript{189} Id. at 656.
\textsuperscript{190} Compare \textit{Pembaur}, 475 U.S. at 484-85 (noting that the assistant prosecutor's advice to deputies to break down door to serve capiases constituted policy in violation of Fourth Amendment when state law specifically sanctioned the advice-giving function) and \textit{City of Newport v. Fact Concerts, Inc.}, 453 U.S. 247, 253 (1981) (recognizing that a vote by the City Council itself to cancel contract, based on content of group's music, violated First Amendment) with \textit{Praprotnik}, 485 U.S. at 123 (holding that a plaintiff's allegation that he was fired because he was a whistle-blower did not constitute policy if, inter alia, city employee who discharged plaintiff did not have final policy-making authority).
\textsuperscript{191} See \textit{infra} text accompanying note 325.
policy with respect to the challenged conduct, or to circumstances so obviously posing a substantial threat to federal rights that the failure to act amounts to "deliberate indifference." Second, plaintiffs suing government entities may proceed even if the particular federal right allegedly invaded by that policy lacked prior judicial recognition, a condition that would establish immunity for an individual defendant. 192

The Owen dissenters may have overstated their case by asserting that the majority's rejection of immunity imposes "strict liability" on local government entities. 193 It is clear hyperbole, for example, to suggest that strict liability operates in a "failure to act" case like City of Canton, in which entity liability attaches only upon a showing of "deliberate indifference." The Owen dissenters, however, might accurately lament that the method used to deny entity immunity facilitates the imposition of civil liability for constitutional violations newly announced in the course of § 1983 litigation.

Entity liability under § 1983 for newly declared constitutional rights, recently reaffirmed in dictum by a plurality of the Court in American Trucking Associations, Inc. v. Smith, 194 was realized in Owen itself. The plaintiff, a former police chief, was discharged under stigmatizing circumstances and denied an opportunity publicly to clear his name. The majority agreed that a due process hearing was required and held that local governments enjoyed no § 1983 immunity. 195 The dissenters argued vehemently that the Court had not previously accorded employees at will a "name clearing" hearing after their discharge. Consequently, no protectable species of property or liberty existed, at least if there was no public disclosure of the reasons for discharge; the majority's denial

192 With respect to entity omissions, and thus the "deliberate indifference" standard, it may be difficult for the plaintiff to show that the need for entity action was "obvious" in the absence of settled law. See City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989) (citing Tennessee v. Garner, 471 U.S. 1 (1985)); Brown, supra note 24, at 656; infra note 200.

193 See Owen, 445 U.S. at 658 (Powell, J., dissenting).


of immunity thus cleared the way for the Court to declare a theretofore unsettled constitutional right.\footnote{See id. at 661-64 (Powell, J., dissenting). The durability of expanded constitutional rights declared in § 1983 actions is another matter. For example, the Owen dissenter's position on the predicate "name-clearing" claim now apparently commands a majority of the Court. See Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991) (holding insufficient to state a claim plaintiff's allegation that his former supervisor's defamatory statements violated due process by causing the loss of current and future government employment); see also infra notes 214 & 240. But Siegert's negative reprise on the type of liberty interest in reputation that Owen recognized does not alter the fact that the § 1983 entity action brought in Owen did generate new doctrine at the time.}

This same willingness of the Court to use entity liability under § 1983 as a vehicle for the creation of new procedural rights has since been visible several times. In Pembaur, for example, three circuits, including the one in which the defendants' conduct took place, had reached conclusions contrary to Steagald as of the time of the events in question.\footnote{See Pembaur, 475 U.S. at 486 (White, J., concurring); id. at 492-93 (Powell, J., dissenting); supra text accompanying note 166. The new law on which the liability of all Pembaur defendants turned was declared by Steagald, not Pembaur. Since that law had not been established when the defendants acted, the individual defendants would have been exonerated by qualified immunity even if Steagald were ultimately given retroactive effect. The Court in Pembaur nevertheless exposed the entity to liability.} Although the individual defendant prevailed on her immunity defense for want of clearly settled applicable precedent, the possibility of entity liability was affirmed, subject to the severe prima facie stricture of "policy."

This dynamic was also at work in Praprotnik, in which the plaintiff lost not because the entity was relieved of the duty to anticipate developments in constitutional law but because the Court found the alleged retaliatory conduct not fairly attributable to the entity.\footnote{In Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 283-84 (1977), the Court recognized that an untenured teacher, though dismissable for any reason, could not be dismissed for exercising his First Amendment rights. The plurality in Praprotnik, without mentioning Mount Healthy, expressed no opinion on "whether the First Amendment forbade the city to retaliate . . . for having taken advantage of the [available] grievance mechanism in 1980." Praprotnik, 485 U.S. at 127.} A suit against individual defendants, by contrast, might have been barred at the threshold because the Court had not unambiguously recognized the right of a public employee to be free from retaliation for using a state-created grievance mechanism.\footnote{See Praprotnik, 485 U.S. at 128-30.} And in City of Canton, the dissenters, explaining why they would have denied the plaintiff a remand to establish "deliberate indifference," noted disapprovingly that the predicate right of a pretrial...
In her dissent, Justice O'Connor confronted the majority with what appeared to be a legal requirement implicit in the “deliberate indifference” formulation—a reasonably well-settled constitutional right. See City of Canton v. Harris, 489 U.S. 378, 396-97 (1989) (O'Connor, J., concurring in part and dissenting in part). By the majority's own reckoning, to show that the failure to train amounts to advertent "policy" fairly attributable to the entity, a plaintiff must demonstrate that the need for such training was “obvious” from “usual and recurring situations.” Id. at 391. Only such obviousness could illustrate that “the inadequacy [of training was] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need.” Id. at 390.

Necessarily embedded in this standard, as Justice O'Connor seemed to perceive, are two issues, one factual and one legal. The factual issue is whether the situation confronting the entity was sufficiently recurrent that a constitutional harm resulting from inaction was “obvious.” Knowledge or reasonably imputable knowledge that a failure to act would obviously violate a constitutional right necessarily also assumes that the right in question had been previously determined, a distinct legal question. Justice O'Connor concluded that this legal component “ha[d] not and could not” be met in City of Canton. Id. at 394 (O'Connor, J., concurring in part and dissenting in part). This, she argued, followed from the fact that the Court had “not yet addressed the precise nature of the obligations that . . . Due Process . . . places upon the police to seek medical care for pretrial detainees who have been physically injured.” Id. at 397. A fortiori, she seemed to argue, there was no clear legal obligation with respect to the duty to prevent emotional or mental harms. There were, consequently, “no clear constitutional guideposts for the municipalities.” Id. Absent such guideposts, the need for training could not, as a matter of simple logic, be obvious.

The majority did not confront the issue directly, noting only that “we must assume that [plaintiff's] constitutional right . . . was denied by city employees—whatever the nature of that right might be.” Id. at 389 n.8. We are thus left to speculate whether the Court's opinion authorized the appellate court on remand to recognize a new constitutional duty on the part of municipalities to provide adequate training for the treatment of mentally disabled pretrial detainees. The majority's failure to dispel Justice O'Connor's suspicions on this point permits the inference that the city would face potential liability for what was at best a dimly sketched right. Some support for this conclusion may be drawn from Justice White's repeated generalized references to the denial of “medical attention” or “care,” shorn of Justice O'Connor's distinction between care for physical and psychiatric conditions. See id. at 381-82, 389 n.8. If this is the case, liability may be fastened on a municipality for a violation of rights that, at the very least, would not meet the highly particularized version of the “clearly established” requirement adumbrated in Anderson v. Creeighton, 483 U.S. 635 (1987), for the liability of individual defendants. See supra text accompanying notes 113-21.

We hasten to acknowledge that neither the disposition nor the discussion in City of Canton compels this interpretation. First, the Court did not purport to highlight the contours of the right. See City of Canton, 489 U.S. at 389 n.8. It might well be an open question on remand whether there was circuit authority supporting a right of pretrial detainees to psychiatric care and, if so, whether it was sufficiently settled that failure to furnish such care would “obviously” violate a constitutional right. Second, it is possible that the substantive rights issue is simply open. The Court's “whatever the nature of the right” statement can be read to suggest that it was simply dealing with the § 1983 issue (whether the Monell "policy" requirement could ever be satisfied...
IV. POLICIES, TECHNIQUES, AND ACCOUNTS OF THE INDIVIDUAL-ENTITY ASYMMETRY

A. Policies and Techniques

The divergence of the prima facie elements and defenses in § 1983 actions against individuals and entities may be viewed as responses by the Court to three perceived problems: unfairness to individual defendants, the opening of litigation floodgates, and threats to federalism resulting from intrusive interference with vigorous state administration of public functions. In this Part, we explore the varying techniques the Court has employed to address these issues, the resulting differentiation of the individual and entity cases, and the consequences for dynamic lawmaking.

In suits against individual defendants, the Court has responded to these concerns not only by fortifying the qualified immunity defense, but also by redefining certain predicate constitutional violations. The early common law immunity doctrine typified by cases such as Scheuer v. Rhodes demanded a fact-based inquiry that sought to unfetter discretionary administration of the law. This qualified immunity insulated individual public officials, ineligible for absolute immunity, from liability without fault through the general defense of good faith and probable cause. Scheuer identified two bases for this qualified immunity: the injustice of punishing the officer who, in good faith, exercises discretion as a requirement of his job, and the fear that the threat of liability would chill the

by entity omission) and that it did not undertake to decide whether the particular predicate right alleged was constitutionally cognizable.

Accordingly, should a reconstituted Court (Justices Souter and Thomas having replaced Justices Brennan and Marshall) address the issue squarely, it may agree with Justice O’Connor that the § 1983 predicate right must to some degree be settled before an entity may be held liable on the basis of an agent’s omission. If so, the entity in such cases would enjoy an escape from liability prima facie that in substance mirrors the immunity from damages enjoyed by individual officials via an affirmative defense. See supra notes 89-127. In this context, then, an implicit settledness requirement would render irrelevant the Owen Court’s refusal to accord entities a formal immunity. Indeed, where the predicate right is unsettled and plaintiff accordingly fails to state any claim, the entity in an omission case would be spared liability not only from damages but also from attorneys’ fees incidental to injunctive or declaratory relief. The Court in Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980), authorized attorney’s fees even where injunctive relief only is obtained.

201 The perception may be somewhat discordant with reality. See supra note 16.
203 See supra note 93; supra text accompanying notes 97-98.
officer’s execution of his duties “with the decisiveness and judgment required by the public good.”

Yet in Harlow v. Fitzgerald and again in Anderson v. Creighton, the Court jettisoned this heavily fact-laden version of common law immunity. It substituted a two-part inquiry that begins—and usually ends—with the legal question of the settledness of the specific right at issue. More rarely, if the right is deemed well-settled, the test of immunity unfolds into a factual inquiry about the reasonableness of official conduct in light of that highly particularized precedent. These decisions were avowedly designed to enable defendants to obtain early dismissals before extensive (and preferably, before any) discovery. Substantively, they broaden immunity so that it is generally no longer defeasible by evidence of subjective bad faith. What had traditionally been a jury question aimed at determining the justice of excusing the officer in light of all the circumstances she confronted in the course of discretionary decision-making is now usually a question of law for the trial judge.

At the same time, the Court was closing the floodgates on these individual actions by narrowing certain predicate constitutional protections. In Paul v. Davis, the Court announced its determination to prevent the Fourteenth Amendment from becoming “a font of tort law” through the medium of actions under § 1983. Justice Rehnquist, following a course laid out in Board of Regents of State Colleges v. Roth, constricted the circumstances under which any process was due to avoid “alter[ing] the basic relations between the States and the national govern-

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204 Scheuer, 416 U.S. at 240.
207 In at least one circuit, however, specifically pleaded and proven malice may sometimes defeat the immunity. See supra note 101.
208 See Eisenberg & Schwab, supra note 16, at 646-47 (arguing that the Paul and Parratt lines of authority had their impetus in a desire to control the flood of litigation).
210 Id. at 701.
211 408 U.S. 564, 569-79 (1972) (holding that untenured teacher had no property right and was not deprived of liberty upon nonrenewal of his contract). The significance of Roth in the development of Fourteenth Amendment jurisprudence occupies a central role in Henry P. Monaghan, Of “Liberty” and “Property,” 62 CORNELL L. REV. 405, 409 (1977) (concluding that after Roth, “life, liberty and property” no longer “embrace the full range of state conduct having serious impact upon individual interests”).
The police "posted" Davis's name as an "active shoplifter" before any adjudication on the charge. Distinguishing recent precedent, the Court explained why there is no free-floating liberty interest in freedom from state-perpetrated defamation: "no specific constitutional guarantee" safeguards reputation, and the plaintiff could cite no source of a liberty interest in state law.

Concurrently, in the Parratt line of cases that reached its apogee in Davidson v. Cannon, the Court pared down the category of liberty or property deprivations protected by due process and afforded state actors an escape from liability for otherwise actionable deprivations. In Davidson the Court found no liberty deprivation, and therefore no violation of due process, when prison officials negligently failed to protect an inmate from a beating at the hands of another inmate, despite evidence that the officials had some foreknowledge of the possibility. In a companion case, the Court explained that some degree of fault greater than negligence is prerequisite to an actionable "deprivation." Also, Parratt and Hudson v. Palmer dilute the process that is due for cognizable liberty or property deprivations whenever defendants' conduct is "random and unauthorized."

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212 Paul, 424 U.S. at 700 (quoting Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion)). For a blistering critique of Paul that remains as convincing today as when it was written, see Monaghan, supra note 211. On Justice Rehnquist's federalism concerns see Durchslag, supra note 77, at 739-41. See generally Sheldon H. Nahmod, Due Process, State Remedies, and Section 1983, 34 Kan. L. Rev. 217, 217-18 (1985) (discussing the several policies that drove the Burger Court's § 1983 jurisprudence).

213 See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (stating that "[w]here a person's good name... is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential").

214 Paul, 424 U.S. at 700; see Monaghan, supra note 211, at 408 (noting that the Court was using § 1983 to define liberty and property "to place limits on the level of federal superintendence of the operations of state and local law"). The residual reputation interest that appeared to survive Paul and Owen v. City of Independence, 445 U.S. 622 (1980), see supra text accompanying notes 188-96, was in substance repudiated in Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991) (holding that the Fourteenth Amendment provides no redress for defamation that accompanies permanent termination from government employment). See supra note 196; infra note 240.


217 See id. at 347-48.

218 See Daniels, 474 U.S. at 330-31 (noting that "mere lack of care" is not sufficient to state a claim for a state-caused "deprivation" and overruling Parratt in this respect).


220 The Court first articulated the "random and unauthorized" rationale in Parratt,
point to Justice Harlan's observation in *Monroe* that Congress apparently contemplated fuller relief under § 1983 than states might afford for the same misconduct,\footnote{221}{See Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring), overruled in part by Monell v. Department of Social Servs., 436 U.S. 658 (1978).} the Court held in *Parratt* and *Hudson* that a state remedy made available after the deprivation in such a case satisfies the obligation to provide "process." This holds even if the state remedy is more restrictive and affords lesser redress than § 1983. Thus, in this procedural due process sphere,\footnote{222}{See infra note 239.} the source of the greatest concern about floodgates, § 1983 is no longer the fully supplementary remedy that the Court contemplated in *Monroe*.

For present purposes, the salient point about these familiar developments is the technique employed by the Court to implement its stingy approach to due process in cases against individual defendants. Neither the newly shrunken circumference of procedural due process nor the "clearly established rights" approach to immunity represents a broad-spectrum restriction on the scope of § 1983 itself. Rather, each doctrinal definition reduces the plaintiff's likely success in actions asserting the violation of a particular right, such as procedural due process, or of a federal guarantee not previously articulated with clarity. This selective redefinition process has a distinct consequence for the role of § 1983 in the development of constitutional law.\footnote{223}{We have little to add to the fifteen years of criticism asserting that the Court's stingy approach to due process does not accord with the history of the Fourteenth Amendment. See, e.g., Soifer, supra note 112, at 1519, 1525-26 (decrying the Court's narrow interpretation of due process requirements in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)). We focus instead on § 1983, if only because the changes proposed could be achieved by Congress should the Court adhere to its current course.} Not only has the statute become, in the particular realm of due process, the Court's chosen instrument for crimping constitutional guarantees; more generally, the "clearly established" limitation significantly disables § 1983 individual-defendant litigation from pushing the frontiers of any protected constitutional or statutory right.\footnote{224}{There are more ominous predictions. The "clearly established" barrier may affirmatively encourage constitutionally questionable conduct. Officials know their conduct is largely free from constitutional scrutiny to the extent that no specific precedent unequivocally prohibits the conduct. See Rudovsky, supra note 34, at 54. For example, Professor Rudovsky foresees the possibility that *Anderson*'s double bite}

451 U.S. at 541. In *Hudson*, the Court extended the rationale to intentional property deprivations. See *Hudson*, 468 U.S. at 533.
By contrast, in actions against entity defendants the Court has addressed the same problems of fairness, federalism, and floodgates by altering the scope of § 1983 itself. In Monell, the Court appeared to conclude that it would be unfair to encumber entities with liability on the same terms as it had exposed individual defendants under Monroe—liability for any conduct carried out under the emblem of government authority, whether or not authorized in fact or enshrined in official policy. The Monell court addressed this issue by constricting generically the scope of § 1983 prima facie claims.225

In one respect only has the Court employed a common technique—early disposition by the court—to dampen the flow of entity and individual litigation. On the entity side, it has delegated to trial judges the function of deciding whether an entity’s official has final policymaking authority, characterizing this as a question of state law.226 Similarly, an individual official’s assertion of qualified immunity turns initially and usually ultimately on the legal question whether plaintiff’s claimed right is clearly established as a matter of federal law. In both instances liability is determinable in a way that protects the entity official’s calendar by offering a quick escape from the litigation.

The Court’s policy-impelled changes on the entity side reflect more than modest tinkering with particular species of claims such as due process. Rather, in § 1983 entity litigation the Court has placed wholesale limitations on the nature of claims assertable against the government. The original architect of these restrictions, Justice Brennan, would only two years later consider it “uniquely

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226 This was a major point of contention in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). Justice O’Connor, for the plurality, opined that federal courts are “not . . . justified in assuming that municipal policymaking authority lies somewhere other than where the applicable [state or local] law purports to put it.” Id. at 126. In contrast, Justice Brennan would have treated the issue as a question of fact; he argued unsuccessfully that denominating the issue as one of state law permitted the municipalities to escape liability “for the acts of all but a small minority of actual city policymakers” named in a statute. Id. at 132 (Brennan, J., concurring). Justice O’Connor’s position has carried the day. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737-38 (1989) (remanding for a determination whether a school superintendent, who approved an allegedly racially motivated reassignment, had “final policymaking authority” over employee transfers under state law).
a misstep” if the government entity, “to which all in our society look for the . . . setting of worthy norms and goals for social conduct,” was to enjoy a qualified immunity to backstop the stringent prima facie case set out in Monell.227 In effect, the majority he spoke for in Owen found that Monell already provided an adequate response to fears about fairness. “Policy” ensures that the government can be held responsible only for conduct unequivocally attributable to its advertent decisions.

Nevertheless, the decision in Owen to deny entities an immunity defense parallel to that enjoyed by their agents preserves the theoretical possibility that § 1983 entity cases may continue to serve as a crucible for the development of federal constitutional law, provided the plaintiff can thread the policy needle of Monell and its progeny.228 The significance of this decision was appreciated at


228 This statement may be somewhat overbroad. Two situations come to mind in which the entity, like the individual defendant, may enjoy some protection when the predicate right it allegedly violated is not well settled. First, the entity may enjoy immunity from damages when the decision declaring its liability breaks sharply with past precedent. See infra note 233 (discussing the potential impact of American Trucking Ass'ns, Inc. v. Smith, 110 S. Ct. 2323 (1990), and Dennis v. Higgins, 111 S. Ct. 865 (1991), on entity immunity). Second, when the plaintiff asserts that entity "policy" takes the form of an omission, plaintiff is required to demonstrate that it should have been obvious to the entity's agent that failure to act would violate a constitutional right. That, in turn, implies that the right in question must have been somewhat settled before the events at issue in the action. See supra note 200 (discussing City of Canton v. Harris, 489 U.S. 378 (1989)). If the Court comes to recognize this legal requirement explicitly, see supra note 200, entities in these omission cases would escape all liability for newly declared rights. They would be better off than similarly situated individual defendants, who are shielded only from damages liability under the “clearly established” version of qualified immunity.

Nevertheless, in other contexts the entity action remains the primary vehicle for creating new constitutional rights. An instructive example of this generative potential is glimpsed by comparing Owen, an entity action, with Paul v. Davis, 424 U.S. 693 (1976), an action against an individual. In Owen, the majority strained the record to find that the defamatory statements about the plaintiff police chief were made in the course of his discharge from public employment and thus implicated a liberty interest protected by due process under the decision in Wisconsin v. Constantineau, 400 U.S. 433 (1971), see supra note 213, and Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), see supra text accompanying note 211. See Owen, 445 U.S. at 633-34 n.13. In Paul, by contrast, the Court labored to avoid finding a predicate liberty interest by conjuring up the thinnest imaginable distinctions to distinguish Constantineau, 400 U.S. 433. See Monaghan, supra note 211, at 423-29; David L. Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 HARV. L. REV. 293, 324-28 (1976). It may not be a coincidence that in Owen, unlike Paul, the defendant was an entity. Cf. infra note 245 (comparing City of Canton with Danese v. Asman, 875 F.2d
RESHAPING SECTION 1983'S ASYMMETRY

the time. Inveighing against what they foresaw as "strict liability on municipalities for constitutional violations," the dissenters accused the majority of ignoring "the vast weight of common-law precedent as well as the current state law of municipal immunity."229 The result, according to the dissent, was that the government entity, unlike its agent, would be liable if it "incorrectly—though reasonably and in good faith—forecasts the course of constitutional law."230

Justice Brennan, for the majority, acknowledged this consequence directly. First, he foresaw the possibility that by compounding the qualified immunity for individuals with a "good faith" municipal immunity the Court might "freez[e]" constitutional development.231 Second, he declared that if officials prove unable to forecast some doctrinal development, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."232 A plurality of the Court, in dictum, recently reiterated its understanding that Owen allows for doctrinal development in actions against entities.233

1239 (6th Cir. 1989), cert. denied, 110 S. Ct. 1473 (1990)).

229 Owen, 445 U.S. at 658 (Powell, J., dissenting). As we have pointed out, beginning only two years later with Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court superseded the common law approach to individual immunity with its more expansive version driven by concerns for calendar congestion and effective government administration. See supra text accompanying notes 107-21.

230 Owen, 445 U.S. at 668 (Powell, J., dissenting).

231 See id. at 651 n.33.

232 Id. at 655.

233 See American Trucking Ass'ns, Inc. v. Smith, 110 S. Ct. 2323, 2334 (1990) (O'Connor, J., plurality opinion). Smith and Dennis v. Higgins, 111 S. Ct. 865 (1991), brought nominally against individuals, should be regarded functionally as actions against entities, as we explain later in this footnote. As such these decisions warrant some ink.

Although the Smith Court expressly endorsed Owen and its understanding that suits against municipalities will continue to stage the recognition of at least some new constitutional guarantees, skeptics might see Smith and Dennis as spade work for overruling or qualifying Owen's rejection of entity immunity. On balance, we believe that some cutting back has already occurred but that the extent of the cut back will vary depending upon whether the entity sued is a state or one of its political subdivisions.

Smith reviewed a dormant commerce clause challenge to Arkansas's flat rate highway equalization tax. The Arkansas Supreme Court initially affirmed the trial court's ruling upholding application of the tax to nonresident motorists. During the pendency of the petitioner's appeal to the United States Supreme Court, the Court struck down a similar statute in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987), in a decision that the Smith Court described as "a clear break from"
established precedent. *Smith*, 110 S. Ct. at 2334. The *Smith* Court thereafter vacated the judgment of the Arkansas Supreme Court and remanded. The Arkansas Supreme Court subsequently held the state act unconstitutional, but concluded that, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Scheiner* could not be applied retroactively. Accordingly, petitioners were denied a full refund. They appealed again to the United States Supreme Court.

The Supreme Court upheld the Arkansas high court in pertinent part. First, the Court held that, in light of the pre-*Scheiner* precedent that reasonably supported the state’s belief that its tax was permissible, “the purpose of the Commerce Clause does not dictate retroactive application of *Scheiner*,” since retroactive application would not deter future state efforts to erect trade barriers. *Smith*, 110 S. Ct. at 2332. The Court also found that equitable considerations, which constitute one prong of the retroactivity analysis required by *Chevron Oil*, supported the decision to forego retroactive application. The state legislature had relied in good faith on past precedent in passing the tax and “had good reason” to believe it was constitutional. *Id.* at 2333.

In discussing whether the equities favored retroactive application, the Court addressed petitioner’s analogy to *Owen*, namely, that an entity could not “disavow liability for the injury it has begotten.” *Id.* at 2334 (quoting *Owen*, 445 U.S. at 651). Petitioner argued that the state was not entitled to what was in effect a good faith immunity. The Court, however, distinguished *Owen*. Unlike the constitutional issue at bar, Justice O’Connor stated, *Owen* involved a determination of congressional intent, and thus “provide[d] little guidance for determining the fairest way to apply our own decisions.” *Id.* The Court then suggested that the policy issues underlying *Owen* were distinct. *Owen* determined that a “special [municipal] immunity for violations of constitutional rights would not best serve the goals of § 1983, even if those rights had not been clearly established when the violation occurred.” *Id.* *Owen*, the plurality explained, rested in some measure on a deterrence rationale; entity liability would cause the municipal official to “consider whether his decision comports with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury.” *Id.* (quoting *Owen*, 445 U.S. at 656). By contrast, Justice O’Connor wrote, when Supreme Court constitutional determinations “clearly break[] with precedent . . . which . . . public officials could not anticipate,” a different analysis applies. *Id.* The Court’s refusal to require the state to provide a full refund had the effect of conferring a partial, one-time immunity from damages only, and then only in a “clearly breaks” context.

It cannot be doubted that *Smith*’s express rhetorical support for *Owen* is offset in some measure by the questionable nature of the plurality’s distinctions. See Peter W. Low & John C. Jeffries, Jr., Civil Rights Actions 6-7 (Supp. 1991) (asking whether the plurality is sub silentio creating an exception to *Owen*, and if so, how such an exception differs from affording municipal government a good faith immunity). The claim that *Owen*-generated damages might deter a government official from violating the law, whereas the prospect of a state tax refund would not, is highly debatable. A break with clear precedent would a priori be no more foreseeable in one case than in the other. The Court’s distinction between sources of violation—statutory versus constitutional—is not wholly convincing either. Section 1983 individual defendant immunity doctrine, after all, has sometimes been transported as a formal matter from the realm of actions arising directly under the Constitution. See supra note 107.

*Smith* could therefore be viewed as providing an opening for subsequent reappraisal of *Owen* on the good faith immunity issue. One could contend that the Court is preparing *Owen* for reversal on the good faith immunity issue, and will do
so by citing to Smith as a basis for reconsideration. For example, since Owen itself was a § 1983 case that did not "clearly break" with, but merely took a step beyond, existing precedent, see supra note 228, the Court has left itself room to invoke a de facto Smith immunity in another § 1983 entity case where the decisional rule contended for by the plaintiff does chart virgin territory. That this possibility is not far-fetched is suggested by the Court's adoption of standards friendly to non-retroactive application of new rules in a cognate civil rights context, federal habeas corpus law. There the Court precludes retroactive application of "new constitutional rules of criminal procedure," with new rules broadly defined to include those that merely break new ground. Teague v. Lane, 489 U.S. 288, 301, 310 (1989). The Court has since applied this approach to validate state court interpretations that failed to forecast constitutional developments, provided that they represented "reasonable, good-faith interpretations of existing precedents." Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990) (refusing to apply a "new rule" barring certain police-initiated interrogations to the defendant's murder conviction).

The general trend in Supreme Court decisions thus supports the conclusion that under certain circumstances a partial exception to Owen is in the offing. Indeed, the Court's even more recent decision in Dennis, by finding alleged state tax violations of the Commerce Clause actionable under § 1983, suggests that in practical effect an even broader immunity than Smith affords is already accomplished by a distinct § 1983 doctrinal development. Before Dennis, such actions were sui generis; it was unclear what source of law spawned them. See, e.g., McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 110 S. Ct. 2238, 2257 n.34 (1990) (suggesting that authority for the action arose because Florida had waived sovereign immunity in its own courts); Ward v. Board of County Comm'rs, 253 U.S. 17, 24 (1920) (explaining that "the law, independent of any statute," provided the substantive grounds for the litigation (quoting Marsh v. Fulton County, 77 U.S. (10 Wall.) 676, 684 (1870))). After Dennis, § 1983 limitations may apply and § 1983 of its own force may turn out to absolve states of all liability for damages.

Complete absolution is a potential consequence of Will v. Michigan Department of State Police, 491 U.S. 58 (1989), which held that the state is not a "person" for purposes of § 1983. See infra text accompanying notes 301-05. As applied to states eo nomine, Smith's limited, partial immunity pales by comparison to Will; the latter shields the state as a named defendant from all § 1983 liability, even where there is no clear break with existing precedent. By analogy to Eleventh Amendment jurisprudence, however, Will continued the fiction that permits prospective relief in suits against individual state officials sued in their official capacities for violations otherwise chargeable to their employers. See Will, 491 U.S. at 71 n.10. See generally Ex parte Young, 209 U.S. 125 (1908); infra notes 292 & 304. Thus in cases like Smith, brought against state officials in their official capacities, Will (now made applicable to such cases via § 1983 and Dennis) would preclude precisely what Smith precluded: retroactive relief alone. But it would do so even where the state officials could not reasonably have anticipated the unconstitutionality of their tax.

In principle, tax refund claims brought against state officials are functionally equivalent to actions against the state, regardless of the party formally named, because recovery could ultimately come from state coffers. Cf. Edelman v. Jordan, 415 U.S. 651, 663 (noting that "even though a State is not named a party, . . . the suit may [if the state pays] nonetheless be barred by the Eleventh Amendment"). (Of some potential import is the fact that Edelman relied on Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); there the Court held that a non-resident's challenge to a state income tax could not be maintained in federal court, regardless of the identity of the party formally named.) Thus Will—with its analogy
Ironically, it is in a procedural due process case after *Parratt*, *Hudson*, and *Davidson*, the least fruitful category of predicate constitutional claim, that the Court appears to hold out the possibility that the individual action, too, may facilitate substantive to Eleventh Amendment learning like *Edelman*—would limit the § 1983 plaintiff, in state or federal court, to injunctive relief if refunds are deemed a "retroactive" remedy.

Whether tax refunds are always precluded as "retroactive" is undecided. *But cf. Ford Motor Co.*, 323 U.S. 459. In *Edelman*, the Court had refused to permit federal welfare beneficiaries, suing in federal court, to recover benefits wrongfully withheld by state officials. The Court held that under the aegis of the Eleventh Amendment and *Ex parte Young*, a federal court could award only prospective relief against a state employee sued in her official capacity, and that the relief sought—"equitable restitution" of benefits—partook of non-recoverable, "retroactive damages." *Edelman*, 415 U.S. 666-69.

To avoid the retroactive label, one could perhaps distinguish the payment coerced from taxpayers' pockets, as in *Smith*, from the statutory benefits withheld through wrongful computation in *Edelman*. But it is not altogether clear why taxpayers injured by state laws are more deserving of full recovery than impecunious plaintiffs for whom Congress has created an entitlement. The equities are especially obscure because the underlying substantive constitutional law gives states special options to remedy Commerce Clause taxing violations. Subject to very niggardly due process protections, they may decline to refund entirely and instead eliminate the discriminatory trade barrier by increasing the taxes of those who benefitted under the invalid act. *See McKesson*, 110 S. Ct. at 2252. Thus the ultimate violation in the Commerce Clause context is not reflected in taxes wrongfully levied, but simply in the inequality of the taxing mechanism. By contrast, the problem in the entitlement context is the loss of funds that can never be recovered. The taxpayer, in short, may stand on shakier equitable footing than the welfare recipient.

The situation is somewhat different with respect to a tax refund (or other) claim against a state political subdivision, provided it does not look to state funds to bankroll an adverse judgment. Unlike the State itself, the subdivision is a "person" suable under § 1983. But where a decision against the subdivision sharply breaks with existing precedent, *Smith* may accord that entity a remedial exception to the *Owen* holding that entities lack immunity grounded in good faith. Still, there is substantial reason to conclude that *Owen* is not being set up for wholesale overruling outside the clear break context. The *Smith* plurality opinion falls in line with a conservative Court's traditional deference to state choices. An about-face, comprehensive overruling of *Owen* in an opinion that would also necessarily be supported by conservative justices and premised on *Smith*, itself partly justified by features that distinguished it from a reaffirmed *Owen*, is probably too unseemly jurisprudentially for the Court to contemplate.

In any event, the clear break limitation of *Smith* is unlikely to portend an end to incremental, as distinct from dramatic, doctrinal development in actions against state subdivisions. In the tax context, *Scheiner* and *Smith* generated new constitutional law, a limitation on state taxing authority. Moreover, the one-time immunity created by *Smith* was, on its facts, limited to state (and not municipal) taxes received before the announcement of *Scheiner*. *See Smith*, 110 S. Ct. at 2335-36. Because the tax continues to toll even if full refunds are unavailable under § 1983, ample incentive remains for local taxpayers to bring suit for injunctive relief and attorneys' fees.

*See supra* notes 215-22 and accompanying text.
doctrinal evolution. Nevertheless, a closer look at this decision, Zinermon v. Burch, reveals the likelihood to be minimal.

Burch attempted to have himself "voluntarily" admitted to a state mental hospital at a time he claimed he was disoriented and psychologically incompetent to give informed consent. He alleged that the staff knew or should have known that he was incompetent and, by admitting him nevertheless, wilfully or recklessly disregarded his rights to due process. The Eleventh Circuit reversed the district court's ruling that because the staff's conduct was random and unauthorized Burch had failed to state a claim under Parratt and Hudson. As framed by the Supreme Court majority, the issue was whether Florida, in delegating to mid-level state hospital employees the voluntary admission decision, owed admittees some pre-admission process to determine whether consent was in fact informed.

A five-member Supreme Court majority affirmed, distinguishing Parratt and Hudson on the ground that the defendants' conduct was something other than "random and unauthorized." For one thing, the Court found that because the moment of deprivation and the fact that some prospective patients might lack capacity were predictable, the State, before taking Burch's liberty, could have accorded him a pre-deprivation hearing that would have guarded against an admission in violation of the statute. Moreover, the conduct could not be considered "unauthorized" in the Parratt/Hudson sense because the state had delegated authority to the hospital staff to make admissions decisions, without prescribing any particular procedure to determine the competence to consent requisite to a voluntary admission.

236 See id. at 977-78, 987. Florida had a complex series of procedures for use in determining the propriety of involuntary psychiatric admissions. See id. at 981-82. Those procedures, however, did not cover the case in which a person attempted to admit himself as a voluntary patient when there was reason to doubt his capacity to give informed consent. The statute governing voluntary admissions required "express and informed consent" to be given "voluntarily [and] in writing," but provided no process for determining voluntariness. Id. at 982 (quoting Fla. Stat. ch. 394.465(1)(a), 394.455(22) (1990)).
237 See id. at 987-88. Among the important aspects of the decision was the majority's statement that liberty as well as property interests are subject to the Parratt/Hudson doctrine. See id. at 986-87.
238 See id. at 990. Justice Blackmun articulated the distinction somewhat differently and perhaps less clearly. He stated that Parratt does not apply because (a) the state could foresee that mental patients might lack capacity, (b) providing pre-deprivation process was not literally impossible in view of the established procedure
Zinermon thus renders Parratt and Hudson inapplicable when identified government personnel with evident statutory discretion to provide appropriate process can feasibly provide a pre-deprivation hearing that will reduce the risk of an erroneous deprivation of liberty.\footnote{289} By declaring new doctrine, Zinermon appears to refute the argument that the state of constitutional law is frozen in § 1983 damage actions against individual defendants. On remand, Burch himself may well lose out to a qualified immunity defense, for a newly defined right to process will not likely be deemed "settled." But in any subsequent action, that law will indeed be settled, and local governments are now on notice that in this context they must adopt appropriate procedures to determine voluntariness.

On examination, however, Zinermon's law-evolution potential looks chimerical. The practical lesson of the case may simply be that defendants should press for a decision on the affirmative defense of immunity rather than move to dismiss the complaint for legal insufficiency under Parratt.\footnote{240} Had defense counsel in for determining involuntary admissions, and (c) the conduct was not "unauthorized," since the State had delegated admissions decisions to the hospital staff. See id. at 989-90. Points (a) and (c) seem to be reasons that support point (b), rather than independent criteria that distinguish Parratt and Hudson.\footnote{289} The case has cleared up several questions concerning the reach of the Parratt doctrine. We can now conclude with confidence that the holdings of Parratt and Hudson regarding "random and unauthorized" avoidance of liability are limited to procedural due process claims involving situations in which pre-deprivation process is literally impossible. The Court has assuaged the fear, identified by Henry P. Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979, 985-86 (1986), that Parratt also restricted substantive due process claims. The Zinermon condition that the process plaintiff demands must have "value," see Zinermon, 110 S. Ct. at 988, would not even be an issue if the subject were fundamental, substantive rights. This conclusion is fortified by the lengths to which the majority and dissent went to place Parratt squarely within the procedural due process context created by Mathews v. Eldridge, 424 U.S. 319 (1976). See Zinermon, 110 S. Ct. at 984-86; id. at 995-96 (O'Connor, J., dissenting). The Court thus folded Parratt into a line of cases bracketed by Zinermon and Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Parratt does not control when, as in Zinermon, the state fails to provide pre-deprivation process that it readily could have provided or, as in Logan, when the state formally creates an established procedure but as a practical matter makes it unavailable. See generally Laura Oren, Signing Into Heaven: Zinermon v. Burch, Federal Rights, and State Remedies Thirty Years After Monroe v. Pape, 40 Emory L.J. 1, 67 (1991) (concluding that Parratt is now a narrow doctrine).\footnote{240} See Danese v. Asman, 875 F.2d 1239, 1240 (6th Cir. 1989), cert. denied, 110 S. Ct. 1473 (1990). The plaintiff in Danese might well have succeeded with a procedural due process claim that could have skirted Parratt via Zinermon had the defendant successfully pressed the qualified immunity defense first. See id. at 1242-44.

As a purely procedural matter, defendants are entitled to move separately on the defenses of legal insufficiency and qualified immunity, provided both defenses are
properly preserved in the responsive pleading. See FED. R. CIV. P. 12(b), 8(c), 7(b). The former defense attacks the legal adequacy of the plaintiff's claim and is resolved solely by reference to the allegations of the complaint, while the latter asserts an affirmative defense, which, if legally sufficient and factually supported, avoids liability for damages even if the elements of the claim are adequately pleaded and proven. Given the ease of deciding the legal insufficiency issue, and its ripeness at the threshold of a lawsuit, a defendant would ordinarily make that motion first.

Substantively, however, the current version of qualified immunity subsumes the question of legal sufficiency that is normally raised by a motion to dismiss for failure to state a claim. While it remains unclear how settled a right must be to meet the Court's requirements, a determination that a particular right is well settled must mean at a minimum that the right has been recognized by a court of some dignity and does state a legally sufficient claim. Rejection of the qualified immunity defense on its first, legal prong would thus doom a follow-up motion to dismiss for failure to state a claim. By the same token, however, a plaintiff's claim, although adequate to survive a motion to dismiss for legal insufficiency, may not implicate a right that is settled to the degree necessary to avoid the defense of qualified immunity. From an efficiency standpoint the individual defendant is therefore better advised to move on qualified immunity at the outset, even though the ultimate denial of that motion should spell the defeat of the legal insufficiency defense as well.

Efficiency aside, the tactical approach Zinermon counsels was made problematic by the Court in Siegert v. Gilley, 111 S. Ct. 1789 (1991). Plaintiff, a former government psychiatrist, brought a defamation action, presumably under what he perceived to be the residue of Paul v. Davis, 424 U.S. 693 (1976). The Court of Appeals for the District of Columbia assumed, without deciding, that plaintiff stated a claim under Paul, but remanded the case with instructions to dismiss because, among other things, the right was not clearly established. See Siegert v. Gilley, 895 F.2d 797, 803 (D.C. Cir. 1990), aff'd, 111 S. Ct. 1789 (1991).

The Supreme Court majority affirmed, but rejected the circuit court's analysis. Concluding that "[a] necessary concomitant to the determination of whether the constitutional right asserted . . . is 'clearly established' . . . is the determination of whether [there is] . . . a constitutional right at all," Siegert, 111 S. Ct. at 1793, the Court found no such right, despite Paul. See supra note 228. It also instructed lower courts to decide the "rights" or legal sufficiency challenge before turning to the defense of immunity. See Siegert, 111 S. Ct. at 1794. This approach, by scrutinizing a component of the defense that is identical to the "rights" element of a § 1983 plaintiff's prima facie claim, has the potential to absolve the defendant from any liability, including prospective relief and attorneys' fees; by contrast, the qualified immunity defense as such relieves the individual defendant from liability for damages alone. In this way the Siegert prescription for sequencing these issues promises some government officials even greater freedom from the expense and time demands of litigation than they enjoyed when trial courts turned immediately to the question whether an assumed right was clearly established. See id. at 1793.

The approach suggested by the Court creates some doubt about our assertion that § 1983 damage actions against individuals are dead-ends for the development of new constitutional rights. A trial court, directed to decide whether there is a right before determining whether that right is clearly established, may generate precedent declaring new rights. In many cases, of course, the trial court will find for the defendant and no new rights will arise. There is a possibility, however, that by resolving the legal insufficiency claim first, the trial court will find for the plaintiff. In that event, the Siegert marching orders for trial courts—do not decide whether a right was well settled at the time the defendant acted until you have first decided that
Zinermon followed that tack, the Parratt question would probably never have been presented. The right to newly declared procedural protections could not have been settled at the time Burch was admitted. If this is correct, damage actions against entities remain the only sure vehicle for the creation of new constitutional protections, assuming that counsel for individual defendants are alert to litigate the qualified immunity defense initially. This conclusion is buttressed by the extreme latitude appellate courts

such a right is currently cognizable—may work to the disadvantage of future defendants. That is, even if, in the rights-deciding case (Case 1), the qualified immunity defense ultimately prevails, the right may have been sufficiently declared there to be deemed clearly established, and thus defeat a claim of immunity in a subsequent action (Case 2).

Still, the post-Siegert use of § 1983 individual damage actions to create such rights may prove limited. First, if Case 1 fails to move beyond the district court, Case 2 may not accord a great deal of weight to the part of the Case 1 opinion that declares a right. Cf. Davis v. Scherer, 468 U.S. 183, 192 (1984) (citing circuit authority as evidencing precedent that is “clearly established”). Second, even an appellate opinion in Case 1 may have little precedential value if, after declaring a right, it nevertheless finds the defendant qualifiedly immune because the right was not well established. A court in Case 2 may reason that the Case 1 court did not need to consider the "rights" issue carefully because declaration of the right had no effect on the Case 1 result. Cf. RESTATMENT (SECOND) OF JUDGMENTS §§ 17(3), 27, 28 (1982) (stating that issue preclusion is appropriate only when determination of the common issue was essential to the earlier judgment).

241 See P.C. v. McLaughlin, 913 F.2d 1033, 1039-41 (2d Cir. 1990) (determining that the issue of whether officials complied with federally incorporated state statutory requirements for admitting plaintiff to residential school for retarded individuals, and thus with requirements of the Education of the Handicapped Act of 1975, 20 U.S.C. §§ 1401, 1415(b)(1)(C), (b)(2) (1988), was pretermitted by a grant of qualified immunity through the application of Harlow).

242 A defendant's attorney, after Siegert, may no longer be able (or want) to follow our post-Zinermon advice that they press for qualified immunity before moving to dismiss for failure to allege the violation of a federal right. See supra note 240. Instructed by Siegert, trial courts may refuse to acquiesce in this tactic. See supra note 240. Moreover, counsel may conclude that the instant defendant (unlike potential future defendants, see supra note 240) is better served by litigating the "rights" issue first. After all, a determination that there is no predicate right avoids all liability, not just liability for damages. In this way a threshold determination of the rights issue, if it is favorable to defendant, fully implements the Supreme Court's recent resolve to provide a complete immunity from suit, not just from liability. See Siegert, 111 S. Ct. at 1793-94 (concluding that qualified immunity creates "an immunity from suit rather than a mere defense to liability" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))). Under previous practice, trial courts usually ruled first on the "clearly established" question: A defendant who prevailed on that question, and hence on qualified immunity, would be relieved of liability for damages only. Cf. Pulliam v. Allen, 466 U.S. 522 (1984) (holding that even absolute judicial immunity bars only damages, not injunctive relief or attorney's fees incident thereto). On the possibilities and perils of using suits for injunctive relief against individuals as a vehicle for creating new procedural rights, see supra note 18.
have granted the *Harlow*/Anderson immunity defense, by insisting on its resolution before discovery, by permitting immediate appeals from the denial of qualified immunity motions, and by applying zealously the "clearly established" concept. In any event, even assuming that it has some claim-expansion potential, *Zinermon* may ultimately be limited to situations where the discretion of the entity's actors to design pre-deprivation procedures is "uncircumscribed" and results from "statutory oversight."  

**B. Flawed Accounts of the Doctrinal Divergence**

Attempts to explain the rigorous new prima facie entity case and the capacious affirmative defense enjoyed by individual defendants have been notably unsatisfactory. Perhaps only a generalized hostility to the underlying constitutional claims unifies the Court's recent decisions:

Low and Jeffries have suggested, for example, that the latest formulations of *Monell* "policy" in cases such as *Praprotnik* and *City of Canton* confer a de facto qualified immunity on entities, and hence wreak the revenge of the *Owen* dissenters. If this were correct, the current asymmetry in form would effect a symmetry in substance, with the common feature of immunity constituting the bridge between the two types of actions. The suggestion fails, however, because the *Monell* "policy" stricture, even as rigidly applied, is still only an effort to identify liability-conducive conduct that the factfinder can fairly impute to the entity; it does not

\[\text{\cite{243} See supra note 119 (citing cases).}\]
\[\text{\cite{244} See supra notes 117, 119 \& 123.}\]
\[\text{\cite{245} See Auriemma v. Rice, 895 F.2d 338, 340, 344 (7th Cir.), aff'd in part and rev'd in part, 910 F.2d 1449 (7th Cir. 1990), cert. denied, 111 S. Ct. 2796 (1991) (holding that police superintendent qualifies for immunity when prior decisions failed to establish clearly that he could not reasonably have relied on race as a factor in reorganizing his department, even though he did not purport to be implementing an affirmative action plan when he promoted black officers and demoted only white officers); Danese v. Asman, 875 F.2d 1239, 1244 (6th Cir. 1989), cert. denied, 110 S. Ct. 1473 (1990) (stating that a pretrial detainee's generalized right to medical care does not clearly establish a correlative right to be screened to determine if such care is needed). The divergence of approaches to § 1983 entity and individual actions becomes evident upon comparison of *Danese* and *City of Canton*. *Danese* provides immunity although the right is arguably clearly established, but in *City of Canton*, an entity action, a majority refused to foreclose an almost identical claim despite its novelty. See supra note 200 and accompanying text.}\]
\[\text{\cite{246} See Easter House v. Felder, 910 F.2d 1387, 1401 (7th Cir. 1990) (en banc), cert. denied, 111 S. Ct. 783 (1991).}\]
\[\text{\cite{247} See LOW \& JEFFRIES, supra note 233, at 99.}\]
categorically preclude novel federal claims. If the plaintiff dem-
strates "policy" or its "deliberate indifference" surrogate,248 the
entity may face liability for unsettled federal constitutional or
statutory violations, despite its agents' reasonable behavior. For
individual defendants, either of these characteristics—the settled
nature of the predicate right or the objective reasonableness of the
state actor's conduct—would provide immunity. There is no
symmetry in substance.

Nor can one explain the Parratt doctrine as the individual
defendant's counterpart to the Monell requirement of a policy or
custom.249 The casuistic logic of Parratt, in which the state provi-
sion of remedial process after the deprivation of constitutionally
protected liberty or property transforms a denial of due process
into a denial with due process,250 pertains only to constitutional
violations that turn on the denial of some sort of process.251
Indeed, the Parratt opinion itself stressed that the reason certain
forms of post-deprivation process sanitized apparently unlawful
conduct was to prevent the Fourteenth Amendment, and that
amendment only, from becoming the dreaded "'font of tort
law.'"252

In support of its rationale, the Court relied on Paul v. Da-
vis,253 in which the same fear had driven it to limit the scope of
constitutionally protected liberty to deprivations that included the
loss of a state-defined right. Justice Rehnquist, also the author of
Parratt, stated explicitly that the holding did not affect enforcement
of interests that have their origin directly in the Bill of Rights. On
the authority of Monroe, Rehnquist wrote that those interests may be
redressed under § 1983 "independently of state law."254 Conse-
quently, and especially in light of Zinermon,255 it is apparent that Parratt
leaves unaffected the Monroe holding that individual

248 See supra text accompanying note 192.
249 See Susan Bandes, Monell, Parratt, Daniels, and Davidson: Distinguishing a
Custom or Policy from a Random, Unauthorized Act, 72 IOWA L. REV. 101 (1986).
250 See Monaghan, supra note 239, at 985-86.
251 See supra text accompanying notes 235-39 (discussing Zinermon v. Burch, 110
S. Ct. 975 (1990), which strongly suggests that Parratt now will be confined to
procedural due process claims alone, as a special application of the formulation of
Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976)).
254 Id. at 711 n.5.
255 See supra text accompanying notes 235-39.
defendants may be liable under § 1983 for violations of constitutional rights other than procedural due process. This holds even though their conduct is entirely unauthorized by their governing principal, or, even if authorized, unassimilated into the kind of entity policy that Monell requires for liability. In brief, Parratt is simply not the comprehensive barrier to claims against individuals that the evolved version of "policy" raises to claims against entities.

Expediency does not account for these developments either. The Court has, of course, noted and apparently acted upon concerns about calendar congestion. Its responses include broadening the immunities available to individual defendants, paring down the scope of constitutionally protected "property" and "liberty," restrictively redefining "deprivations," hinging the obligation to provide process on the subsequent availability of doubtfully efficacious state remedies, and, more recently, inviting early dispositions of entity suits.256 Yet if stanching the dikes motivates the Court's restrictions on § 1983 as a tool for vindicating constitutional rights, what explains the Court's permissive approach to the statute as a remedy for violations of federal legislation?257 In Maine v. Thiboutot,258 the Court, fully cognizant of the enormous resulting potential increase of § 1983 "filings in our already overburdened courts,"259 nevertheless charted a course conspicuously hospitable to the assertion of these historically tangential claims.

Consider, for instance, the fate of Justice Rehnquist's attempt to limit the utility of § 1983 as a remedy for federal statutory violations. In Pennhurst State School and Hospital v. Halderman,260 he articulated a substantive rights restriction corresponding to the Paul or Parratt restrictions in due process cases, as well as a more general limitation that would oust § 1983 whenever the underlying federal statutory entitlement provided "an exclusive remedy for violations

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256 This appears to be a natural outcome of the decision to classify "final policy-making authority" as a question of positive state law. See supra note 226 and accompanying text.
257 This trend is most recently evidenced by Wilder v. Virginia Hospital Ass'n, 110 S. Ct. 2510, 2517 (1990), Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989), and Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987). See Monaghan, supra note 21, at 247 (concluding that "section 1983's availability turns only on whether federal statutory law creates a 'primary' right, even though the federal law does not otherwise establish a 'remedial' right").
258 448 U.S. 1 (1980).
259 Id. at 23 (Powell, J., dissenting).
of its terms.” Justice White, dissenting, argued that the Court should read Thiboutot as erecting the “presumption that a federal statute creating federal rights may be enforced in a § 1983 action,” rebuttable only by an express indication in the underlying statute that Congress considered its stated remedies to be exclusive.262

In three recent decisions that presumption has apparently carried the day.263 The Court has found § 1983 available if the predicate statute provides either no remedy, as in Golden State Transit Corp., or only an administrative remedy, as in Wilder and Wright, for the kind of violation alleged. Only twice, when the entitlement statutes created their own judicial remedy, or a “carefully tailored administrative and judicial mechanism,”265 was § 1983 held displaced as a matter of congressional intent. The case law may therefore be read to hold that § 1983 is supplanted only when Congress has provided a carefully considered federal judicial remedy for the predicate statutory violation. Justice Rehnquist’s second attempted limitation, a narrow definition of the “rights secured by” a federal statute, has likewise apparently failed.267

261 Id. at 28 (quoting Thiboutot, 448 U.S. at 22 n.11 (Powell, J., dissenting)). Justice Powell found this standard met in Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1, 13 (1981) (finding that Congress had provided “unusually elaborate [judicial] enforcement provisions” in lieu of § 1983).

262 Pennhurst I, 451 U.S. at 51 (White, J., dissenting in part); cf. Bush v. Lucas, 462 U.S. 367, 390 (1983) (Marshall, J., concurring in unanimous decision) (precluding Bivens recovery for a government employee if Congress provided a comprehensive administrative and judicial remedy that was “substantially as effective as a damages action”).

263 See supra note 257 (citing cases).

264 See Middlesex, 453 U.S. 1.


266 Wilder provided support for this qualification by rejecting the argument that the availability of state judicial review of Virginia’s implementation of the Medicaid amendment was relevant to the availability of relief under § 1983. See Wilder v. Virginia Hosp. Ass’n, 110 S. Ct. 2510, 2525 n.20 (1990).

267 Justice Kennedy made the argument in Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989), but was joined only by Chief Justice Rehnquist and Justice O’Connor. See id. at 114-19 (Kennedy, J., dissenting). The Court rejected the argument again in its 1990 term. See Wilder, 110 S. Ct. at 2517-23 (determining that the statute imposed a “binding obligation” on the state that would be rendered “essentially meaningless” without judicial enforcement); cf. Dennis v. Higgins, 111 S.
Why would the Court assiduously nick away at § 1983 jurisdiction in its primary sphere, the vindication of constitutional rights, yet open the doors to a perceived onslaught of litigation whenever any federal statute, not just a civil rights statute, is violated under color of state law? Particularly inexplicable is this embrace of federal statutory claims under § 1983 after the Court had just announced a notably more restrictive approach to implying judicial rights of action directly under federal statutes.\(^268\) The Court's open-ended receptiveness to § 1983 statutory claims is even more baffling because this result is not compelled. The historical argument is certainly respectable that the addition in 1874 of the words "and laws" to § 1983 was intended merely to parallel the subject matter jurisdiction conferred by the forerunner of 28 U.S.C. § 1343(3), a section limited to claims arising under "any law providing for equal rights."\(^269\)

We are not suggesting that the use of § 1983 to vindicate statutory entitlements is normatively undesirable or inconsistent with the Court's policy-driven changes in entity or individual actions.\(^270\) We do note, however, that whatever the logic of the Court's decision to entertain all manner of federal statutory claims

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\(^{269}\) See Maine v. Thiboutot, 448 U.S. 1, 14-19 (1980) (Powell, J., dissenting) (reviewing the historical argument); cf. John C. Jeffries, Jr., Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts, 75 VA. L. REV. 1461, 1485 n.60 (1989) (discussing the Supreme Court's efforts to except particular statutes from its general rule that § 1983 provides a private damages action for all federal statutes).

\(^{270}\) The point is that the terms under which individual and entity actions are brought in the constitutional sphere are significantly different from those in the statutory entitlement sphere. For example, because of Will v. Michigan Department of State Police, 491 U.S. 58 (1989), and the vapors of the Eleventh Amendment, see infra text accompanying notes 301-06, although the entitlement suit must take the form of an action against an individual state official, in substance it is generally a suit against a state entity charged with a violation in the implementation of a federal statute or regulation. Thus, no question of "settled law" exists for purposes of an individual defense; its settled nature exists a priori in the federal enactment. Additionally, the existence of state policy for purposes of entity liability is not a viable issue, because the policy resides in the challenged regulation.
while excluding so many based on the Constitution, it is not a logic
of expediency. Why the Court defers to Congress when legislating
new entitlements but defers to the states when enforcing constitu-
tional rights is not readily apparent. It may reflect the Court's
perception of itself as a jealous guardian of the values of federalism,
or perhaps it is nothing more than a contingent fact of the Court's
historiography.

V. SHAPING A NEW ASYMMETRY FOR ENTITY AND
INDIVIDUAL ACTIONS

A. The Drawbacks of Deterrence- and Compensation-Based Redesigns

Section 1983's dynamic history reminds us that redefining the
prima facie cases and defenses for individual and entity defendants
cannot be undertaken sensibly without first identifying the statute's
paramount objectives.\textsuperscript{271} Professors Kramer and Sykes, for exam-
ple, design a liability rule intended to "maximize the net economic
value of municipal activity," and their sole yardstick for measuring
the efficiency of alternative liability rules is deterrence.\textsuperscript{272} They
acknowledge that "economic analysis makes no allowance for purely
distributional objectives."\textsuperscript{273} Contending that "the pursuit of
compensation for its own sake should not play an important role in
the common-law jurisprudence of § 1983,"\textsuperscript{274} they note that the
legislative history contains "no talk of enacting this statute to
provide needed compensation to victims of constitutional
torts."\textsuperscript{275}

This pure deterrence premise is doubtful. The Court has
identified compensation together with deterrence as the chief
remedial goals of § 1983.\textsuperscript{276} Moreover, compensation need not
be "for its own sake." The express congressional authorization of
damages through a private right of action may well be a more
effective means to the ultimate end of deterrence than injunctive
relief alone.\textsuperscript{277}

\textsuperscript{271} See infra part V.B.
\textsuperscript{272} Kramer & Sykes, supra note 24, at 267.
\textsuperscript{273} Id. at 268.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} See infra text accompanying notes 335-37.
\textsuperscript{277} See infra note 365 and accompanying text.
From their premise that the exclusive remedial aim of the statute is deterrence, Kramer and Sykes urge a "direct correlation" between an individual defendant's qualified immunity and the liability of the entity: either both are liable, or neither is.\textsuperscript{278} This "double or nothing" stance adopts respondeat superior as the basis of entity liability, although only for "bad faith torts." Using this approach would expand the scope of entity liability well beyond the bounds of the Court's current insistence on "policy."\textsuperscript{279} Kramer and Sykes reason that fastening liability on the individual wrongdoer alone directly affects only his incentives, not those of his superiors.\textsuperscript{280} They note that because individual wrongdoers like municipal employees "are often unable to pay adverse judgments in full"\textsuperscript{281} the ultimate task is to create incentives for supervisory personnel to take steps to prevent constitutional violations by their subordinates.

Kramer and Sykes share the Supreme Court's premise that although the prospect of liability may not deter individual officials from committing "good faith torts," that same prospect might unduly chill the vigorous execution of their duties.\textsuperscript{282} They state that a "rule of individual immunity is . . . efficient for such cases

\textsuperscript{278} See Brown, supra note 24, at 680 n.351 (discussing Kramer and Sykes's treatment of the connection between official liability and municipal liability).

\textsuperscript{279} See Kramer & Sykes, supra note 24, at 284. More precisely, Kramer and Sykes believe that either of two approaches to entity liability would achieve more deterrence than the Monell "policy" rule. One is classic respondeat superior—the entity is liable whenever the federally violative conduct of the agent is carried out in the course and scope of his employment. The other imposes liability only when the agent's "bad faith" conduct was the result of negligence on the part of a superior in the administrative hierarchy. See id. at 283-85. Neither standard reaches the entity if the agent acted in good faith. In contrast, Monell reaches an entity whenever the agent implements formal policy or acts through a final policymaking official. Compare supra text accompanying note 154 (stating that Monell did not decide when official's toleration or sanctioning of agent's unauthorized federally unlawful conduct would justify extending liability beyond the agent to the entity) with supra text accompanying notes 170-71 (explaining the Court's later ruling in Praprotnik that liability extends to the entity only when the agent's conduct is approved by and carried out according to the instructions of final policymaking officials).

\textsuperscript{280} See Kramer & Sykes, supra note 24, at 284. The imposition of individual liability might, however, have an indirect effect on supervisors' incentives. Kramer and Sykes explain that because "the imposition of personal liability on an employee may lead to an exercise of caution that is excessive from the employer's perspective," the employer may have an incentive to alter the employees' incentives so as to encourage them to act less cautiously. See id. at 275.

\textsuperscript{281} Id. at 276.

\textsuperscript{282} See id. at 297 & n.125.
[only] if the municipality is also immune from suit."\textsuperscript{283} Allowing the entity to escape liability for good faith torts is necessary to protect low-level employees from entity-imposed penalties respecting career advancement or tenure that might produce undesirable "chilling."\textsuperscript{284} They contend in the alternative that even if liability were imposed upon municipal entities, it would have "little impact on the ex ante behavior of municipal employees and their supervisors" because good faith torts "involve actions which, ex ante, appear almost certainly to be legal."\textsuperscript{285}

Consequently, an exclusive focus on deterrence suggests that entities should enjoy immunity on the same terms as their agents, and vice versa. Kramer and Sykes do acknowledge the risk-sharing benefits of liability if governments are "better risk bearers than injured parties. But risk sharing benefits alone rarely suffice to justify the imposition of civil liability, since civil litigation is ordinarily far more costly than alternative mechanisms for the redistribution of risks, such as social insurance schemes."\textsuperscript{286}

Congress, which created a damage remedy for constitutional injuries under color of state law but chose not to require social insurance, may have had just such risk distribution in mind. More significantly, if government entity liability is limited, even on the broad plane of respondeat superior, to constitutional violations committed under circumstances that would divest its agents of Harlow/Anderson immunity, \textsuperscript{287} the entity will have little incentive to steer clear of questionable conduct. The entity need only avoid "clearly established" violations, a realm which after Anderson may be practically nonexistent.\textsuperscript{288}

At the other end of the spectrum, compensation is the chief value of § 1983 for Professors Whitman and Brown; they condemn any liability matrix that could leave a plaintiff without remedy.\textsuperscript{289}

\textsuperscript{283} Id. at 299.
\textsuperscript{284} See id. at 290-91. In this way Kramer and Sykes's "double or nothing" approach does recognize, albeit indirectly, that damages may deter. Their suggestion that entities enjoy the same immunity as their agents rests, in part, on the fear that an agent, facing career-threatening penalties if her principal incurs damage liability for her good faith torts, would seek refuge in inertia or other defensive postures. \textsuperscript{285} Id. at 299.
\textsuperscript{286} Id.
\textsuperscript{287} See supra text accompanying notes 107-21.
\textsuperscript{288} See supra notes 116, 119-21 and accompanying text.
\textsuperscript{289} See Brown, supra note 24, at 674 (criticizing the liability matrix suggested by Justice White in Pembaur v. Cincinnati, 475 U.S. 469 (1985), because it led to the possibility that "[t]he victim would be deprived of a remedy because the law was both
This assumption impels Professor Brown to saddle individual government employees with liability whenever the entity can avoid it under the Monell/Praprotnik conception of "policy." In many circumstances, neither the culpability of the individual nor that of the entity will resemble common law fault; thus, liability may simply dispense compensation "for its own sake," even if it does not significantly serve to deter. Furthermore, and somewhat ironically given his premise, Brown's suggestion gives scant assurance of meeting its purely compensatory goal, because it is indifferent to whether a usually solvent entity or an often insolvent individual defendant will satisfy a judgment.

Professor Brown argues for an "inverse relation" between municipal liability and the liability of individual officials.\footnote{See Brown, supra note 24, at 680 n.351 (contrasting the "inverse relation" approach with Kramer and Sykes's approach).} Under this view, individual officials are liable, or unprotected by qualified immunity, when the entity is not liable and vice versa. The virtue of this relationship is that "the remedial purpose of section 1983 is served because liability is always present."\footnote{Id. at 680.} Brown derives this result from an analysis of Justice White's \textit{Pembaur} concurrence. Justice White reasoned that if a municipality was limited by either federal or state law, its agent's act contrary to those limits could not constitute "policy." The entity could therefore not be liable, because local governments lack the authority to make policy contrary to superior law.\footnote{\textit{Pembaur}, 475 U.S. at 485-86 (WhiteJ, concurring). Justice White's position is an echo of \textit{Ex parte Young}, 209 U.S. 123 (1908), in a different context. In \textit{Pembaur}, he concludes that "[w]here the controlling law"—federal, state, or local—limits the authority of government entity agents, "they cannot be said to have the authority to make contrary policy." \textit{Pembaur}, 475 U.S. at 486 (WhiteJ, concurring). Unless such policy is set forth in a legislative enactment, formal statement, or settled custom, its existence, for Justice White, depends on whether the federal violation is defined by prior judicial decision. Thus he concluded that \textit{Pembaur} would have been a different case—the entity's agents would have violated a clear limit on their authority and therefore could not have been executing entity "policy"—if Steagald v. United States, 451 U.S. 204 (1981), had been decided before the events at issue. See \textit{id.} at 486-87; supra note 197; supra text accompanying notes 160-67. By comparison, \textit{Ex parte Young}}
words, is absolved precisely when its agent is stripped of immunity because he could not reasonably believe that he had authority to act. To assure that liability is always present, Brown reverses the equation: officials who are immune from individual liability because the law is not reasonably clear should be treated as having authority to act on behalf of the entity; the entity should, therefore, be accountable.²⁹³

Apart from the merits of Justice White’s foundational observations,²⁹⁴ Brown’s insistence that some defendant must compensate the plaintiff creates two serious problems. First, it is not obviously fair to hold an individual liable simply because “the law is reasonably clear”²⁹⁵ that his actions are prohibited when he acts

holds that when prospective relief is sought individual state officers cannot be acting as agents of the State (and are thereby suable in federal court despite the Eleventh Amendment) whenever it is merely “alleged” that they are acting unconstitutionally, apparently without regard to whether decisional law supports the allegation. See Ex parte Young, 209 U.S. at 159-60.

Curiously, in another context, Justice White was willing to abandon the Ex parte Young fiction entirely. He joined the majority in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) [hereinafter Pennhurst II], which held that the Eleventh Amendment acts as a jurisdictional bar to a federal court’s authority to award injunctive relief against state officials found to have violated state law. See id. at 100. What is curious is that Justice Powell’s majority opinion in Pennhurst II rationalized the Ex parte Young fiction not by recourse to traditional common law understandings of an agent’s authority, but by positing that the fiction plays an essential role in fulfilling the vindication of federal rights, a role not demanded by the facts of the case. See id. at 102-03. By contrast, Justice White’s Pembaur opinion seems to rest wholly on the premise rejected in Pennhurst II: the common law’s fictional formalism of authority. See Pembaur, 475 U.S. at 485-87 (White, J., concurring).

²⁹³ See Brown, supra note 24, at 680.
²⁹⁴ The conclusion that there can be no municipal liability because municipalities are incapable of making policy contrary to law creates conceptual tension with Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913), and Monroe v. Pape, 365 U.S. 167 (1961), overruled in part by Monell v. Department of Social Services, 436 U.S. 658 (1978), which held that individual state actors could violate the Fourteenth Amendment and § 1983, respectively, although their conduct also violated state law. See supra notes 66-68 and accompanying text. Furthermore, this conclusion seems unacceptably formalistic and unrealistic. Municipalities routinely make spur-of-the-moment, sweeping decisions that even Justice Powell would classify as “policy,” but these policies bear few of the teethmarks of debate or deliberation. Moreover, policy may be reflected in simple custom. Cf. Pulliam v. Allen, 466 U.S. 522 (1984) (treating a state magistrate’s practice of routinely requiring bond for nonjailable offenses as a form of policy). In any event, Brown’s double liability category subjects both the individual and the municipality to liability for facially unconstitutional policies such as the one in Monell. See Brown, supra note 24, at 683. Brown’s position sharply diverges from the stance of Justice White, who would hold a municipality powerless to create plainly unconstitutional policy. See supra note 292.
²⁹⁵ Brown, supra note 24, at 680.
in complete good faith. Brown's contrary proposition unrealistically assumes that the employee is knowledgeable about the nuances of local or federal law; it is therefore blind to the received wisdom that the obligations defined by adjudicatory rules are ambiguous. Second, Brown's regime would remit the plaintiff to an often judgment-proof individual defendant in the nontrivial number of cases in which the law governing the injury-producing act is well-established and the entity, in Brown's scheme, is therefore immune.

B. An Alternative Dominant Premise: Restraint of Federally Unlawful Conduct

To posit a priori one of two remedial goals as exclusive and redesign liability standards around the preferred goal overlooks the intimate link between victim compensation and deterrence. Our own principal guidepost for a dynamic federal common law of §1983 is the congressional purpose implicit in affording a private right of action against any "person" to redress federal injuries inflicted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." The implicit purpose of §1983 is the restraint of governmental conduct violative of any federal right, not just conduct that is the subject of distinct, unexceptionable judicial articulation. All such conduct should be restrained independent of the value of private compensation.

At the same time, to exalt government restraint as the dominant concern of the enacting Reconstruction Congress does not denigrate victim compensation, which remains an important supplementary mechanism for achieving deterrence. An emphasis on restraint need not ignore either the common law's concern for fairness in subjecting individual defendants to damages or the new federalists' concern that local government be permitted to function free of needless national intrusion. These related values are accommodated, to varying degrees, in the proposal set forth in the following subsection.

Each of the historical reasons offered by Justice Douglas for the enactment of §1983 touches issues of governmental structure: the

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297 The Court has recognized the overriding public nature of the interests served by civil rights legislation: the "public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." Hensley v. Eckerhart, 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part).
need to “override certain kinds of state laws,” to “provide[] a remedy where state law was inadequate,” and to “provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.” Justice Harlan’s separate views similarly point to the paramount importance of government restraint, whether directly through deterrence or indirectly through victim compensation. The culpability requirement embedded in both the Court’s qualified immunity and “policy” doctrines, however, is calculated to confound fulfillment of that end.

The government restraint thesis should make us skeptical of wide-ranging judicially crafted exceptions to the liability of entities. Entity liability impacts most immediately on executive-level government officials, and it is they, not line employees, who are in a position to balance liability avoidance measures against the requirements of governing. For the statute to have significant prophylactic effect, it must enforce all constitutional norms, not just those fortuitously enmeshed in government policy.

The Court has tacitly recognized the signal importance of the entity by denying local governments the immunity it conferred on individual defendants charged with transgressing emerging constitutional rights. Indeed, the particular defendant in the action in which the Court first explicitly extended § 1983 to federal statutory violations was an entity. Consequently, a local government is now liable for federal statutory violations, which by their nature implicate policy, as soon as federal law is declared; an individual is liable for a constitutional violation only after some uncertain hiatus during which the judiciary establishes a right with clarity.

Our central premise that government entity defendants should be the chief and ultimate target of § 1983’s proscriptions is virtually irreconcilable with the holding of Will v. Michigan Department of State Police that the statute does not authorize a claim for

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298 Monroe, 365 U.S. at 173-74; see supra part II.A; see also Shapo, supra note 13, at 280 (stating that the enacting Congress was concerned about “a widespread outbreak of violence” exacerbated by “the relative inaction of state and local governments . . . [creating a situation] which bordered on anarchy”).

299 See supra notes 81 & 88.

300 See Maine v. Thiboutot, 448 U.S. 1, 2 (1980).

The Will result is both counter-textual and counterintuitive; the statute mentions states (and territories) alone and was enacted to implement Fourteenth Amendment restrictions on state action. Will stands in stark contrast to Justice Powell's lament in Owen that the Court imposed strict damage liability on a level of government, a municipality, "least able to bear it." for Will provides comprehensive damage immunity in all courts, state and federal, to the entity best able to offer relief, the state.

Yet within Will there is indirect support for the government restraint thesis. By reaffirming that an individual state agent named in her official capacity remains a § 1983 "person" for purposes of prospective relief, the Court continues to nurture the root concept of the statute. Conduct fairly attributable to government that causes the deprivation of federally secured rights should be subject to judicial oversight and a federal remedy in a proceeding under federal law, and generally in a forum of the plaintiff's choice.

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302 See Will, 491 U.S. at 64, 71; supra note 233.
303 Owen v. City of Independence, 445 U.S. 622, 670 (1980) (Powell, J., dissenting). Justice Powell's lament increases in poignancy after City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), restricted ad hoc "policy" to decisions by final policymakers. See id. at 127. Because of Praprotnik, the lowest levels of state government and the smallest government entities are most vulnerable to § 1983 liability. In a county or town with a one- or two-member constabulary or executive department, virtually every decision affecting a citizen may be made by a final policy-making official.

304 Although we are not in accord with the Court's conclusion in Will, and a full discussion of its soundness is beyond the bounds of this Article, we cannot resist one note. In Will the Court elided another interpretive difficulty foreseen by Justice Powell. In Monell v. Department of Social Services, 436 U.S. 658 (1978), Justice Powell described the awkwardness of importing the Eleventh Amendment fiction of Ex parte Young, 209 U.S. 123 (1908), into § 1983. The consequence is that a public official sued in his official capacity is a "person" only to the extent the plaintiff prays for prospective relief. See Monell, 436 U.S. at 712 (Powell, J., concurring). As Justice Powell observed, the decision in Monell to subject local government entities to liability as § 1983 "persons" avoided this bifurcation, which had no support in the text of the statute. See id. at 711-12. Will resurrects the bifurcation at the level of state government on the authority of Ex parte Young, making no mention of the problem Justice Powell had identified. See Will, 491 U.S. at 71 & n.10.

305 See Will, 491 U.S. at 71 n.10; supra note 233. When the plaintiff takes pains to indicate that he intends to sue the public official in her individual capacity, the official remains a full-fledged § 1983 "person" subject to damages as well as prospective relief. See Hafer v. Melo, 112 S. Ct. 358 (1991). Whether this bifurcated reading of the word "person" as applied to a state official sued in her official and individual capacities makes sense doctrinally is another matter entirely. See supra note 304.

306 A variety of special situations exist in which the plaintiff's federal claims must
C. A New Asymmetry Facilitating Government Restraint, Fairness to Individual Government Agents, and Dynamic Lawmaking

Identifying the statute's objectives in these terms leads to several related prescriptive tenets. First, although a government acts through individuals, it is ultimately the government's conduct with which we are concerned. Moreover, for the compensatory goal to be met, limitations on the liability of the agent, driven by concerns about fairness and untoward stifling of initiative, demand correlative enlargement of the liability of the entity. Consequently, if the plaintiff can demonstrate a violation of her federal rights, the only remaining question we should ask before attaching liability to the entity is whether it can fairly be charged with the conduct. This conclusion is bolstered by the widespread availability of government employee indemnification. In the common situation in which the employee meets the entity's indemnification requirements, we ignore reality if we forget that the entity pays for the liability even if the individual defendant formally suffers the adverse judgment.

The overriding need for restraint of government misconduct, the concern for fairness to individual defendants, and the need to avoid undue chilling of government initiative counsel a dual course. Entity accountability should be enhanced by discarding the Monell "policy" limitation; and the scope of individual liability under Monroe requires both widening and narrowing, with local government agents responsible for federal law violations whether settled or unsettled, but only if they intended to harm their victims.

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See, e.g., Brown, supra note 24, at 654 (stating that the problem with applying a fault standard to determine entity liability "is simple: [the entity] cannot think"); Kramer & Sykes, supra note 24, at 253 ("The problem is that municipal action is always—can only be—carried out by persons employed by the municipality.").

See Oren, supra note 24, at 1000-03 (supporting municipal liability based on respondeat superior, the inclusion of state and federal governments in the scope of the money damages remedy, and the exclusion of an action against an individual official in light of the available governmental remedy).

See supra note 140.
1. Entity Liability: Respondeat Superior Redux

The "policy" dictum in Monell reflected the concern, prompted by one of several available interpretations of statutory text, that an entity's liability should be limited to conduct fairly attributable to it. As we have argued, however, the "policy" stricture, especially as elaborated through Pembaur and Praprotnik, goes beyond what is necessary to attribute fairly the actor's conduct to the entity. In fact, the Court's stated concern could be largely satisfied under respondeat superior. We would allow common law respondeat superior in imposing liability on the principal for the conduct of an agent who acts with the principal's authority, either express or implied or, at the edge, apparent. As asking if the injury-producing decision or conduct occurred within the actual, implied, or apparent scope of the state actor's duties should assure fair

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310 See supra text accompanying notes 169-87.
312 We envision employing the definition of authority contained in the Restatement of Agency: "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." RESTATEMENT (SECOND) OF AGENCY § 7 (1957). This manifestation of consent can be either express or implied. See id. cmt. c.

The Restatement's drafters include "implied" authority as simply a subspecies of express authority, recognizing that no principal can describe all the details of the tasks she wants performed. The scope of consent, therefore, rests on the familiar notion of "reasonable inference." See id. cmt. b. As that comment indicates, "[t]he agent's conduct is authorized if he is reasonable in drawing an inference that the principal intended him so to act although that was not the principal's intent." Id.
313 Again our prescription rests on noncontroversial, routinely applied principles in agency law. When "it is reasonable for the third person," or by extension, an injured plaintiff in a § 1983 action, "to believe that the agent is authorized" to undertake a certain act, such conduct has the trappings of apparent authority. See id. § 8 cmt. c. Under these circumstances vicarious liability is premised on conduct of the principal that permits the third party reasonably to believe that the authority exists, such as giving the agent a badge. See id. cmt. b (stating that manifestations of the principal sufficient to create apparent authority include those made "directly to a third person, or ... to the community, by signs, ... by authorizing the agent to state that he is authorized"); see also id. § 27 cmt. a (stating that the creation of apparent authority occurs through the "indicia of authority given by the principal to the agent"). A latent lesson of Monroe v. Pape, 365 U.S. 167 (1961), overruled in part by Monell v. Department of Social Services, 436 U.S. 658 (1978), is that apparent authority is a sufficient condition for liability, although Monroe involved an individual defendant, not an entity. The individual actors in Monroe, carrying and no doubt displaying badges or other indicators of entity approval, were liable even though their conduct violated state law.
314 No entity liability exists when an official acts wholly outside any colorable
attribution. At a minimum, a positive answer to the question means that the entity is responsible for a representation to a third person, the plaintiff, that the state actor had authority to act.\footnote{315}

Assuming that the 1871 Congress sought to restrain unconstitutional government behavior, we should attend to the reality that in most cases an effective remedy lies against the entity and not its agents. Respondeat superior generally provides a remedy against entities even if the challenged act does not rise to the level of "policy" as defined by state law. Our proposed version of respondeat superior would modify the common law by reaching the entity principal under some circumstances in which its agent would be absolved.\footnote{316} Respondeat superior has the added virtue of afford-

actual, implied, or apparent authority. First, if the defendant is not clothed with government authority, it is hard to see how his acts can be "under color of" state law. Second, consider Professor Brown's observation, derived from Justice White's position in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), that entities may not properly be held responsible for conduct that their officials could not reasonably believe to have been authorized. Brown explains that courts define respondeat superior broadly so that "persons who act beyond their authority are necessarily acting unreasonably." Brown, supra note 24, at 683 & n.365.

\footnote{315} Liability for intentional torts undertaken with apparent authority is covered generally in RESTATEMENT (SECOND) OF AGENCY §§ 245, 254, 257, 266 (1957) (describing conditions of liability for use of force, defamation, misrepresentation, and physical harms, respectively).

\footnote{316} The version of respondeat superior advocated here is "modified" because, under familiar principles of respondeat superior, both the agent who originally causes the harm and his principal are liable, the latter vicariously. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 499 (5th ed. 1984). Moreover, the principal is liable for the agent's ordinary negligence, see infra note 318 (citing cases), and for intentional torts committed in furtherance of the employer's business, see KEETON ET AL., supra, at 505. The proposals we make for individuals, however, would free individuals from liability unless they act with intent to harm. See infra text accompanying notes 353-91. This leads to the result, jarring from a traditional perspective, of "vicarious" liability for a principal predicated on acts for which the agent is absolved.

We offer two justifications for this departure from standard doctrine. First, retaining entity liability even under circumstances that in fairness should relieve agents from liability is essential for fulfilling § 1983's fundamental purpose of restraining governmental misconduct. Second, there may be only negligible differences in practice between the operation of ordinary principles of respondeat superior and our suggested modification. The need for vicarious liability stems from the judgment-proof status of many employees. See, e.g., CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 252 (2d ed. 1980); see also SCHUCK, supra note 89, at 33 (noting that the doctrine was originally conceived as a surety device that was called upon if the employee was unable to pay). For satisfaction of a judgment the injured plaintiff looks to the employer, the deep pocket to whom the risk is allocated. See KEETON ET AL., supra, at 500; MORRIS & MORRIS, supra, at 252. In theory, the employer then has a claim for subrogation against the employee. The fact that the latter is judgment-proof, added to the potential problems an employer would face in
ing whatever meaningful restraint is possible against "good faith"
torts by compelling higher-level officials to weigh the risk that their
agents' conduct could result in an award of damages from the
public treasury. At the same time, if reasonably enforced,
respondeat superior should serve to ensure that entities are held
responsible only for conduct they actually or apparently autho-
rize.

By relaxing the § 1983 notion of "policy," the proposed standard
would lead to a different result in a case like Praprotnik, in which
the supervisor who effected the plaintiff's retaliatory discharge had
apparent authority to make that personnel decision. Yet it would
not alter the results of cases in which the Court has circumscribed
§ 1983 by redefining predicate constitutional violations. For
example, our approach would not disturb the result in *DeShaney v.
Winnebago County Department of Social Services*, because the
predicate "liberty" interest would still be wanting. Similarly,
the floodgates concern would continue to be substantially ameliorat-
ed even if respondeat superior were recognized as the appropriate

recruiting and retaining employees so threatened, however, has meant that the
employer generally forgoes prosecution of this claim and instead seeks to deter
employee misconduct indirectly, through discipline and discharge. See *id.* at 252;
*SCHUCK, supra* note 89, at 105.

The modifications proposed are designed in part to encourage precisely such
deterrence. See *infra* text accompanying notes 358-59. At the same time, to the
extent they deprive government entities of their common law subrogation rights as
principals, the forfeiture is not grievous in practice and may be necessary to stimulate
internal checks on employee misconduct.

See *Owen v. City of Independence*, 445 U.S. 622, 656 (1980) (making the same
observation on the narrower assumption that entity liability would attach only for acts
of policy).

The doctrine of respondeat superior has, at times, known no apparent limita-
tions, see, e.g., *Fruit v. Schreiner*, 502 P.2d 138, 142 (Alaska 1972) (holding employer
liable where employee at a convention was involved in an automobile accident en
route to a tavern in the early morning), a fact attributable in part to the absence of
a uniform rationale. See *Riviello v. Waldron*, 391 N.E.2d 1278, 1281 (N.Y. 1979)
(discussing the evolution of the rationales underlying respondeat superior).

In the § 1983 context, *Monell* discussed two justifications, deterrence and loss-
spreading. See *Monell*, 436 U.S. at 693-94. *Owen* accepted the equitable "loss-
spreading" purpose. See *Owen*, 445 U.S. at 655 & n.39. We would tie liability to
scope of authority—what conduct did the agent have the actual, apparent, or implied
authority to undertake? See *supra* notes 312-15. On the interface between deterrence
and the suggestions we are about to make, see *infra* text accompanying notes 355-65.

489 U.S. 189 (1989). This is by no means an endorsement of the *DeShaney*
decision on its merits. We have no occasion to inveigh against the Court's state
action doctrine.

See *id.* at 195-96.
standard for entity liability. The Roth/Paul\textsuperscript{321} and Parratt\textsuperscript{322} lines of authority, involving individual defendants, have eliminated the greatest potential "font" of tort law by redefining restrictively the property or liberty protected by procedural due process and the nature of actionable deprivations.\textsuperscript{323} These limitations on liability should accrue to entities even if, as we propose, they were held generally accountable via respondeat superior for "random and unauthorized" federal law violations of their agents.\textsuperscript{324} Further, except in highly unusual circumstances pointing to direct taxpayer involvement in a violation, entities would continue to be exempt from punitive damages.\textsuperscript{325} Proof requirements surrounding causation and damages would furnish further protection of entity coffers.\textsuperscript{326}

\textsuperscript{321} See supra text accompanying notes 209-14.
\textsuperscript{322} See supra text accompanying notes 215-22.
\textsuperscript{323} "Parratt cases" involve individual defendants because the Parratt predicate for absolution from conduct that would otherwise violate procedural due process is that the conduct be "random and unauthorized." Parratt v. Taylor, 451 U.S. 527, 541 (1981), overruled in part by Daniels v. Williams, 474 U.S. 327 (1986); see also supra text accompanying notes 215-22 (discussing "Parratt cases"). To conclude that a defendant's conduct is random and unauthorized is to define a situation in which the defendant is an individual. An entity defendant would escape liability today in the same circumstances on the independent ground that such conduct could not represent an implementation of Monell "policy."

\textsuperscript{324} In our proposed redesign, actions against entities arising from "random and unauthorized" conduct would no longer be flatly precluded, since liability would no longer hinge on the existence of formal "policy." Nevertheless, if a particular challenge to such conduct were brought on procedural due process grounds the plaintiff would likely still encounter the restrictions raised by Parratt. Parratt reconceptualizes when process is due, as Paul and Roth reconceptualize whether it is due at all. Although Paul was an individual defendant action, Roth was brought against an entity. Thus, the doctrinal origins of the "random and unauthorized" restriction on procedural due process claims suggest that it should be available to entity defendants.

Our suggestion removes the "policy" barrier that applies to all \textsuperscript{\S} 1983 entity actions regardless of the nature of the predicate right. Parratt, by contrast, narrows the scope of a particular federal right, procedural due process. Thus, even though \textsuperscript{\S} 1983 would reach an entity despite the absence of entity policy, a plaintiff who sues an entity complaining that the agent's "random and unauthorized" conduct violated her procedural due process rights could still lose by virtue of Parratt. In the end, the plaintiff would fail to state a sufficient \textsuperscript{\S} 1983 claim, because no recognized predicate constitutional violation occurred.

\textsuperscript{326} The courts do not simply give away an entity's funds. Recent decisions indicate that entities may avoid liability for conduct that clearly constitutes "policy" if the plaintiff is unable to bear the burden of proving that her federal injury was proximately caused by the implementation of that policy. See Liggins v. Morris, 749 F. Supp. 967, 972 (D. Minn. 1990); Pembaur v. City of Cincinnati, 745 F. Supp. 446,
Respondeat superior does impose a species of liability without fault. Application of the doctrine assumes that compensation to victims of unconstitutional conduct is not only an important objective of § 1983, but an invariable consequence of a judgment of entity liability. That assumption was recently challenged by Professor Jeffries, who argues that the Aristotelian notion of "corrective justice" is the sole justification for money damages to victims of constitutional violations; corrective justice, in the form of a damage award, "at once annuls the wrongful gain and rectifies the wrongful loss." Wrongdoing, and not just the normal requirement of causation, is an indispensable prerequisite of the conception.

Using this premise, Jeffries contends that constitutional violations that do not depend on a showing of culpability, such as a reasonably conducted search carried out in good faith under an invalid warrant, should not result in damage sanctions against the entity. He therefore takes issue with the Owen holding that entities enjoy no immunity corresponding to that accorded individuals under the principles set forth in Harlow and Anderson. The implication of Owen, he observes, is that "corrective justice requires restorative transfers for all violations of constitutional rights, without regard to fault." As a critical illustration of the point, Jeffries cites the situation in Owen itself: the only constitutional violation alleged had not been definitively declared, and so "the [city's] only apparent fault is a failure of prescience."

Further condemning the discontinuity between the Owen holding and the immunity conferred on individual defendants, Professor Jeffries observes that "the defense of qualified immunity precludes
compensation for many unconstitutional acts." To argue for extending the Harlow/Anderson version of qualified immunity to entities is, therefore, simply to acknowledge, as the Owen Court wrote, that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." That outcome is correct, Jeffries writes, because only fault-based constitutional injuries warrant damages. Thus, the syllogism is complete: only those acts to which we ascribe fault warrant damages; even if the acts in Owen were the acts of the city, the city was not at fault; damages were accordingly unwarranted.

Jeffries's unstated premise that entities may, for purposes of fault, be equated with individual defendants overlooks or trivializes important reasons for distinguishing the cases. First, because entities do not think or act the search for entity "fault" is literally futile. Equally futile, then, is the search for an interface between moral condemnation of the entity and compensation. Second, the statute's textual authorization of damages as a customary remedy that does not vary by genre of defendant "person" supports the Court's pronouncements that compensation and deterrence are more prominent aims of the statute than punishment that compensatory damages are the "traditional" personal injury

332 Id. at 86.
333 Id. at 88 (quoting Owen v. City of Independence, 445 U.S. 622, 651 (1980)).
334 Jeffries approaches the problem from a slightly different angle when he argues that compensation is proper if the injury alleged is within the risk created. See Jeffries, supra note 269, at 1471. Only if the creation of risk is wrongful and the injury lies within that risk is compensation warranted. Conversely, if the injury is not within the risk, merely finding "but for" causation "lacks moral significance." Id. at 1470. As a result, compensation serves an attenuated deterrence function under traditional negligence principles. See infra text accompanying note 355.

For our response to this argument, see infra text accompanying notes 335-49. Additionally, Professor Jeffries is flogging a dead horse. Questions addressed to the relationship between risk and injury converge with principles of negligence liability. See Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928) (concluding that the risk of injury to be perceived by the defendant defines the duty with which courts are concerned when finding negligence). Notions of "policy," requiring a deliberate choice or its "deliberate indifference" counterpart in an omission case, move far beyond negligence: both demand advertent behavior committed with knowledge or anticipation of certain consequences. Professor Jeffries's universal fault requirement also departs radically from an apparent congressional purpose of compensation. See infra text accompanying notes 335-37. Moreover, he fails to address the justiciability barriers to injunctive relief in suits against entities. See infra text accompanying notes 343-52.

And that a "damages remedy . . . is a vital component of any scheme for vindicating cherished constitutional guarantees." If plaintiffs cannot fairly obtain compensation from a local government official—either, as we propose, because he lacked intent to harm or, as the Court ordains, because he could reasonably believe he was not violating clearly established law—then it will be available, if at all, from the entity.

One need not resort to the Owen loss-spreading rationale, condemned by Professor Jeffries, to see why the fundamental purposes of the statute are served by assessing damages against the entity under circumstances that would preclude such relief from the entity’s agent. His conclusion that fault is a prerequisite for individual liability is consonant with an appropriate regard for the statute’s deterrence rationale and the general common law principles on which the statute draws. But insistence on fault, a concept of marginal pertinence to artificial creatures, understates the importance of § 1983 actions against the government itself, the actions that lie at the heart of congressional concern. After all,


337 Owen, 445 U.S. at 651; see Carey v. Piphus, 435 U.S. 247, 254 (1978) (explaining that our constitutional rights “protect persons for injuries to particular interests, and their contours are shaped by the interests they protect”); see also Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) (stating that two of the policies underlying § 1983 are compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under the color of state law).

338 See Low & Jeffries, supra note 27, at 919.

339 Professor Jeffries might respond that the state, as opposed to municipal or other local government, has escaped § 1983 sanctions by virtue of the Eleventh Amendment, see Quern v. Jordan, 440 U.S. 332, 343 (1979) (stating that congressional silence on the sovereign immunity matter indicates a desire not to abrogate sovereign immunity through § 1983) or, more broadly, by a narrow construction of the § 1983 defendant “person,” see Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 (1989) (holding that in light of common usage, ordinary rules of statutory construction, and Congress’s purpose in enacting the statute, a state is not a “person” for purposes of § 1983). It is therefore not surprising, he argues, that citizens injured by the unconstitutional acts of local government should also go without remedy. See Jeffries, supra note 101, at 88. Will, however, tells us only that no conduct of a state itself is within the liability sphere of § 1983; it does not suggest that compensatory damages
§ 1983 liability, as distinct from liability under § 1981, was predicated originally on constitutional violations alone. These violations (with rare exceptions, such as the Thirteenth Amendment's affirmative ban on any slavery, public or private) target conduct of the government entity rather than its agents. In sum, a fault requirement is troublesome both because it sometimes places the loss on either a fault-free, state-authorized actor or on an innocent victim, and because it ignores the statute's special concern with the conduct of government.

Above all, as Jeffries recognizes, his willingness to equate entity and individual defendants puts the "focus on individual responsibility [and thereby] tends to divert attention from problems of government structure and organization, as distinct from the specific acts of individual officials." The importance of this point is reflected in the asymmetric shape of the prima facie and defensive cases of individual and entity defendants. The Court has chosen to preserve the entity action, but not the action against individuals, as a stage for dialogue over the definition of constitutional rights. Emerging issues stemming from "government structure and organization," such as property taxation to finance public education, across-the-board practices respecting zoning and public employment, and police department decisions on the use of force, are often best contested in the entity suit.

Neither the text nor history of § 1983 suggests that judges who decide these vital constitutional questions should restrict compensation to those violations that, in some uncertain way, reflect entity "fault."

This view of government structure and organization reveals a deeper, more troubling aspect of Professor Jeffries's project. He assumes that we can meaningfully discuss noninstrumental or nondeterrent rationales for § 1983's remedial scheme without...
considering deterrence or restructuring. Jeffries's theoretical assumption, however, must confront a practical problem.

Jeffries's proposal undermines efforts to challenge systemically caused constitutional harms, perhaps the most important and least accessible area of government conduct. Implicit in his proposal is the assumption that injunctive relief will be available and will deter sufficiently. Unfortunately, City of Los Angeles v. Lyons critically subverts that assumption with its standing requirement that a plaintiff who seeks injunctive relief demonstrate "a sufficient likelihood" that he will suffer the same injury in the future. One year before Lyons was decided, in Harlow v. Fitzgerald, the Court explicitly assumed that the plaintiff would obtain recompense in the form of damages from the individual government defendants. That assumption was soon dashed because the "clearly established" wrinkle of the qualified immunity defense barred such claims at the threshold. The Jeffries approach would thus foreclose the only remaining form of compensation, damages from the entity. Even if, as in Lyons, the challenged practice amounts to Monell policy, Jeffries would not find a compensable injury unless the practice reflects municipal fault in the sense that it violated well-settled law; in Lyons, use of the chokehold did not.

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545 Justice Douglas's historical exegesis in Monroe on the factors animating the enactment of § 1983 highlights systemic governing problems in the Reconstruction South. See Monroe v. Pape, 365 U.S. 167, 173-74 (1961), overruled in part by Monell v. Department of Social Servs., 436 U.S. 658 (1978); see also Shapo, supra note 13, at 280 (noting that, in the eyes of the legislators who proposed § 1983, the relative inaction of state and local governments exacerbated the widespread outbreak of violence the statute was meant to address). Professor Jeffries would preclude a damage remedy for systemic harms because, he argues, they fall outside the risk that ordinarily makes such injuries compensable in tort. See Jeffries, supra note 269, at 1480.

544 461 U.S. 95, 105-10 (1983) (denying injunctive relief to the victim of an unlawful police chokehold because the victim could not show that he personally was likely to be subject to a future chokehold).

545 See id. at 111.


547 See Lyons, 461 U.S. at 111.

548 Justice Marshall pointed out in his Lyons dissent that there had been no occasion to test the contours of Los Angeles's chokehold practice. See id. at 118 (Marshall, J., dissenting). The violation, if any, was thus not "clearly established" in the terms Harlow would lay down; individual police defendants would therefore be qualifiedly immune.

549 See id. at 111 ("The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there."); see also supra note 348.
Since Lyons, the Court has demonstrated its awareness that damages against an entity can play a critical role in eradicating institutional government misconduct. In City of Riverside v. Rivera, a damage action against thirty members of the Riverside Police Department, the Court quoted approvingly from the trial judge's opinion that the "institutional behavior involved here . . . [harassing Chicanos because of their national origin] had to be stopped." Alluding to Lyons-like limitations, the Court wrote that damage relief was critical to deterrence because "injunctive relief generally is unavailable."

2. Individual Liability and the Controlling Role of Fault

This critique should not be interpreted as an assertion that notions of fault are irrelevant to § 1983. We part company with Professor Jeffries only on the application of fault concepts to government entity defendants. Because entities act through their agents and are therefore liable only vicariously, deterrence has its most immediate impact in relation to the conduct of individuals. Thus, despite our disagreement with Jeffries on the liability of entities, we generally concur with and even expand upon his fault-based prescription for the liability of individual defendants.

Specifically, we propose that the individual face liability when, but only when, her conduct was committed with the intent to harm, or a state of mind approaching a desire to produce harmful consequences. This standard assures direct deterrence under

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351 Id. at 574.
352 Id. at 575.
353 See Brown, supra note 24, at 653-54; see also supra note 307 and accompanying text.
355 Throughout this Article we use the terms "intentional" and "intent" as if they represented a unitary, determinate conception. In fact, in the ordinary parlance of tort law, the conclusion that an actor's conduct was "intentional" may reflect relatively distinct levels of culpability. See, e.g., Garratt v. Dailey, 279 P.2d 1091, 1093-94 (Wash. 1955) (holding actor liable for the tort of battery if he intended to bring about contact with the plaintiff, even if he did not intend the contact to cause the ensuing harm). Provisionally, as it is used in this Article, "intent" conforms with two routinely used criteria: one is stated by the RESTATEMENT (SECOND) OF TORTS § 8A (1965) (describing "intent" as either "[(a)] the actor desires to cause [the] consequences of his act, or [(b)] . . . believes that the consequences are substantially certain to result from it"); the other is used in suits under 42 U.S.C. § 1985(3) (1988) (attaching
the most egregious and hence necessitous circumstances: when the state actor decides to inflict harm that amounts to a constitutional injury or tort. Absent an intent to harm, this suggestion would relieve the individual of liability for all acts that the entity directed or authorized (a situation in which liability seems unfair) as well as for conduct that is entirely unauthorized and as such is not under color of state law.

We appreciate that under traditional tort law conduct as low on the culpability scale as mere negligence implicates deterrence and warrants damages. The "reasonable person" fiction presupposes that the defendant did not act as a reasonable person ought to have acted under the same or similar circumstances. But transplanting a negligence standard to § 1983 would engender liability with little appreciable deterrence and with large potential for chilling officials in the execution of their duties. It is difficult to achieve a substantial incremental deterrent effect when a government official causes an unintended constitutional harm. The reasonable person standard of general tort law may be justified on the basis of wealth transfer, but it is unlikely that personal liability will significantly deter the individual defendant who acts in good faith. By contrast, if the entity would bear liability for all federal rights deprivations attributable to its agents' acts within the scope of their agency, one may predict renewed internal checks and constraints on reckless or negligent conduct by government employees.

Additionally, negligence-based § 1983 liability carries with it special costs. In common law negligence actions few noncompensatory policies compete for judicial attention; costs to the defendant and compensation for the plaintiff usually comprise the universe of policy rationales. Exposing a § 1983 individual defendant to liability for a conspiracy depriving persons of rights or privileges). See, e.g., Griffin v. Breckenridge, 403 U.S. 88, 102 n.10 (1971) ("The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.").

356 See infra note 367.

357 See supra text following note 176.

358 See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("[T]he standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."). The classic description of the interface between the negligence standard and deterrence remains that of Justice Holmes. See OLIVER W. HOLMES, THE COMMON LAW 76-78 (Mark D. Howe ed., 1963) (1881).

359 See Kramer & Sykes, supra note 24, at 290-91.

360 We acknowledge that our characterization is overbroad. In certain areas, such as drug manufacturers' liability and the development of orphan drugs, patient dumping, and dram shop liability, monetary costs alone can create significant
liability for inadvertent harms may cause an important nonmonetary consequence: chilling a government officer's inclination to act. Inertia becomes safer than action. Even the Court's expansive version of individual immunity, manifested in the "clearly established" rule as refined by Anderson, does not fully avoid chilling. An employee engaged unintentionally in an actually or apparently authorized function cannot know whether the federal right he might have negligently or recklessly violated will be deemed "clear-

additional policy considerations.

See SCHUCK, supra note 89, at 68-69; Mashaw, supra note 95, at 26-27. Moreover, it is more difficult to find state action when the harm is alleged to have occurred through omission rather than commission. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 203 (1989); id. at 204-05 (Brennan, J., dissenting); supra notes 183, 192 & 200.

Although the Court has rendered mere negligence largely obsolete for constitutional torts, we assume for the sake of discussion that simple negligence may serve as a basis for some § 1983 liability outside the procedural due process arena from which it was excluded by Daniels v. Williams, 474 U.S. 327 (1986). See supra notes 146, 217-18 and accompanying text. The Parratt Court, citing Monroe, asserted that neither the language nor legislative history of § 1983 has "been found by this Court to contain a state-of-mind requirement." See Parratt v. Taylor, 451 U.S. 527, 534 (1981), overruled in part by Daniels v. Williams, 474 U.S. 327 (1986). In Daniels, an action predicated on an alleged due process violation, the Court held that "the Due Process Clause is simply not implicated by a negligent act," since a negligent loss does not amount to a "deprivation" within the meaning of the Fourteenth Amendment. Daniels, 474 U.S. at 328. Accordingly, the Court overruled Parratt but only "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." Id. at 330-31 (emphasis added). It is true that the predecessor to § 1983 was enacted to enforce the Fourteenth Amendment, see supra note 2, by contemporaries of the amendment's drafters, and both statute and amendment include the similar requirement of a "deprivation." One might therefore conclude that § 1983, like the due process clause, is violated only when the defendant acts with more than a negligent state of mind. But see infra note 391 and accompanying text.

Nevertheless, it is apparent that the Court was at some pains in Daniels not to overturn the more general conclusion of Monroe and Parratt that § 1983, as distinct from certain predicate constitutional rights that might be vindicated in § 1983 actions (such as procedural due process), contains no general state of mind requirement. See supra note 15; see, e.g., the following cases all decided under § 1983: Graham v. Connor, 490 U.S. 386, 396-97 (1989) (holding that claims of excessive force in connection with arrest by police should be assessed under objective Fourth Amendment reasonableness standard); First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 316 n.9 (1986) (stating that even unintentional interference with property rights can constitute an unconstitutional taking); Kolender v. Lawson, 461 U.S. 352 (1983) (determining an ordinance to be violative of the First Amendment when it is "objectively" vague).

With greater confidence than we express about simple negligence, we also assume that reckless conduct continues to be a staple source of § 1983 liability, even in the procedural due process realm. See Zinermon v. Birch, 494 U.S. 113, 137 (1990) (holding that a claim of "willful, wanton and reckless disregard of . . . constitutional
ly established." The resultant chilling potential disappears only if liability is limited to deliberately caused harms, those rooted in intentional misconduct.\textsuperscript{364}

Tightening the occasions for individual liability is tolerable in compensatory terms only if coupled with our companion proposal on entity liability. Vicarious entity liability relieves the action against individual officers from doing double duty as a gap-filler in the lacuna erected by Monell's conception of "policy." Put bluntly, emphasis on entity liability for damages will more often assure a solvent defendant and will serve more than compensation "for its own sake." It fosters deterrence, too, if, as is widely believed, damages deter more effectively than injunctive relief alone.\textsuperscript{365}

One might object, along with Professor Jack Beermann,\textsuperscript{366} that permitting the individual to escape liability for most entity authorized misbehavior\textsuperscript{367} runs counter to the Nuremberg princi-

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\textsuperscript{364} "Because the [individual] employee need only refrain from deliberate misconduct to avoid liability, he or she has no incentive to become over cautious." Kramer & Sykes, \textit{supra} note 24, at 275 n.92.

\textsuperscript{365} When an injunction is not obeyed, the courts customarily resort to a monetary sanction for civil contempt. \textit{See}, \textit{e.g.}, Spallone v. United States, 487 U.S. 1251, 1260 (1988) (mem.) (rejecting City of Yonkers's request to stay imposition of monetary sanctions for contempt in refusing to carry out district court's housing desegregation mandate). \textit{See generally} DAN B. DOBBS, \textsc{Handbook of the Law of Remedies} 96-98 (1973).

\textsuperscript{366} We refer to comments he kindly offered us on an earlier draft.

\textsuperscript{367} Under our proposal, the nonintentional authorized conduct for which the individual would not be liable would include (1) gross negligence or reckless disregard, \textit{see} DAN B. DOBBS, \textsc{Torts and Compensation: Personal Accountability and Social Responsibility for Injury} 31 (1985); \textsc{Restatement (Second) of Torts} § 500 (1965), (2) simple negligence, and (3) "deliberate indifference."
ple, because we allow low-level officials to avoid liability by professing obedience to higher authority. The ordinary § 1983 action, however, contemplates not war crimes but relatively routine tortious conduct that violates federal rights in the process.\textsuperscript{368} Our proposals do not affect the potential for criminal liability.\textsuperscript{369}

Second, the regime we advocate reintroduces the subjective element into the immunity calculation. The officer will not escape damages if she acts in bad faith. Third, our suggestion sketches a reasonably bright line for the submission of issues to the jury. Most important, enhanced entity liability will work its own deterrence, albeit less directly than liability on the officer. The indirectness seems a small, or even nonexistent,\textsuperscript{370} price for alleviating the legitimate concern of chilling.\textsuperscript{371}

The suggested framework for individual defendant cases renders irrelevant for liability purposes the degree to which the allegedly violated right was "settled" on the eve of injury.\textsuperscript{372} Consequently, the framework obviates the nettlesome and subjective analogizing to prior cases that in the current judicial climate reveals a "settled"

\textsuperscript{368} Professor Beermann anticipated this response. \textit{See also} Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) ("[D]eprivation of a constitutional right is significantly different from and more serious than a violation of a state right."), \textit{overruled in part by} Monell v. Department of Social Servs., 436 U.S. 658 (1978). \textit{But see infra} note 392.

\textsuperscript{369} \textit{See supra} note 71.

\textsuperscript{370} Deterring law violations of agents indirectly through their entities may inspire the same desirable measure of caution as today's direct deterrence of the agents themselves, who are often judgment-proof and enjoy an exceedingly generous form of immunity. \textit{See supra} notes 359 & 364 and accompanying text.

\textsuperscript{371} These proposals will in all likelihood increase filings against entities, a situation for which we offer no apology but some explanation. The recommendations make no inroads into the narrowly defined due process sphere: the Roth/Paul/Siegert, Davidson/Daniels and Parratt/Hudson lines remain unchanged. \textit{See supra} text accompanying notes 321-24. Additionally, the proposals are interrelated and inseparable. Thus, we anticipate a substantial reduction in the number of filings against individuals. As suggested in the text, this accommodates fairness concerns as far as its logic will bear. Finally, we recur to the major thesis here that it is the government whose conduct the statute seeks to change. If voters find their local government units frequently sued, it may be because the conduct of those units is questionable. As a result, voters or supervising officials have the option of removing chronic or egregious constitutional tortfeasors from office. \textit{See} City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981) (suggesting that municipal liability for compensatory damage against municipalities "may ... induce the public to vote the wrongdoers out of office").

\textsuperscript{372} The "settledness" of a right may help the factfinder assess the degree of wrongful intent and, therefore, may bear on the appropriateness and measure of punitive damages. \textit{See, e.g.,} \textit{RESTATEMENT (SECOND) OF TORTS} §§ 908(2), 501 cmt. b (1965).
right as a highly prized rarity. Whether trammeling a settled or unsettled federal right, intentional conduct is deterrable and accordingly should be subject to the penalties of the statute.\footnote{73}

In this respect the proposal squares partially with \textit{Monroe}. It conforms fully with the general proposition for which \textit{Monroe} is best known—that individuals may be liable for “unauthorized” conduct, defined as conduct that violates or is not affirmatively warranted under state law. For several reasons, though, we would cabin the individual liability realm to intentionally harmful acts, authorized in

\footnote{75 One permutation of “settledness” requires additional explanation. When an agent with apparent, but neither express nor implied authority, see supra notes 312-13, acts without wrongful intent, see supra note 355, we would impose liability on the entity alone. The argument for holding the officer liable as well is that under such circumstances the imposition of individual liability serves a deterrence function, especially if the violated right is settled. Liability may discourage state actors from disregarding their government principal’s actual or reasonably inferable instructions even if they believe, although unreasonably, that they serve its interest by violating the principal’s instructions. The fear of chilling is minimal because the assumption that the government does not wish to encourage such conduct is probably accurate. Further, employees on a frolic and detour would not be eligible for qualified immunity as it is currently conceived, because conduct wholly outside the scope of one’s actual or implied authority would be neither ministerial nor discretionary. See infra text accompanying note 380.

We nevertheless conclude that this individual defendant should not be subject to liability when she acts with no more than apparent authority, regardless of the status of the violated right. If the right is \textit{not} well settled, the deterrent effect of liability is simply too attenuated. First, it taxes the imagination to hypothesize many contexts in which an agent, acting without intent to harm, will violate newly declared rights while working with only apparent authority. More importantly, it strains credulity to assume that an agent, unreasonably departing from what she herself understands her duties to be, will be deterred by the threat of liability that may arise if a judge, acting after the conduct in question, comes to one but not another subjective conclusion about the status of the legal right. Alternatively, a government employee who acts outside the bounds of any reasonable description of her job will probably not fear a potential judgment for damages contingent on the creation of later-declared rights.

Given the apparently marginal deterrence achieved by imposing liability in this situation, coupled with the fact that the compensation goal could be fulfilled by an action against the entity, it is doubtful whether liability should be recognized for this conduct at the farthest frontiers of state action. One might respond that damages may be an appropriate remedy for dealing with such a loose cannon. The context, however, is still unintentionally harmful conduct, for which a punishment rationale is usually out of place.

A more difficult case is when this apparently authorized agent violates a settled right. The case for liability is arguably stronger, but so is the reason for rejecting it. First, deterrence is unlikely for all the reasons advanced above. Second, and more important, in light of the very few contexts in which such an injury may occur, the costs of applying the clearly established test are excessive. See supra text accompanying notes 123-25.}
this sense or not. First, in light of Monell, it is no longer necessary for individual defendants to carry the weight of the entity on their shoulders; compensation—and its accompanying deterrence—are now assured directly from and through the entity. Second, in all but intentional harm situations, the modest or negligible gain to deterrence won at the expense of individual liability will often be outweighed by the unfairness visited upon an individual whose only shortcoming was in following instructions or failing to predict nascent rights. Finally, the troublesome aspects of the “clearly established” version of qualified immunity, not least of which is its potential for pinching off § 1983's potential as a conduit for the emergence of evolving constitutional standards, make the game worth far less than the candle. Monroe goes awry, we conclude, in continuing to subscribe to the assumption that individuals may be liable for all unintentional harms that the entity “authorizes” simply by conferring express, implied, or apparent authority on its agent. With the significantly expanded basis of entity liability proposed, it would no longer be necessary to impose liability on individuals for unintended harms.

Although we would eliminate the “settled right” aspect of immunity, we effectively reintroduce, by way of the prima facie element of intent to harm, a subjective aspect that the Court in Wood once treated as defeating the affirmative defense. By scotching the subjective element, the Court in Harlow discounted its potential for deterring constitutional torts by individual defendants who otherwise might act with intent to harm. Fairness concerns would dictate imposing liability on the individual defendants in Praprotnik who intentionally retaliated against plaintiff for appealing his suspension, even if they were unaware that in doing so they deprived him of a particular federal right.

With the scope of potential claims against individual defendants substantially reduced both by the Court’s contractions in the predicate constitutional law and by our exclusion of liability for

374 See supra note 373.
375 See supra text accompanying notes 116-27.
377 See Harlow, 457 U.S. at 815-19; supra text accompanying note 107.
most authorized acts, the cost of taking a limited number of individual suits to trial seems worth the concomitant potential for deterrence. The latter-day, policy-driven version of qualified immunity announced by Harlow and expanded in Anderson\(^{379}\) becomes unnecessary when the primary factor that drove it, the fear of chill, is met through an intent-based formula for individual liability.

Drawing a crisp line at intent for the liability of individuals should have other salutary consequences as well. Because the prevalent version of qualified immunity is chiefly concerned with ensuring that the threat of liability will not unduly chill government agents from vigorously exercising their government functions, the immunity now attaches only to their “discretionary,” as opposed to “ministerial,” acts.\(^{380}\) Accordingly, courts must characterize the components of government functions as one or the other and determine what mixture of discretionary and nondiscretionary duties warrants which characterization of the entire function.\(^{381}\) Our rationale respecting individual defendants is broader; to be mulcted in damages, they must have had a clearly deterrable, wrongful state of mind. This rationale applies equally to nondiscretionary as well as to discretionary functions, thus eliminating the characterization problem.

Excising the qualified immunity defense from § 1983's calculus by making intent to harm an element of the plaintiff’s case-in-chief against an individual defendant will have variable effects on the policies the Court has cited in crafting that defense. The primary underlying consideration, easing a potential damper on government administration, would be substantially fortified. Government officials would no longer have to guess, at their own potential risk,

\(^{379}\) Anderson v. Creighton, 483 U.S. 635 (1987); see supra text accompanying notes 113-16.

\(^{380}\) Qualified immunity for government officials under § 1983 protects the defendant’s discharge of only those functions that entail a degree of discretion. See Davis v. Scherer, 468 U.S. 183, 196 n.14 (1984); Harlow, 457 U.S. at 816; Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991).

\(^{381}\) See, e.g., F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1314 (9th Cir. 1989) (determining that a naval study of the environment was a discretionary act, despite its ministerial components); Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1986) (finding that a police officer booking a prisoner was a discretionary act, despite the violation of a nondiscretionary regulation), cert. denied, 483 U.S. 1021 (1987); see also Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988) (defining conduct as discretionary so long as it is pursuant to the official's performance of assigned duties and within her scope of authority).
whether a contemplated act would be deemed within their discretion or whether the constitutional right the act might violate would be deemed well settled. Officials could instead work within the scope of their authority without fear of § 1983 damage liability so long as they refrain from inflicting injury intentionally. Coincidentally, this would bring § 1983 in line with Congress’s recently revised rules respecting the liability of federal employees for common law torts.

At first blush these proposals do not meet the Court’s concern about saving officials’ time. Enhancing the likelihood of entity liability would occupy officials as witnesses; and individuals named as defendants would forfeit the possibility of early dismissal held out by Harlow/Anderson immunity. Indeed, in the vast majority of cases brought against individuals the official would have to submit to trial, because the key question of intent to harm is for the jury.

In the aggregate, however, the Court’s time-sparing policy would be advanced. It may be anticipated that far fewer cases would be

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862 Language in Justice Harlan’s opinion for a plurality in Barr v. Matteo, 360 U.S. 564 (1959), would have conferred immunity on federal officials from common law tort liability whenever the challenged act took place “within the outer perimeter” of their duties, or within the scope of their employment. Id. at 575. The Court later retreated from that stark position. See Westfall v. Erwin, 484 U.S. 292, 298 n.4 (1988) (holding that the conduct must also represent an exercise of discretion to qualify for the immunity). Westfall itself has in pertinent part been legislatively overruled. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (codified at 28 U.S.C. § 2679(b)(1) (1988)); Lunsford v. Price, 885 F.2d 236, 237 n.5 (5th Cir. 1989) (stating that law “in essence” overrules Westfall); Jordan v. Hudson, 879 F.2d 969, 971 (11th Cir. 1989) (stating that law “expressly displaces Westfall’); Newman v. Saballe, 871 F.2d 969, 971 (4th Cir. 1989) (stating that law was “enacted to negate ... Westfall”). This statute, while preserving tort claims against the United States, precludes any damages action against the individual federal employee for any “negligent or wrongful act or omission” undertaken “while acting within the scope of his office or employment.” 28 U.S.C. § 2679(b)(1) (1988). “Wrongful” act as used in the federal employee context has long been understood to refer to conduct more egregious than simple negligence but not rising to the level of intentional harms. See Hatahley v. United States, 351 U.S. 173, 181 (1956) (stating that “wrongful...[is] intended to include situations...which might not be considered strictly negligent”); Dalehite v. United States, 346 U.S. 15, 45 (1953) (same); In re Bomb Disaster at Roseville, Cal., on Apr. 28, 1973, 438 F. Supp. 769, 778 & n.2 (E.D. Cal. 1977) (“Congress intended to include more than negligence and trespass in the word ‘wrongful.’”). This approach appears similar to the one proposed for state actors under § 1983: the entity is accountable under modified respondeat superior, the individual agent only for intentionally harmful acts. 863 See Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1985) (concluding that early resolution of the qualified immunity defense may permit the official to avoid discovery).
brought against individual government officials. In potential liability situations, the entity, with its usually deeper pocket, would be liable as well. In our intentional harm regime, punitive damages would be potentially available in all remaining cases of individual liability. Nevertheless, the number of actions brought against individual officials should sharply decline. To avoid Rule 11 sanctions, plaintiffs' allegations must be fairly well founded, and their lawyers can receive statutory attorney's fees only if the allegations are so well founded that the client prevails. The difficulty of satisfying our intent to harm standard should give considerable pause to counsel who contemplate naming individual defendants, even apart from the tactical issue of jury sympathy for an individual sued with an entity co-defendant. For the plaintiff, securing the individual official as a less hostile witness will often be worth sacrificing the doubtful possibility of punitive damages.

Saddling the entity with liability for all federal law violations its agents commit within the scope of their authority, while relieving agents of liability for all but egregious harms, admittedly takes an asymmetrical approach to state of mind. The Court's own framework suffers from the same flaw, but in reverse. The Court reaches individuals regardless of state of mind and entities if they are acting with the degree of advertence reflected in the several variations of

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384 Smith v. Wade, 461 U.S. 30 (1983), authorized punitive damages for conduct that "involves reckless or callous indifference to the federally protected rights of others." Id. at 56. Presumably, that standard would be exceeded in each case meeting our proposed "intent" standard. See supra note 355. We acknowledge an incongruity: our intent to harm standard requisite for any individual liability demands a somewhat greater showing of fault than Smith does for punitive damages. We offer an explanation. The additional chilling of initiative entailed by the relative lenity of Smith is a disadvantage that more than offsets its potential for an incremental gain in deterrence. After all, in our proposal the entity would be liable for actual damages whenever the individual would be liable, thus assuring compensation and hence indirect deterrence. Moreover, it is difficult to imagine deterring an individual defendant who was unaware of a risk that an ordinarily reasonable and prudent person should recognize.

We doubt, moreover, that the current Court would retain the Smith standard if the issue were revisited. Of the five member majority, Justices Brennan and Marshall have departed. They have been replaced by Justices far less favorably disposed towards plaintiffs' claims, particularly to the claims of civil rights plaintiffs. Our high standard of fault for individual liability, therefore, may prove to be no higher than the standard for punitive damages that an increasingly conservative majority may declare.


official policy. Our proposal's aesthetic flaw, however, is of no real consequence. Redesigning § 1983 liability standards to achieve a uniform approach to state of mind strikes us as little more than Emersonian foolish consistency. If satisfying this formal qualm were to foreclose entity liability without fault, the redesign would fail, as does the Court's current formulation of "policy," to serve the statute's paramount purpose of restraining governmental misconduct.

The flaw would be worse than aesthetic if the "deprivation" about which any § 1983 plaintiff must complain is the same as the more-than-negligent state of mind required by the term "deprive" in the Due Process Clause. Were that the case, the Court departs from the statutory scheme by enabling recovery against individual defendants whose only sin is ignorance of well-settled precedent. Similarly, we would depart from the statutory scheme by urging recovery against entities whose only sin is engaging agents who violate federal rights. But the Court itself has held that not every § 1983 "deprivation" need entail the same wrongful state of mind required to "deprive" a person of due process. We are therefore sanguine about the prospect of holding liable an entity (which is mindless in any event) based solely on the unlawfulness of its agents' conduct.

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See supra paragraph following note 176 (stating that individual defendants remain liable for conduct their entity authorized); supra paragraphs preceding notes 183 & 192 (discussing the Court's several formulations of "official policy" as the prerequisite for entity liability). Of these official policy formulations, the "deliberate indifference" element of City of Canton v. Harris, 489 U.S. 378 (1989), applicable in cases where the plaintiff seeks to hold the entity liable for an omission, most clearly reflects the requirement of advertence. Some degree of advertence is also evinced in the Court's other approved variations: the official policy statement (Monell), legislation (Pembaur), settled custom (Praprotnik and Jett), or delegation of final policymaking authority to an individual official (Praprotnik and Jett).

See supra part V.B.

See supra notes 2 & 66.

See supra text accompanying notes 217-18 & 362-63.

See supra notes 15 & 362. Additional support for this conclusion may be found in the fact that the Ku Klux Klan Act from which § 1983 is derived was enacted not only to enforce the Fourteenth Amendment, but also "for other purposes." See supra note 2. That § 1983 ranges beyond Fourteenth Amendment enforcement goals is also evident from its provision of a remedy for deprivations of rights secured by "the laws," now understood to refer to federal statutes. See supra text accompanying notes 257-69.
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tional law. Within the sphere of intent, individual defendants would incur liability even for newly declared federal violations so that the individual case would recapture some of its lawmaking potential. In the end, redirection of the statute's enforcement efforts away from the individual defendant and toward the government entity is informed by Justice Harlan's central notion that the "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy."\(^{392}\)

\(^{392}\) Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring), overruled in part by Monell v. Department of Social Servs., 436 U.S. 658 (1978). In light of the guidance we take from Justice Harlan's language, one might ask why we would limit the liability of individuals to cases in which the actor's conduct is intentional. Recall that when Justice Harlan wrote in Monroe, the only "person" liable for violations was the individual. By holding government entities amenable under § 1983, Monell recognized an alternative conduit for deterrence. As a result, new questions are presented in striking the right balance between, on one hand, the statutory goals of government restraint, compensation, and deterrence and, on the other, the fairness and chilling concerns identified by the Court. These suggestions address those questions.