IN PRAISE OF THE ELEVENTH AMENDMENT AND SECTION 1983

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AS everyone knows, the Eleventh Amendment[1] is a mess. It is the home of self-contradiction,[2] transparent fiction,[3] and arbitrary stops in reasoning.[4] Any hope of doctrinal stability is undermined by shifting paradigms, as the Eleventh Amendment is inconsistently conceptualized as a form of sovereign immunity, as an exception to federal jurisdiction, and as a structural constraint on the powers of the national government.[5] While commentators dispute the merits of these conceptions, the courts forge logic-chopping combinations.[6]

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[1] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[2] Like defects of subject-matter jurisdiction, Eleventh Amendment immunity can be raised for the first time on appeal, *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); but unlike defects of subject-matter jurisdiction, Eleventh Amendment immunity can be waived if the state consents to suit, *Hans v. Louisiana*, 134 U.S. 1, 17 (1890).

[3] A constitutional claim against a state officer requires state action, but the defendant is said to be "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Ex parte Young, 209 U.S. 123, 160 (1908).

[4] The reasoning of *Ex parte Young* applies with equal (im)plausibility in every case, yet the precedent applies only in suits for prospective relief. *Edelman*, 415 U.S. at 667-68.

[5] See, e.g., Stewart A. Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139, 139-40, 165-66 (1977) (arguing that federalism concerns underlie Eleventh Amendment doctrines that are explained on other grounds); George D. Brown, State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of *Atascadero State Hospital v. Scanlon*, 74 Geo. L.J. 363, 367, 370 (1985) (reviewing the confusing categories surrounding the Eleventh Amendment and suggesting that it is best viewed as a "limitation on the national government derived ultimately from the structure of the federal system"); William Burnham, "Beam Me Up, There's No Intelligent Life Here": A Dialogue on the Eleventh Amendment with Lawyers from Mars, 75 Neb. L. Rev. 551 (1996) (leading the reader on an entertaining romp through the curiosities of Eleventh Amendment jurisprudence).

[6] See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105-06, 119-20

Finally, there is the astonishing (if widely welcomed) proposition that whatever the Eleventh Amendment may mean, Congress can override it.[7] Even *Marbury v. Madison*[8] takes a hit in the intellectual disaster of the Eleventh Amendment.

Despite—or perhaps because of—the incoherence in the cases, the Eleventh Amendment has drawn the attention of leading scholars. The dominant academic position asserts that the Eleventh Amendment limits only diversity jurisdiction, that it has no application in federal question cases, and that in constitutionalizing some form of state sovereign immunity, the Supreme Court has been on the wrong track these past 100 years.[9] Of course, there have been rebuttals[10] and contributions from other perspectives.[11] Among the most im-

(1984) (variously discussing the Eleventh Amendment as a "constitutional immunity," as a limitation on "the scope of Art. III's grant of jurisdiction," and as a barrier to "intrusion on state sovereignty" derived from "principles of federalism"). For critical discussions of *Pennhurst*, see George D. Brown, Beyond *Pennhurst*—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court, 71 Va. L. Rev. 343, 365-67 (1985) (analyzing the impact of *Pennhurst* on structural reform litigation); Erwin Chemerinsky, State Sovereignty and Federal Court Power: The Eleventh Amendment after *Pennhurst v. Halderman*, 12 Hastings Const. L.Q. 643, 647-54 (1985) (analyzing *Pennhurst* in light of competing conceptions of the Eleventh Amendment); David Rudenstine, *Pennhurst* and the Scope of Federal Judicial Power to Reform Social Institutions, 6 Cardozo L. Rev. 71, 83-99 (1984) (predicting that *Pennhurst* foreshadowed restrictions on judicial power to vindicate *federal* rights in institutional reform litigation); David L. Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61, 62, 67-71 (1984) (attacking *Pennhurst* for reinforcing the erroneous constitutionalization of sovereign immunity).

[7] See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[8] 5 U.S. (1 Cranch) 137 (1803).

[9] Contributors to this tradition include Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1473-84 (1987); Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines (pt. 1), 126 U. Pa. L. Rev. 515, 538-40 & 540 n.88 (1978); William A. Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. Chi. L. Rev. 1261, 1271-75 (1989); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1060-63 (1983); Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1, 39-51 (1988); Suzanna Sherry, The Eleventh Amendment and Stare Decisis: Overruling *Hans v. Louisiana*, 57 U. Chi. L. Rev. 1260, 1271-72 (1990).

[10] See, e.g., William P. Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation, 102 Harv. L. Rev. 1372 (1989).

[11] See, e.g., Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1188-1202 (1988) (locating the Eleventh Amendment in a wide-ranging examination of "Federalist" versus "Nationalist" ideologies); Wayne McCormack, Intergovernmental Immunity and the Eleventh Amendment, 51 N.C. L. Rev. 485

portant are articles endorsing the power of Congress, if its intention be clearly stated, to override Eleventh Amendment immunity—at least in some cases.[12] In the aggregate, Eleventh Amendment scholarship is not only voluminous but dazzling. In insight, elegance, and sophistication, it is unsurpassed by any similar body of work in all of constitutional law.

Yet for all its virtues, Eleventh Amendment scholarship neglects a crucial fact: The Eleventh Amendment almost never matters. More precisely, it matters in ways more indirect and attenuated than is usually acknowledged. Most discussions proceed on the (often unstated) assumption that Eleventh Amendment immunity, when applicable, categorically forbids actions against states. That is formally true but substantively misleading. In almost every case where action against a state is barred by the Eleventh Amendment, suit against a state officer is permitted under Section 1983.[13] Very

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(1973) (relating the sovereign immunity conception of the Eleventh Amendment to the traditional doctrines of intergovernmental immunities); Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342, 1351-71 (1989) (arguing that it is "not ridiculous" to follow the text of the Eleventh Amendment); James E. Pfander, History and the Eleventh Amendment: An "Explanatory" Account of State Suability, 83 Cornell L. Rev. (forthcoming 1998) (on file with the Virginia Law Review Association).

[12] The originators of this theory were John E. Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1441 (1975) (arguing that the "pragmatic problems of federalism posed by the eleventh amendment should be resolved by Congress, not by the judiciary"), and Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 693-99, 711 (1976) (supporting congressional power to determine Eleventh Amendment and other intergovernmental immunities). Subsequent contributions include Allen K. Easley, The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents, 64 Denv. U. L. Rev. 485, 513-17 (1988) (exploring the relationship between congressional authorization and state consent to suit), and Vicki C. Jackson, One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term, 64 S. Cal. L. Rev. 51, 61-76, 78-80 (1990) (offering a comprehensive examination of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

[13] 42 U.S.C. § 1983 (1994). The statute reads in part:

> 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.

generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment.[14] So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably. In most jurisdictions, the state's readiness to defend and indemnify constitutional tort claims is a policy rather than a statutory requirement, but it is nonetheless routine.

Some years ago, Peter Schuck concluded, in the best summary of this subject, that indemnification of state and local officials sued under Section 1983 was "neither certain nor universal."[15] He is surely still right about the uncertainty—if only because indemnification so often depends on local practice or decision rather than on contract or statute. He may also be right about the incompleteness of indemnification—at least if one takes account of the occasional cases of flamboyantly bad actors. State officers who become targets of criminal prosecution are unlikely to receive financial subvention for civil liability. Such cases aside, the state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on government defense and indemnification.[16] In the generality of cases, constitutional tort actions against government officers are functional substitutes for direct access to government treasuries.

This is not to say that the identity of the defendant is completely inconsequential. Juries confronting a flesh-and-blood defendant may be less quick to play Robin Hood. State officers named as defendants may feel more anxiety and embarrassment than if their em-

[14] See Lant B. Davis, John H. Small & David J. Wohlberg, Project, Suing the Police in Federal Court, 88 Yale L.J. 781, 810-11 (1979) (reporting that, in Connecticut cases reviewed, police sued under § 1983 were provided counsel and indemnified against loss). Aside from this useful but dated work, there is a dearth of scholarly attention to the question of who actually pays § 1983 claims.

[15] Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 85 (1983).

[16] The best evidence I can give for this statement is personal experience. For nearly 20 years I have lectured at the National Academy, a training institution for state and local law enforcement located at the Federal Bureau of Investigation Academy in Quantico, Virginia. I routinely ask whether the officers there assembled know personally of any case where an officer sued under § 1983 was not defended and indemnified by his or her agency. The uniform answer is "no." If there were any real risk that police officers would be left to defend § 1983 actions on their own, this population would know it.

ployers were sued for their conduct.[17] Occasionally, individual defendants will doubt the competence or loyalty of government lawyers and hire their own counsel.[18] These effects are real and in particular circumstances may be important, but insofar as the question is whether states can be held financially accountable for constitutional violations, the functional answer is yes.

The real role of the Eleventh Amendment is not to bar redress for constitutional violations by states but to force plaintiffs to resort to Section 1983. It is as if the state treasury were a large house whose facade is guarded by the hurdles and mazes of the Eleventh Amendment but whose side doors stand ajar. Almost always, plaintiffs who face state "immunity" under the Eleventh Amendment can sue under Section 1983. The rules that actually control state liability for constitutional violations are, therefore, not the ostensibly categorical prohibitions of the Eleventh Amendment but the more qualified doctrines of Section 1983.

The ambition of this Article is to analyze the Eleventh Amendment and Section 1983 as an integrated package of liability rules for constitutional violations.[19] This analysis will be purely functional.

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[17] In talking with officers at the National Academy, I have been struck by their aversion to being sued, even when they were confident that no judgment would be satisfied from their personal resources.

[18] Peter Schuck has observed:

> Most jurisdictions apparently provide [defense counsel] for employees who acted within the scope of employment. Officials assured of representation by government counsel, however, may still be apprehensive, for they neither select, pay, nor directly control the lawyers assigned to their case; counsel may be incompetent, unresponsive, or subject to conflicts of interest that become apparent only after the case is well under way.

Schuck, supra note 15, at 84-85.

[19] For statutory rights, the role of the Eleventh Amendment is different. There it functions as a kind of super-*Erie* doctrine, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requiring not only that abrogation of state sovereign immunity be accomplished by Congress rather than by the courts, but also that Congress confront and record that decision with unmistakable clarity. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

Despite rhetorical overheating on both sides, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), is not to the contrary. By overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *Seminole Tribe* seemed to raise the prospect that the Eleventh Amendment would be a substantive limit on congressional power under Article I, rather than merely a procedural requirement. According to the Court, however, the decision could be overruled tomorrow if Congress simply clarified its intention to allow—more

The reader will find here no foray into the "nontextual originalism" of Eleventh Amendment jurisprudence.[20] Nor does this Article attempt to find meaning in the silences in the legislative history of the 1871 Civil Rights Act.[21] Indeed, there will be no attention to the

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accurately, its intention not to disallow—enforcement actions against state officers. See *Seminole Tribe*, 116 S. Ct. at 1133 n.17 ("Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act.").

Seminole Tribe's conclusion that Congress intended to preclude *Ex parte Young* enforcement is one of the Supreme Court's strangest actions in many years. Since enforcement against state officials would have implemented precisely the intention manifest in every section and sentence of the statute, the Court's insistence that Congress actually intended to forbid this solution strikes me as wilfully perverse. Cf. Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 Sup. Ct. Rev. 1, 43 (describing the Court's discussion of the *Ex parte Young* remedy as "singularly unpersuasive"). So long as officer suits remain generally available, *Seminole Tribe* will have relatively little impact. But see Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2040 (1997) (establishing a narrow exception to *Ex parte Young*); see id. at 2039-40 (Kennedy, J.) (where two Justices indicated that they would be willing to go farther in curtailing officer suits).

[20] Marshall, supra note 11, at 1345. "Nontextual originalism" refers to constructions based not on the language of the Eleventh Amendment but on its apparent purpose to overrule *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See, e.g., Ex parte New York, 256 U.S. 490, 497 (1921) (describing "the fundamental rule of which the Amendment is but an exemplification").

[21] I have had occasion elsewhere to remark on the Supreme Court's uses of legislative history in § 1983 jurisprudence:

> Nothing will be said here about the "reasoning" of *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978)], as the opinion is concerned chiefly with the legislative history of the Civil Rights Act of 1871. Anyone who spends time with the Court's investigations of that history will find them at least opportunistic. *Monell* is a particularly rich example. First, it reversed the Court's earlier and unanimous conclusion, based equally on the history of the 1871 Act, that "person" did not include municipality. *See* Monroe v. Pape, 365 U.S. 167, 187-92 (1961). Second, the *Monell* Court found in that same history a requirement, for municipal liability, of an official "policy or custom" supporting the unconstitutional act. This is the same sort of showing that the *Monroe* Court, over Justice Frankfurter's dissent, refused to require for any other "person" who might be sued under § 1983. Thus, we are told that the 42d Congress simultaneously intended to require proof of an official policy or custom in order to hold a municipality liable as a "person" acting "under color of any statute, ordinance, regulation, custom or usage" of state law (R.S. § 1979, 42 U.S.C. § 1983), but to dispense with this requirement for any other kind of "person" sued under the same provision. [Whatever else may be said of these conclusions,] they are not a persuasive reading of the historical record adduced in the Court's opinions.

John C. Jeffries, Jr., Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82, 86 n.24 (1989). See also Peter W. Low & John C. Jeffries, Jr., Civil Rights Actions: Section 1983 and Related Statutes 128-30 (2d ed. 1994)

sources of law of the Eleventh Amendment or Section 1983. This Article will focus exclusively on the content of the law, how the Eleventh Amendment and Section 1983 interact, and whether the rules they create make any sense.

This approach yields some surprising conclusions. First, taken together, the Eleventh Amendment and Section 1983 are more nearly coherent—or less radically incoherent—than initially appears. Basically, the law of governmental liability for constitutional torts aligns on a requirement of fault. Very generally, the victim of a constitutional violation can recover damages (in effect, from the government) on proof that the actor who caused the injury was in some relevant sense at fault. The requirement of fault is more nearly comprehensive than is generally perceived, and assessing the wisdom of its use in this context should be at the top of the academic agenda.

Second, as a deviation from the Section 1983 regime of fault-based liability for constitutional violations, the Eleventh Amendment is much less important than the literature would suggest. The Eleventh Amendment purports to establish a rule of no liability, but that is functionally true only where the alternative of Section 1983 is not available. The area so described is the practical space inhabited by Eleventh Amendment scholarship, and for constitutional violations, that space is very small.

A third conclusion is normative and deeply controversial. Unlike most others who have studied the matter, I believe that a constitutional tort regime based on fault is wise policy. To that extent, I find the law of the Eleventh Amendment and Section 1983 fundamentally

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(commenting on judicial methodology under § 1983). Scholars from a variety of perspectives have noted the Court's misuses of the history of § 1983. See, e.g., Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 Stan. L. Rev. 51, 101 (1989) (describing the Court's "manipulation of text, legislative history and policy" as "transparent, especially when it jumps merrily from one source of law to another"); Michael J. Gerhardt, The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983, 62 S. Cal. L. Rev. 539, 541 (1989) (concluding that, contrary to its "ostensible and misleading reliance" on history, the Court has treated § 1983 as an "open-textured delegation of authority" for common-law lawmaking); Richard A. Matasar, Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis, 40 Ark. L. Rev. 741 (1987) (criticizing the Court's reliance on history in the law of official immunity); Michael Wells, The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules, 19 Conn. L. Rev. 53, 54 (1986) (suggesting that the Court "should discard legislative intent as an analytic tool for adjudicating constitutional tort claims").

sound, despite rococo doctrine and occasional nuttiness. By viewing the Eleventh Amendment and Section 1983 as an integrated liability regime, I hope to show the hidden sense in current law.

I. THE CENTRALITY OF FAULT

The centrality of fault in the law of constitutional torts is easily seen. Every state or local officer sued under Section 1983 (and every federal officer sued under the analogous common-law regime of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[22]) can claim official immunity. For those engaged in legislative, judicial, or certain prosecutorial functions "intimately associated with the judicial phase of the criminal process," the immunity is absolute.[23] The same holds true for the President of the United States, at least for official acts.[24] All other executive officers, from rookie cops to state governors, enjoy only qualified immunity.[25]

Defining qualified immunity is a matter of some subtlety. At an abstract level, it exists if the defendant had a reasonable and good faith belief in the legality of the act in question.[26] For reasons of

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[22] 403 U.S. 388, 397 (1971) (authorizing private actions for damages for Fourth Amendment violations by federal officers). Federal officers sued under *Bivens* can claim the same immunities as those available to state and local defendants under § 1983. Butz v. Economou, 438 U.S. 478, 504 (1978) (concluding that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

[23] Imbler v. Pachtman, 424 U.S. 409, 430 (1976). See id. at 423-30 (prosecutorial immunity); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (judicial immunity); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (legislative immunity). These immunities protect functions, not offices. A judge engaged in nonjudicial activities is not entitled to absolute immunity. See Forrester v. White, 484 U.S. 219, 229-30 (1988) (finding no absolute immunity for discharge of court employee).

[24] See Clinton v. Jones, 117 S. Ct. 1636, 1644 (1997) (holding that a sitting President is not immune from civil liability for unofficial acts); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that the President is absolutely immune for official acts).

[25] See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (holding that governors enjoy only qualified immunity).

[26] In *Scheuer*, the Court observed:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for

administration, the Supreme Court has curtailed the subjective branch of the inquiry, so that today qualified immunity usually turns on whether a reasonable officer "could have believed" the conduct to be lawful.[27] What a reasonable officer could have believed depends, of course, not only on the factual circumstances, but also on the clarity and specificity of the constitutional rule and the knowledge that the officer could reasonably be expected to have. That the interaction of these factors is not well described in the literature probably results from the particularization of the inquiry. The problems faced by various types of executive officers and the constitutional rules governing their conduct are sufficiently distinct that there have developed in fact, though not in name, a law of qualified immunity for police officers, a law of qualified immunity for school board members, and so forth.[28] In all cases, however, qualified immunity turns on the reasonableness of a mistake as to constitutionality. The absence of qualified immunity is therefore equivalent to a specie of negligence, and that word is the best short description of the minimum liability standard for constitutional torts.

Some rights require more. Some constitutional rights can be violated only by persons acting with a particular purpose or intention. A good example is the Fourteenth Amendment guarantee against racial discrimination. An act violates equal protection only if done with discriminatory purpose. Racially disproportionate impact, standing alone, is not unconstitutional.[29] Another example comes from the law of procedural due process. The "deprivation" of life, liberty, or property subject to due process must be intentional; mere negligence

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qualified immunity of executive officers for acts performed in the course of official conduct.

Id.

[27] See, e.g., Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) (noting that Secret Service agents are entitled to qualified immunity for an allegedly unconstitutional arrest "if a reasonable officer could have believed" in the existence of probable cause); Anderson v. Creighton, 483 U.S. 635, 639 (1987) (same standard).

[28] 2 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 §§ 8.09-8.21 (3d ed. 1991) (analyzing separately the qualified immunity of school officials, mental hospital officials, law enforcement officers, and state and local government executives).

[29] See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 239-40 (1976). For criticism of this requirement, see Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105 (1989).

does not suffice.[30] A plaintiff seeking to vindicate those rights must prove specific intent. Even though Section 1983 itself does not demand such culpability, a showing of specific intent is essential to establishing a violation of the underlying right.[31]

Regardless of the culpability (if any) required by the underlying right, Section 1983 precludes damages liability for conduct that the reasonable officer could have believed was lawful. One may be tempted, therefore, to think that qualified immunity matters only when the underlying right contains no intent element, but that is not strictly true. For some constitutional violations, the required state of mind is utterly inconsistent with a reasonable belief in the legality of one's conduct. Racial discrimination against minorities is an example. The defendant shown to have purposefully discriminated against African-Americans will not be heard to claim that he reasonably thought such actions lawful. On those facts, qualified immunity would be irrelevant because so plainly foreclosed. For other rights, however, the required state of mind, even some form of specific intent, would not preclude an immunity defense. Affirmative action is an example. Given current law, a reasonable officer (say in law school admissions) might discriminate in favor of minorities in a reasonable (but mistaken) belief that her conduct met constitutional standards. Procedural due process is similar. The defendant who intentionally takes life, liberty, or property might have a reasonable belief in the legality of that conduct. One could intentionally fire a government worker in the reasonable (but mistaken) belief that the procedures accompanying that discharge met constitutional standards. On those facts, qualified immunity would come into play, even though the underlying right required specific intent.

One of the frustrations of working in this area is the absence of any comprehensive account of the ways qualified immunity and specific rights interact.[32] Pending further study, perhaps the best that can be said is that some constitutional violations require a particular motivation or state of mind that makes qualified immunity irrele-

[30] See Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (holding that due process is not violated by merely negligent act causing loss of life, liberty, or property).

[31] See id. at 330.

[32] For an admirable beginning, see David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 57-61 (1989).

vant, while others do not. Debate about the merits of qualified immunity should focus on cases where it might control the outcome; cases where qualified immunity will be irrelevant to the outcome must be put aside.

Throughout this Article, I refer to the requirement of negligence as to illegality as a specie of "fault" and the absence of any such requirement as "strict liability." This terminology is familiar, but incomplete. As used here, "strict liability" refers only to the absence of a fault requirement springing from Section 1983 (or the parallel remedial scheme of *Bivens*). As has been noted, in many cases the right itself requires culpability even when Section 1983 does not. Where the underlying right requires a "morally reprehensible" state of mind,[33] the absence of a qualified immunity defense as part of the law of Section 1983 would render liability "strict" only in a technical sense. A more descriptive statement might be that abrogation of qualified immunity would render liability *potentially* strict, depending on the content of the underlying right.

Under current law, the requirement of fault is very nearly comprehensive. Qualified immunity applies to all executive officers at all levels of government, with the solitary exception of the President of the United States. It is true that legislative defendants enjoy absolute immunity, but legislative judgments are implemented by executive officers, who can themselves be sued and who can claim only qualified immunity. Absolute immunity is also available to persons performing judicial functions and those prosecutorial functions "intimately associated with the judicial phase of the criminal process."[34] The best explanation for this rule is probably that the alternative mechanisms for remedying misconduct by judges and the in-court misconduct of prosecutors are thought good enough to obviate the need for money damages.[35] In any event, the absolute immunity for judicial and some prosecutorial functions is a relatively minor exception to the fault standard.

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[33] Harold S. Lewis, Jr., & Theodore Y. Blumoff, Reshaping Section 1983's Asymmetry, 140 U. Pa. L. Rev. 755, 762 (1992) ("[T]he conduct at issue in most nonintentional § 1983 situations would seldom be morally reprehensible . . . .").

[34] Imbler v. Pachtman, 424 U.S. at 430.

[35] See Ronald A. Cass, Damage Suits Against Public Officers, 129 U. Pa. L. Rev. 1110, 1146-47, 1150 (1981).

Of greater intellectual interest is the deviation in the other direction. For certain acts of local governments, the nominal rule is strict liability. Localities can be sued directly and held strictly liable for unconstitutional acts done pursuant to official policy or custom.[36] Despite the hopes of academics, who generally have applauded strict governmental liability,[37] the Supreme Court has adopted a variety of stratagems to constrict its availability. The threshold requirement of "official policy or custom" has been narrowly construed,[38] and in "failure-to-train" cases, fault has been explicitly reintroduced by requiring proof of "deliberate indifference" to violations of constitutional rights.[39] Indeed, the Court's most recent pronouncement on "official policy or custom" hints, albeit quite confusingly, at the possibility of reinstating a fault requirement for all cases of governmental liability under Section 1983.[40] In any event, though a minority of Justices have called for dropping all restrictions on local government liability for the actions of municipal employees,[41] the majority seems eager to take any opportunity to defeat it.[42] As constrained

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[36] Owen v. City of Independence, 445 U.S. 622, 638 (1980) (concluding that localities are entitled to no immunity); Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978) (holding localities liable for acts done pursuant to official policy or custom).

[37] See infra note 79 and accompanying text.

[38] See, e.g., City of St. Louis v. Praprotnik, 485 U.S. 112, 124-27 (1988) (plurality opinion) (delineating the category of officials for whose actions local governments can be held directly liable).

[39] City of Canton v. Harris, 489 U.S. 378, 388-89 (1989).

[40] See Board of the County Comm'rs v. Brown, 117 S. Ct. 1382 (1997). To say that *Brown* is not a model of clarity would be a model of understatement. The case rejected the liability of a county for its sheriff's decision to hire an apparently unqualified relative as a deputy. Id. at 1394. In the opinion of the Court, Justice O'Connor repeatedly stresses "fault" or "culpability" as an essential prerequisite to governmental liability. See, e.g., id. at 1389. Of course, that is precisely what *Owen v. City of Independence* said was not required. *Owen*, 445 U.S. at 650. Yet Justice O'Connor treats *Owen* as good law. Indeed, she cites *Owen* as an example of a case where the evidence against the municipality proved both fault and causation, *Brown*, 117 S. Ct. at 1389, though the only "fault" of the municipality in *Owen* was its failure to anticipate future developments in constitutional law, *Owen*, 445 U.S. at 631 n.10. What all this may mean is, at this point, anyone's guess.

[41] See *Brown*, 117 S. Ct. at 1401-04 (Breyer, J., with whom Stevens and Ginsburg, JJ., joined, dissenting).

[42] See, e.g., *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997), where the Court reached the surprising conclusion that Alabama sheriffs were state, not county, officers and thus that their acts could not constitute county "policy or custom." Id. at 1736. The basis for this ruling was a detailed historical examination of Alabama law, id. at 1737-40, none of which has any apparent functional (as opposed to doctrinal) relevance to the

by these interpretations, the exception of municipal liability is exactly that—a narrow deviation from the generally applicable rule of liability based on fault.

II. THE RESIDUAL ELEVENTH AMENDMENT

What then is the residual role of the Eleventh Amendment in constitutional tort cases? It certainly does not bar constitutional tort actions against states, save in a purely formal sense. In the main, it functions to force civil rights plaintiffs to sue state officers rather than the states themselves, thus triggering qualified immunity. The alternative of suing state officers under Section 1983 is anything but irrelevant to the law of the Eleventh Amendment. The Eleventh Amendment has survived not because it means so much but precisely because it means so little. If it were not possible to circumvent the Eleventh Amendment through Section 1983, the Supreme Court would long ago have confined the Eleventh Amendment to diversity cases or adopted some other debilitating construction. Put another way, *Monroe v. Pape*[43] is the *Ex parte Young*[44] of retrospective relief. Just as the fiction of *Ex parte Young* routinely allows civil rights plaintiffs to evade the Eleventh Amendment when they seek injunctive relief, *Monroe v. Pape* (almost as) routinely allows civil rights plaintiffs to evade the Eleventh Amendment when they seek money damages.[45]

But are there not cases in which the Eleventh Amendment (as distinct from the immunity rules of Section 1983) effectively bars enforcement of constitutional rights against states? Are there not

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questions of when and whether strict liability may be imposed under § 1983.

[43] 365 U.S. 167 (1961).

[44] 209 U.S. 123 (1908).

[45] What about claims against state officials who enjoy absolute immunity from awards of damages under § 1983? For such cases, the role of the Eleventh Amendment is unclear. If the Eleventh Amendment were repealed—or, which is functionally the same thing, the Supreme Court were to confine it to diversity cases—civil rights plaintiffs might be able to avoid absolute legislative and judicial immunity. Or perhaps the considerations that prompted the courts to recognize absolute immunities under § 1983 would resurface in actions directly against states. So far as I know, the Eleventh Amendment has not been thought of as the essential problem in absolute immunity cases. At any rate, the defects of absolute immunity could certainly be cured without resort to actions against states and without necessitating any change in the law of the Eleventh Amendment.

cases in which the Eleventh Amendment actually, as well as apparently, renders states immune from suit? The answer is "perhaps."

In *Ford Motor Co. v. Department of Treasury*,[46] the Supreme Court said: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."[47]

These words were uttered in 1945, long before the (re)invention of Section 1983 in *Monroe v. Pape*. *Monroe*'s recognition of a broad right of action against state officials obviously collides with *Ford Motor Co.*'s financial protection of states. From the state's point of view, every damage action against a state officer is "in essence one for the recovery of money from the state," as the state routinely will bear the cost of the defending the action and satisfying any adverse judgment. *Monroe v. Pape* may have eviscerated *Ford Motor Co.*, but it did not overrule it. The idea survived of a narrower category of actions nominally brought against state officers but coercively recharacterized as "in essence" against states and therefore barred by the Eleventh Amendment. For cases in this not-well-defined category, the alternative of Section 1983 is not available, and the Eleventh Amendment actually bars all relief.[48]

The premier example is *Edelman v. Jordan*.[49] Jordan brought a class action to recover money that Illinois had wrongfully withheld in violation of federal regulations under the Aid to the Aged, Blind, or Disabled Act.[50] To evade the Eleventh Amendment, Jor-

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[46] 323 U.S. 459 (1945).

[47] Id. at 464.

[48] The "unruly distinction" between actions against officers and those against states has a long and unfortunate history. See Tribe, supra note 12, at 687. Tribe compares *In re Ayers*, 123 U.S. 443 (1887), with *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952). Tribe, supra note 12, at 687 n.27. In the former case, the Eleventh Amendment was held to forbid a suit to enjoin state officers from destroying the value of tax coupons by proceedings against attempted users, *Ayers*, 123 U.S. at 507, while in the latter the Eleventh Amendment was held to allow a suit to enjoin state officers from assessing *ad valorem* property taxes contrary to a legislative charter, *Redwine*, 342 U.S. at 305-06. Perhaps the real distinction, if there is one, is the date. The Eleventh Amendment meant more in 1887 than in 1952. For an informative recent attempt to find the logic in the older cases, see Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 82 (1997) (suggesting that there may have existed a "common law baseline" of trespass remedies against government officers for illegal conduct).

[49] 415 U.S. 651 (1974).

[50] Id. at 653.

dan sued the relevant state officers, but the Supreme Court nevertheless forbade retroactive relief. After quoting *Ford Motor Co.*, the Court said that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[51]

Unfortunately, the Court did not explain how this rule differentiated *Edelman* from all other Section 1983 cases. Why was this liability one "which must be paid from public funds"? Why could the state not leave the liability on the responsible state officers, as it is ostensibly free to do in all Section 1983 cases? If the answer is that the state would be coerced by necessity or bound by conscience to hold the officers harmless, why would that reasoning not convert every Section 1983 action into a suit against the state barred by the Eleventh Amendment? And if (as is sometimes suggested) the answer is that the officers would have had a right of indemnification from the state, that is simply a question of state law. Whether a state chooses to recognize a right to indemnification surely cannot control the availability of federal remedies or the meaning of federal constitutional guarantees.[52]

Despite the lack of any coherent generalization about why the action was "in essence" against the state, *Edelman* was on its facts not surprising. Historically, the Eleventh Amendment has been linked to protecting states against forced repayment of debts.[53] Although the welfare benefits allegedly withheld in *Edelman* were not exactly like the defaulted debts involved in the early cases,[54] there

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[51] Id. at 663.

[52] See Tribe, supra note 12, at 687 n.25 ("[A] state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity.").

[53] See generally John V. Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423, 435 (linking the post-Reconstruction revival and extension of the Eleventh Amendment to Southern states' desire for protection from creditors); Pfander, supra note 11, (concluding that the Eleventh Amendment protected states from suits in federal court for debts incurred under the Articles of Confederation).

[54] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (to which the Eleventh Amendment was a response); see also the 19th-century cases that refurbished the Eleventh Amendment as a variant of state sovereign immunity, including *Hans v. Louisiana*, 134 U.S. 1 (1890) (barring suit on a state bond by one of the state's own citizens); *Christian v. Atlantic & N.C. R.R. Co.*, 133 U.S. 233, 243 (1890) (barring attachment of state's property); *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (barring suits by other states); and *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883) (barring mandamus action against state officials).

was an apparent similarity. Both claims are more like contract than tort. On that (rather shaky) ground, *Edelman* might be differentiated from the routine Section 1983 action, but as an analytic rule for determining when an action against a state official would be recharacterized as "in essence" against the state, *Edelman* was spectacularly uninformative.

The Supreme Court returned to the problem a decade later. *Kentucky v. Graham*,[55] decided in 1985, treated the lower courts to a little essay on the distinction between "official capacity" and "personal capacity" suits against government officers. A suit against a state officer in his or her official capacity is a suit against the state and (absent congressional abrogation) is barred by the Eleventh Amendment. A suit against a state officer in his or her personal capacity may go forward under Section 1983. In other words, a damages action brought against a state officer in his or her official capacity is a serious pleading error.

Graham told plaintiffs what to say, but it did not tell courts when (if ever) to dismiss properly pleaded complaints. Not surprisingly, some courts lost their way. After all, they had been instructed that state officers could be sued only in their personal or individual capacities but only for their official misconduct. In *Hafer v. Melo*[56] a lower court accepted the defendant's argument that because she was sued for employment decisions made in her official capacity as state auditor, the suit must necessarily lie against her in her official capacity as state auditor.[57] To anyone not schooled in the intricacies of Section 1983, this might seem logical, but the Supreme Court disagreed. As Justice O'Connor pointed out, allowing state officers to recharacterize suits against them as "official capacity" would render them (and the states that employ them) absolutely immune from the award of damages.[58] The true rule, of course, is that executive officers (and, indirectly, the states that employ them) have only qualified immunity. The defendant's gambit therefore failed.

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[55] 473 U.S. 159, 165-67 (1985).

[56] 502 U.S. 21 (1991).

[57] Id. at 23.

[58] Id. at 28. Absolute immunity results from the Eleventh Amendment and from its shadow, *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), which held that the term "person" in § 1983 does not include a state. Id. at 64.

Though the *Hafer* Court insisted that "the distinction between official-capacity suits and personal-capacity suits is more than a 'mere pleading device,'"[59] its reasoning proves exactly the opposite. If acts central to a defendant's official duties do not render the suit "official capacity," perhaps nothing does. Overwhelmingly, that is the conclusion of the lower courts, at least for constitutional violations.

Two surveys confirm this finding. The first looked at all potentially relevant lower court decisions for the first six months of 1997.[60] The second made a series of more focused attempts to locate relevant cases in the six years from 1991-1996, inclusive.[61] Of the several hundred decisions produced by these surveys, there are only two clear instances of constitutional damages actions properly pleaded against a state officer in his or her personal capacity being dismissed as "in essence" against the state.[62] When the constitutional tort plaintiff

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[59] 502 U.S. at 27 (quoting *Will*, 491 U.S. at 71).

[60] Research was conducted in Westlaw's "ALLFEDS" database. The search request was: ("42 U.S.C." /S 1983 "42 U.S.C.A." /S 1983) & "ELEVENTH AMENDMENT" & DA(AFT 12/31/96 & BEF 7/1/97) & ("PERSONAL CAPACITY" "INDIVIDUAL CAPACITY" "OFFICIAL CAPACITY"). This survey found 153 cases, 99 of which were relevant to the present analysis.

[61] For this time period, three different searches were conducted through the LEXIS database within the "GENFED" library, "COURTS" file. The first search request was: 42 W/5 USC W/5 1983 W/50 OFFICIAL CAPACITY W/50 PERSONAL CAPACITY & DATE AFT 1990 & DATE BEF 1997. This search located 69 cases. The second search request was: 42 W/5 USC W/5 1983 W/50 RETROACTIVE RELIEF & DATE AFT 1990 & DATE BEF 1997. This search, conducted in June 1997, yielded an additional 9 cases. The third search, by far the broadest, was: 42 W/5 USC W/5 1983 W/50 OFFICIAL CAPACITY W/50 INDIVIDUAL CAPACITY & DATE AFT 1990 & DATE BEF 1997. This located 121 appellate decisions, which have been reviewed, and several hundred trial court decisions, which have not.

In addition to these searches, a few decisions relevant to the present study were located by Shepardizing the major cases in this area.

[62] The two exceptions are *Mello v. Woodhouse*, 755 F. Supp. 923, 930 (D. Nev. 1991), and *Woulfe v. County of Cook Dep't of Adult Probation*, No. 95 C 7435, 1997 WL 136265, at *1 (N.D. Ill. Mar. 20, 1997), both of which are discussed in detail in the text. A third possible exception is *Stanescu v. Connecticut*, No. 96-7580, 1997 WL 225117, at *1 (2d Cir. May 5, 1997). In *Stanescu*, the plaintiff thought himself entitled to workers' compensation and sued several state officials for their failure to pay the benefits allegedly required under state law. As summarized by the court of appeals, the district court dismissed the complaint on the ground that the Eleventh Amendment barred suit against these defendants in their official capacities and that the complaint "did not state a claim on which relief can be granted against defendants in their individual capacities." Id. at *1. The United States Court of Appeals for the Second Circuit affirmed in an unpublished opinion emphasizing both the Eleventh Amendment bar against official-capacity suits and the absence of any allegation that would overcome the defendants'

properly identified the defendant, that characterization was allowed to stand. When plaintiffs sued officers in both personal and official capacities, the official-capacity claims were dismissed and the personal-capacity claims allowed to go forward.[63] When plaintiffs sued state officers without specifying the capacity, courts generally allowed the suits to proceed. Most of the circuits follow the rule that complaints ambiguous as to the defendant's capacity sued should be construed liberally in favor of plaintiffs.[64] Other courts sometimes construed ambiguous complaints to see whether official-capacity or personal-capacity was intended (which seems clear, given that one construction is self-defeating),[65] and sometimes used the pleading error as a quick way of dismissing apparently meritless

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qualified immunity in personal-capacity suits:

> [T]he pleading contains no allegations of any acts or refusals to act by defendants other than in their official capacities, no allegation as to any act performed by any defendant individually, no basis for inferring that any defendant was familiar with either plaintiff, and no basis for inferring that any action or omission was the result of an improper motivation.

Id. Additionally, there may have been a question whether the plaintiff had a federal claim in the first place. In any event, the Second Circuit's emphasis on the absence of appropriate allegations against the defendant officials suggests that a personal-capacity suit against them would have been allowed to proceed if there had been any basis for it.

[63] See, e.g., Hutsell v. Sayre, 5 F.3d 996, 997-98 (6th Cir. 1993), cert. denied, 510 U.S. 1119 (1994); Jungels v. State Univ. College, 922 F. Supp. 779, 790 (W.D.N.Y. 1996), aff'd, 112 F.3d 504 (2d Cir. 1997); Collin v. Rector & Bd. of Visitors of Univ. of Va., 873 F. Supp. 1008, 1016 (W.D. Va. 1995); Patrick v. Staples, No. S90-447, 1991 U.S. Dist. LEXIS 18047, at *10 to *12 (N.D. Ind. Sept. 30, 1991); Copsey v. Swearingen, 762 F. Supp. 1250, 1254-55 (M.D. La. 1991), rev'd in part on other grounds, 36 F.3d 1336 (5th Cir. 1994).

[64] See Pieve-Marin v. Combas-Sancho, 967 F. Supp. 667, 669-71 (D.P.R. 1997) (citing decisions of the Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). Some decisions even follow a dispositive presumption in favor of allowing individual-capacity claims. See, e.g., Cerrato v. San Francisco Comm. College Dist., 26 F.3d 968, 973 n.16 (9th Cir. 1994) (stating that a damages claim against a state official "necessarily implies" an individual-capacity suit). The minority rule followed by the Sixth and Eighth Circuits presumes against individual-capacity suits on ambiguous complaints. See *Pieve-Marin*, 967 F. Supp. at 670 (citing cases).

[65] This was the approach followed by the Third Circuit in *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), aff'd, 502 U.S. 21 (1991). Six plaintiffs correctly said they were suing Hafer in her personal capacity; other plaintiffs failed to specify but their complaints were construed as if they had. Id. at 635-36. Other courts have followed a similar approach. See, e.g., Edwards v. Ashley, No. 94-6542, 1995 U.S. App. LEXIS 31136, at *2 (4th Cir. Nov. 3, 1995); Biggs v. Meadows, 66 F.3d 56, 58 (4th Cir. 1995); Hobbs v. Roberts, 999 F.2d 1526, 1528 (11th Cir. 1993); Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 88-89 (2d Cir. 1991); Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990), cert. denied, 502 U.S. 967 (1991).

suits.[66] Additionally, most courts allowed plaintiffs to amend their complaints in damages actions to specify that the action was directed against an officer in his or her individual capacity.[67] Almost never did the courts refuse to accept a properly pleaded complaint by coercively recharacterizing the complaint as being "really" against the state and therefore barred by the Eleventh Amendment.

The exceptions are informative. One was a Title VII "reverse discrimination" suit to which the plaintiff appended a constitutional claim under Section 1983.[68] Under both theories, the plaintiff sought reinstatement and back pay, standard remedies in employment discrimination but not in constitutional torts. The district court ruled that claims for reinstatement and back pay brought against state officials in their personal capacities are more properly claims against the state itself and therefore are barred by the Eleventh Amendment.[69] The most plausible understanding of the refusal to allow personal-capacity suits for reinstatement and back pay was the court's instinct to bring these traditional Title VII remedies into alignment with the emerging Title VII rule against personal liability of individual supervisors.[70] In any event, it seems clear that the particular remedies sought are crucial to this result. As the Supreme Court's decision in *Jett v. Dallas Independent School District*[71] illustrates, "reverse discrimination" suits for money dam-

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[66] See, e.g., Welch v. Laney, 57 F.3d 1004, 1009 (11th Cir. 1995); Birdwell v. Concannon, No. 92-36926, 1993 U.S. App. LEXIS 20174, at *2 to *3 (9th Cir. Aug. 2, 1993); Hylok v. Dickey, No. 89-3075, 1993 U.S. App. LEXIS 6273, at *1 to *2 (7th Cir. Mar. 22, 1993); *Collin*, 873 F. Supp. at 1013; Dea v. Pennsylvania, No. 93-0667, 1993 U.S. Dist. LEXIS 5741, at *1 to *2 (E.D. Pa. Apr. 30, 1993); Kunkel v. Petitgout, No. 92 C 20028, 1992 U.S. Dist. LEXIS 6402, at *4 to *6 (N.D. Ill. May 7, 1992); Hill v. Barbour, No. 91 C 1086, 1991 U.S. Dist. LEXIS 13233, at *13 to *15 (N.D. Ill. Sept. 23, 1991).

[67] See, e.g., Cosco v. Uphoff, No. 96-8069, 1997 WL 141185, at *1 to *2 (10th Cir. Mar. 28, 1997); Hayes v. Reed, No. 96-4941, 1997 WL 125742, at *4 n.3 (E.D. Pa. Mar. 13, 1997); Godon v. North Carolina Crime Control & Public Safety, 959 F. Supp. 284, 289 (E.D.N.C. 1997).

[68] Woulfe v. County of Cook Dep't of Adult Probation, No. 95 C 7435, 1997 WL 136265, at *4 (N.D. Ill. Mar. 20, 1997).

[69] Id. at *4. Insofar as this ruling concerned back pay, the district court was following an earlier Seventh Circuit decision in *Lenea v. Lane*, 882 F.2d 1171, 1178-79 (7th Cir. 1989).

[70] See Joel W. Friedman & George M. Strickler, Jr., The Law of Employment Discrimination: Cases & Materials 33 (4th ed. 1997) (citing Title VII cases and Age Discrimination in Employment Act cases from the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits).

[71] 491 U.S. 701, 735 (1989).

ages can be brought against individual officers in their personal capacities under Section 1983.

The other exception is more nearly analogous to *Edelman v. Jordan* and more likely to reflect a general rule. *Mello v. Woodhouse*[72] involved a Nevada legislator who tried to enforce a retirement contract against the state. In 1989 Nevada changed the law governing legislators' pensions. Under the new law, a legislator could retire before age sixty and still receive full benefits if he or she had completed thirty years of service. One who fell short of thirty years service could "purchase" additional years to make up the difference. Taking advantage of this opportunity, Mello retired early and paid $40,000 to the state retirement board so that he and his wife could enjoy full benefits for life. The legislature then repealed the new law. The state offered to refund the $40,000 but refused to perform the now-repudiated retirement contract. Mello sued state retirement officials, claiming a violation of the Contracts Clause and of due process of law, but the district court found the suit barred by the Eleventh Amendment, holding that "[i]n this case a decree against defendants would operate against Nevada because forcing defendants to perform under the contract would require Nevada to expend money from its state treasury."[73]

Unaided by intelligible doctrine, the district court struggled to explain why, despite the proper pleading, the Eleventh Amendment barred this suit. Perhaps the simplest explanation is that it was too hard to pretend that the retirement administrator was in any way responsible for the problem or that the money for future retirement benefits would come from anywhere but the state treasury. On these facts, the fiction of *Ex parte Young* was strained to the breaking point. A more analytic statement would emphasize that, like the action that gave birth to the Eleventh Amendment,[74] Mello's suit sounded in contract rather than tort. Traditional rules of agency declare that while a servant is liable for a tort committed in the master's business, the servant is not responsible for the master's contracts.[75] Years ago Louis Jaffe noted the distinction between

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[72] 755 F. Supp. 923 (D. Nev. 1991).

[73] Id. at 926.

[74] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (action in assumpsit to recover for supplies furnished to Georgia by a South Carolina merchant).

[75] See Joseph Story, Commentaries on the Law of Agency § 302, at 875-76 (5th ed.

tort and contract as an important determinant of when remedies could be sought from officers rather than states.[76] *Mello* suggests that this factor may still be decisive.

The statutory cases also suggest the importance of contract. In statutory cases, somewhat more often than in constitutional cases, courts occasionally follow *Edelman* in refusing to allow the circumvention of suing state officers.[77] The distinguishing feature of many of these cases seems to be that the underlying claim looks more like contract than tort. Most examples involve alleged underpayment of Medicare or Medicaid reimbursements.[78]

Like *Edelman* itself, the cases are analytically irreconcilable with the broad current of Section 1983 decisions. The reasons given in the occasional case where the Eleventh Amendment bars relief against a state officer apply equally well in the vast number of cases where it does not. As an approximation, one might say that *Edelman* is more likely to be followed in statutory rather than constitutional cases, in cases where the underlying claim is more like contract than tort, and in cases where the fiction that any resulting judgment will be paid by the officer personally is impossible to maintain. In most recent cases disallowing officer suits, all three factors are present. Outside that

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1857) (officers not personally liable for breach of contract), *cited in* Richard H. Fallon, Jr., & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1781-82 & 1782 n.259 (1991).

[76] See Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 29 (1963) (reviewing older cases and concluding that the actions most likely to be found to be, in essence, against a state, rather than against an officer, "are those involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property which has come unsullied by tort into the bosom of the government").

[77] In characterizing cases as statutory, I have disregarded makeweight constitutional claims (usually equal protection) appended to alleged statutory violations. See, e.g., Rye Psychiatric Hosp. Ctr., Inc. v. Surles, 777 F. Supp. 1142 (S.D.N.Y. 1991), which involved a suit to compel Medicaid reimbursements. The state's acts had been found violative of the Boren Amendment to the Medicaid Act, but incidental (and rather obviously unavailing) allegations of equal protection and due process violations were not reached. Id. at 1144.

[78] See Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam) (finding an Eleventh Amendment bar to suit to compel Medicaid reimbursements in the absence of a waiver); Tekkno Lab., Inc. v. Perales, 993 F.2d 1093, 1098 (2d Cir. 1991) (Medicaid reimbursements); *Rye Psychiatric Hosp. Ctr., Inc.*, 777 F. Supp. at 1147 (Medicaid). But see, e.g., Natural Resources Defense Council v. California Dep't of Transp., 96 F.3d 420, 423 (9th Cir. 1996) (holding that the Eleventh Amendment barred action against state officer for civil penalties and declaratory judgment based on the state's violation of the Clean Water Act).

(not very crisply defined) context, the alternative of suing a state officer under Section 1983 is freely available.

The important conclusion to draw from this research is that, aside from the occasional Contract Clause issue, constitutional tort plaintiffs are not categorically barred from relief by the Eleventh Amendment. Almost always, they can recover money damages (indirectly) from the states on proof of fault by state officers. For constitutional violations, the residual space occupied by the Eleventh Amendment is vanishingly small.

III. THE HIDDEN SENSE IN CURRENT LAW

Taken together, the Eleventh Amendment and Section 1983 function not to preclude victims of constitutional violations from damage remedies against government, but to force them into a liability regime based on fault. In that respect, current law seems to me basically sound.

In making that assessment, I align myself with the courts and against the commentators. Scholars who have addressed this specific issue overwhelmingly favor strict liability.[79] Additional academic support for strict liability comes from the literature on municipal liability under Section 1983. Under *Monell v. Department of Social Services*[80] and *Owen v. City of Independence*,[81] local governments (unlike states) can be sued directly under Section 1983 and (unlike every other such "person") can be held strictly liable for unconstitutional acts done pursuant to official policy or custom. This category has been so confined that strict governmental liability is in fact a small part of recoveries for constitutional torts,[82] but it looms large in the literature. Some commentators argue straightforwardly for strict *respondeat superior* liability in all cases.[83] Others seek to relax the

[79] See, e.g., Mark R. Brown, The Demise of Constitutional Prospectivity: New Life for *Owen*?, 79 Iowa L. Rev. 273, 312 (1994) (concluding that § 1983 immunity even for new rights is "unnecessary to promote robust governmental activity, and will only act as an additional impediment to individual recovery and governmental accountability"); Lewis & Blumoff, supra note 33, at 756 (arguing that government entities should be held liable in damages for the acts of their agents, "regardless of the agent's state of mind, status in the entity's hierarchy, or role in the formulation of its policies").

[80] 436 U.S. 658, 690 (1978).

[81] 445 U.S. 622, 638 (1980).

[82] See supra notes 36-42 and accompanying text.

[83] See, e.g., Susanah M. Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell*

doctrinal criteria controlling access to strict liability.[84] The common theme in these arguments is that strict governmental liability for constitutional torts is good and that the current, predominantly fault-based liability regime is not.

As has been noted, this proposition cannot be tested in cases where the underlying constitutional violation requires illicit motivation. In such cases the defense of qualified immunity, though technically available, is functionally irrelevant. The testing case is one where the presence or absence of qualified immunity will actually determine liability. A good example is *Owen v. City of Independence*, where the city had to pay damages for failure to provide a "name-clearing hearing" before anyone knew such exercises were required.[85] Another example is *Pembaur v. City of Cincinnati*,[86] where the city had to pay damages for an assistant prosecutor's legal advice, which anticipatorily contradicted a later Supreme Court decision.[87] *Owen* and *Pembaur* are clear examples of constitutional violations where qualified immunity would defeat damages liability,

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Sketch Becomes a Distorted Picture, 65 N.C. L. Rev. 517, 538 (1987) (arguing that § 1983's text and legislative history, in addition to policy considerations, militate for respondeat superior liability); Laura Oren, Immunity and Accountability in Civil Rights Litigation: Who Should Pay?, 50 U. Pitt. L. Rev. 935, 1000-02 (1989) (endorsing strict respondeat superior liability). To the same effect, see Mark R. Brown, Correlating Municipal Liability and Official Immunity Under Section 1983, 1989 U. Ill. L. Rev. 625, 631 (arguing that strict municipal liability and official immunity of officers should be inversely correlated so as to eliminate any gap in liability).

[84] See, e.g., Steven Stein Cushman, Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker, 34 B.C. L. Rev. 693, 723-28 (1993) (urging a broader interpretation of policymakers whose decisions would render their employing governments directly liable); Peter H. Schuck, Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory, 77 Geo. L.J. 1753, 1779-83 (1989) (arguing that the "official policy or custom" restriction be abandoned in favor of private tort-law principles). Cf. Christina B. Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225, 259 (1986) (urging governmental responsibility for constitutional violations without regard to fault of government officials).

[85] 445 U.S. at 633 n.13. The requirement of a "name-clearing" hearing originated in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), which were decided some ten weeks after the action complained of in *Owen*. I use the term "exercise" because the idea of a hearing leading to no decision and having no necessary consequence, employment or otherwise, seems substantively meaningless.

[86] 475 U.S. 469, 484 (1986).

[87] *Steagald v. United States*, 451 U.S. 204 (1981), held that police attempting to execute an arrest warrant on a person believed to be in a home or business must, absent exigent circumstances, obtain a search warrant before entering the premises. Id. at 216. Four years before *Steagald*, the assistant prosecutor had given police officers contrary advice. *Pembaur*, 475 U.S. at 472-73, 484.

but practically speaking, they are not very important. Both are retroactivity cases. While the Supreme Court insists that all new pronouncements be applied retroactively,[88] the Court—or at any rate this Court—is not much in the business of new pronouncements. Unless and until the Supreme Court embarks on some burst of rights expansion, the problem of damages liability for violation of subsequently declared constitutional rights will remain more intellectually interesting than practically significant.[89]

Of far greater consequence are the ordinary, good faith acts of government officers operating in a world of constitutional imprecision. When constitutional rights are clear and rule-like, officers can be expected to know them. To the extent that constitutional doctrine approaches ideal clarity and specificity, any deviation would be unreasonable. In that case, qualified immunity would not be available, even for those rights that do not require some kind of illicit motivation. Yet to the extent that constitutional law consists of standards, of generalized norms that become clear only upon application, there will inevitably be differences of opinion—and, within some range, *reasonable* differences of opinion—on what the law requires. In that case, qualified immunity would preclude an award of damages for reasonable errors of judgment.

It is unlikely that any constitutional right would be altogether rule-like or that any would consist entirely of abstract standards. The doctrinal landscape is more variegated. Yet in the main, the Fourth Amendment is especially rich in general standards, such as "probable cause," that cannot be specified in advance with precision. The space for reasonable error is consequently large, and the role of qualified immunity correspondingly great. It is no accident that the law of arrest and search and seizure looms particularly

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[88] See Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993):

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. at 97. See Brown, supra note 79, at 274-75 (drawing the connection between *Harper* and *Owen* and endorsing both decisions).

[89] Intellectually, it is very interesting indeed. See Fallon & Meltzer, supra note 75, at 1738-58 (analyzing the problem of "new" law in the contexts of criminal procedure, official immunity, and tax refund litigation).

large in qualified immunity cases (or vice versa),[90] and it is precisely in such areas that one must test whether liability based on fault is the appropriate rule for constitutional torts.

A. Compensation

The inquiry has (at least) two aspects—compensation and deterrence. I have argued elsewhere that the rationale of compensation, properly understood as corrective justice, does not *require* strict liability for constitutional torts.[91] In my view, the normative case for compensation is not made by the mere fact of injury plus causation. Governmental injury is inevitable in an organized society, and there neither is nor could be any general moral claim that all injury must be set right. The normative claim for compensation rests, rather, on the fact of *wrongful* injury. Just as causation shows why *this plaintiff* can make a claim on the defendant's resources, fault shows why *this defendant* is obliged to pay. After all, the plaintiff's injury will have other causes, almost always including the plaintiff's own conduct. Fault shows why the defendant's conduct—as opposed to all the other causal antecedents of plaintiff's injury—should trigger liability. Put more simply, fault supplies the moral dimension to the fact of causation. When both exist, there is a non-instrumental case for payment of money damages, quite apart from incentive or distributive effects. From this I infer that the requirement of fault in constitutional tort cases is, from a non-instrumental point of view, unobjectionable.[92]

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[90] See, e.g., Anderson v. Creighton, 483 U.S. 635 (1987); see also Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 550 tbl.I & 551 tbl.II (1982) (showing that of § 1983 cases filed in the Central District of California in 1975 and 1976, the largest single category was false arrest, with relatively large numbers of search and seizure claims as well).

[91] Jeffries, supra note 21, at 99-101. For antecedents of this argument, see Jules Coleman, Corrective Justice and Wrongful Gain, 11 J. Legal Stud. 421 (1982); Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979); Richard A. Posner, The Concept of Corrective Justice in Recent Theories of Tort Law, 10 J. Legal Stud. 187 (1981); and especially Ernest J. Weinrib, Causation and Wrongdoing, 63 Chi.-Kent L. Rev. 407 (1987).

[92] That is not the same, however, as saying that the rejection of fault in constitutional torts would be objectionable.

B. Deterrence

This non-instrumental argument has been attacked on its own terms, but more forcefully on the ground that it answers the wrong question.[93] Most observers give priority to instrumental concerns and are impatient with an argument that does not address them. With this emphasis, I agree. In a world where our least advantaged citizens suffer grievous injury with no real prospect of governmental redress, it is hard to see a non-instrumental concern for universal compensation as the driving force behind Section 1983. Of greater importance is the inhibition of governmental misconduct. That, of course, is what constitutional law is all about. It should come as no surprise, therefore, that instrumental concerns have dominated the debate over liability rules for constitutional torts.

The instrumental case for strict liability is deceptively simple. Constitutional violations should be discouraged. The rule that discourages them most effectively is strict liability, which creates the maximum incentive for government to invest in the selection of personnel, legal training, effective supervision, internal reviews, and all the other strategies that can reduce the incidence of employee misconduct or error. Therefore, one who disfavors constitutional violations should favor strict liability.

Reasoning of this sort probably makes sense to many judges (and constitutional law professors), but the economists teach us that when administration of the negligence standard is completely predictable, negligence will be as effective as strict liability in inducing caution.[94] Strict liability will not cause defendants to take inefficient precautions (those that are not cost-justified), and all efficient precautions should already have been achieved by a properly functioning regime of liability for negligence.[95] Nevertheless, one might prefer strict

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[93] See Sheldon Nahmod, Constitutional Damages and Corrective Justice: A Different View, 76 Va. L. Rev. 997, 1004 (1990) (arguing that qualified immunity is "essentially instrumental in nature and does not connote wrongdoing or its absence"); see also Brown, supra note 79, at 298 (endorsing Nahmod's view); Lewis & Blumoff, supra note 33, at 836-37 (criticizing as erroneous the assumption "that we can meaningfully discuss non-instrumental or nondeterrent rationales for § 1983's remedial scheme without considering deterrence or restructuring").

[94] See, e.g., Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1, 6-9 (1980).

[95] Setting litigation costs aside, when defendants are held liable, they pay accident costs only—damages suffered by victims. Potential defendants will only avoid

liability on the ground that government should be forced to "internalize" the costs of all constitutional violations, including those not prevented by cost-justified precautions. Additionally, one might prefer that all losses be shifted to the government, so that they can be spread among all citizens and not left to fall disproportionately on a few.

That such arguments have carried the day among scholars and students is not surprising. The reasoning is obvious and, on its own terms, obviously sound. What is surprising is that the courts have so long resisted the drumbeat of academic criticism and adhered to the requirement of fault. Certainly, nothing in the opinions adequately explains or justifies the continued insistence on fault. Nevertheless, I believe that the judges are right and that more can be said to support their view than is commonly perceived.

1. Unintended Deterrence

There are at least two objections to strict liability. The first is the problem of overdeterrence—more accurately the problem of unintended deterrence of socially desirable conduct. In the language of tort, the problem is that strict liability would force government to "internalize" all accident costs, potentially depressing the activity level of government.[96]

To put this point into a practical context, one need only imagine a supervisor instructing police officers (as all police are instructed these days[97]) on the law of the Fourth Amendment. Under the regime of qualified immunity, the instructor would explain the rules of search and seizure and enjoin adherence to them, but would also tell the officers that reasonable mistakes would not be held against them. Now imagine the same situation under a regime of strict liability. The supervisor would instruct her charges not only to be careful about probable cause but also, and more importantly, *not* to

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> paying accident costs by acting more safely when acting more safely is less expensive than [paying accident costs]. Consequently, holding defendants liable even when they have not been negligent will not cause them to act any more safely than it is already in their self interest to act.

Kenneth S. Abraham, The Forms and Functions of Tort Law 160 (1997).

[96] See Shavell, supra note 94, at 6-7 (noting that in general activity levels will be lower under strict liability than under negligence).

[97] E.g., Ind. Admin. Code tit. 250, r. 1-5.2-1 (1997) (search and seizure included in topics to be covered in law enforcement training course).

search in any doubtful case. Under strict liability, the supervisor would require a kind of super-probable cause, steering well clear of the constitutional standard in order to avoid liability for inevitable mistakes. In consequence, there would be fewer searches.

Ironically, it is precisely this effect of strict liability—that it forces potential defendants to "internalize" the full costs of their activities (and thereby to optimize both safety levels and activity levels)—that is counted a virtue in the private sector.[98] The argument against strict liability for constitutional torts depends on the claim that government is different. For government, unlike the private sector, strict liability would likely reduce activity to sub-optimal levels.

At its core, the difference is easy to see. When a company operates a polluting factory, it generates concentrated benefits (for its managers, shareholders, and employees) and diffuse harms. When a police department authorizes searches, it generates diffuse benefits and concentrated harms. All other things being equal, the risk that negligence liability would discourage too little would be greater in the former case, while the risk that strict liability would discourage too much would be greater in the latter.

Peter Schuck has explained in more detail why "street level" government officers may be more likely than their private counterparts to be excessively inhibited by the threat of liability.[99] Police officers, prison wardens, school officials, welfare administrators, and the like deliver basic government services. Their interactions with individual citizens are frequently nonconsensual and sometimes coercive. Street-level officials therefore face a high prospect that their actions will produce conflict and harm. Unlike most private actors, however, public officials typically cannot appropriate for themselves the benefits of good performance, which tend to run to the public at large. The result is a skewed incentive structure that may conduce to defensive, cost-minimizing behavior inimical to the public interest.[100]

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[98] Abraham, supra note 95, at 164-65.

[99] Schuck, supra note 15, at 59-81.

[100] See id. at 68-69. Schuck has written:

> Most private actors would decide to incur any cost if the expected value of the correlative benefit were great enough, but officials tend to reject any course of action that would drive their personal costs above some minimum level, what I call a "duty threshold." ... Officials tend to orient their decisions about whether, when, and how to act less toward maximizing ... net benefits, which they cannot

As Peter Low and I have noted,[101] this bias is exacerbated by what Jerry Mashaw has called the "cause of action" problem.[102] Persons injured by affirmative misconduct can usually state a cause of action. The causal connection between harm to the plaintiff and the act of an identifiable defendant is typically clear. In contrast, those injured by a failure to act find it difficult to bring suit. The causal connection between the plaintiff's injury and an officer's inaction may be indirect and obscure. Moreover, officers with discretionary authority, such as prosecutors, are protected from liability by the absence of any legally enforceable duty to act. In consequence, the risk of being sued for erroneous or improper action is vastly greater than is the risk of being sued for erroneous or improper (and perhaps equally costly) inaction. This imbalance increases the incentive to protect oneself by doing less.[103]

These arguments are sound so far as they go, but they do not go far enough. It is true, of course, that government officers generally cannot appropriate to themselves the benefits of good performance, but it is equally true that they do not personally bear the full costs of mistakes. Their incentives may be *reduced*, but it does not necessarily follow that they would be dramatically *skewed*. As compared to private actors, government officials may simply have less to gain *or* lose. Absent some systematic bias, however, even reduced incentives, if appropriately balanced, might lead government actors to take full account of societal costs and benefits.

Nevertheless, I am inclined to think that the incentives of government officers are skewed, as compared to actors in the private sector, toward inaction, passivity, and defensive behavior. At least three factors play a role. First is government employment law. The tradition of the civil service, powerfully reinforced by doctrines of procedural due process, makes government workers hard to fire. Generally, the absence of good performance is not a sufficient reason. Much more than their colleagues in private industry, govern-

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appropriate, than toward minimizing (subject to their duty threshold) those costs that they would incur personally.

Id. at 68.

[101] Peter W. Low & John C. Jeffries, Jr., Civil Rights Actions: Section 1983 and Related Statutes 54 (2d ed. 1994).

[102] Jerry L. Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, Law & Contemp. Probs., Winter 1978, at 8, 29.

[103] Id. at 31.

ment employees are protected against discharge for relative inefficiency or lack of productivity. For government workers, the risk of job loss is overwhelmingly linked to bad performance, to the provable act of misconduct or neglect that will justify a civil service termination.[104] Government workers might, therefore, rationally be more concerned with avoiding mistakes than with maximizing social benefits.

Second, to the extent that this characteristic of the civil service is recognized by prospective employees, there may be psychological self-selection. Persons willing to take risks in pursuit of gains may gravitate toward private industry, where successful risk-taking is more likely to be rewarded. Those who place a premium on job security may be drawn to government work. If, as a result, government workers are relatively risk-averse, the skewed incentives toward defensiveness and inaction may be reinforced by psychological predisposition.[105]

Third, and to my mind most important, is the political tendency to give greater weight to costs that must be accounted for in the budget and to discount costs that fall elsewhere.[106] On-budget costs

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[104] Public-sector employees who can be discharged only "for cause" have property rights in their employment which trigger procedural due process protections. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); Goudeau v. Independent Sch. Dist. No. 37, 823 F.2d 1429, 1430 (10th Cir. 1987). Federal law also provides procedural protections to public employees. See generally Richard A. Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va. L. Rev. 196, 211-31 (1973) (describing historical practice); see Civil Service Act, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. §§ 1101-1105 (1994)) (providing merit selection and substantial job security for federal government employees); Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970), *reprinted as amended in* 5 U.S.C. § 7101 (1994) (affording federal employees specified procedural rights against adverse action).

[105] For partial support for the supposition reflected in text, see Don Bellante & Albert N. Link, Are Public Sector Workers More Risk Averse Than Private Sector Workers?, 34 Indus. & Lab. Rel. Rev. 408, 411-12 (1981) (discussing empirical results that tend to confirm economic reasoning suggesting that relatively risk-averse workers will be more likely than other workers to seek employment in the public sector); see also Panel I: Inner Cities, the Courts, and the Due Process Revolution (Discussion), 1 Mich. L. & Pol'y Rev. 297, 300 (1996) (quoting the observation of Mayor Stephen Goldsmith of Indianapolis that "public officials tend to be risk-averse in the first place"); accord, Schuck, supra note 15, at 57 ("[C]ivil servants probably tend to be more risk-averse with respect to litigation and liability than individuals generally.").

[106] This is essentially the problem with unfunded mandates. See Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 U. Kan. L. Rev. 1113 (1997). For government managers, on-budget costs are similar to legislators' direct costs. See infra note 107. Cf. Richard B. Stewart, Fed-

mean higher taxes, and the political penalties for raising taxes can be severe.[107] Acts that give rise to Section 1983 claims trigger on-budget costs and are therefore subject to the political disincentives of higher taxes. Government inaction may be just as costly, but the burdens fall elsewhere.[108] The failure to arrest a suspected criminal or to discipline an unruly student may have error costs just as great as would result from taking those actions, but those costs are borne by subsequent crime victims or by other students. If, as seems likely, the political culture punishes on-budget costs more than those that are borne elsewhere, government managers may reinforce their workers' incentives toward caution and constraint.

These problems would be manageable, or at any rate less acute, if constitutional law were precise and rule-like. If, for example, police were told never to search or seize anyone or anything without a warrant, compliance would be fairly easy. In fact, of course, constitutional law is anything but precise and rule-like. Police and other street-level officials constantly make judgment calls, often on inadequate information in situations bordering on emergency. They are guided by constitutional standards that are sometimes vague—what is "reasonable suspicion"? is there "probable cause" for arrest?—and by rules "so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selec-

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eralism and Rights, 19 Ga. L. Rev. 917, 961 (1985) (noting that Congress "spend[s] other people's money" when it expands rights, thereby "escap[ing] the prioritizing discipline that the budget process imposes on direct federal expenditure"). In much the same way, government inaction imposes costs on others without the "prioritizing discipline" of the budget process.

[107] See, e.g., Thomas J. Anton, American Federalism and Public Policy 146 (1989) (noting that "[t]axes are always a potentially explosive issue in democratic systems," and "[t]here is enough evidence of elected officials losing their jobs after voting to increase taxes . . . to lend credence to the belief that tax increases are politically dangerous"); R. Douglas Arnold, The Logic of Congressional Action 194 (1990) (observing that legislators' fear of electoral retribution "seems perfectly justifiable in the case of direct taxes," which "impose perceptible costs on those who pay them [and] the costs can be traced to identifiable governmental actions"). Cf. How Much Does Federalism Matter in the U.S. Senate? A Conversation with Sen. Christopher Bond of Missouri and Sen. Paul Sarbanes of Maryland, Intergovernmental Persp., Spring 1990, at 35, 36 (noting the tendency of both state and federal legislators to "throw burdens on other people" through unfunded mandates).

[108] See Schuck, supra note 15, at 71-73 (concluding that the "asymmetric litigation risks" faced by officials encourage official inaction where superiors may not notice or cannot identify the failure to act or where inaction harms people "who are likely to remain passive or silent").

tively."[109] Whether given no clear rules or forced to choose among too many, street-level officials are "actually awash in discretion."[110]

It is the combination of skewed incentives and constitutional indeterminacy that makes the risk of unintended deterrence so severe. An unconstitutional search and seizure may differ only slightly from good police work. Conduct on the right side of the line is not only legally permissible, but socially desirable, even essential to maintaining adequate order and security. The obvious response to strict liability based on uncertain standards is to draw well back from the danger zone. However tolerable that reaction may be in some contexts, in others it is very costly. By limiting damages liability to acts that clearly cross the line, qualified immunity moderates unintended deterrence.

2. *Dilution of Rights*

A second objection to strict liability is less familiar. Critics of the current fault-based regime assume, I think, that an expansion of remedies would not affect the substance of rights. That is far from clear. It seems more likely that strict liability in money damages (plus attorney's fees) for all constitutional violations would exert a baleful influence on the definition of rights. The risk is that constitutional rights would be defined with one eye on damages liability and that the breathing space now provided by qualified immunity would, if that protection were lost, be recreated by a dilution of rights.

Something of that sort happened in *Paul v. Davis*,[111] a decision universally and justly condemned for its cramped, illiberal view of protected "liberty."[112] In *Paul* the Court held that, so far as the federal Constitution is concerned, a man could be publicly condemned as an "active shoplifter" with no process whatever.[113] It is no accident

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[109] Id. at 66.

[110] Id.

[111] 424 U.S. 693 (1976).

[112] See, e.g., Frank M. McClellan & Phoebe Haddon Northcross, Remedies and Damages for Violation of Constitutional Rights, 18 Duq. L. Rev. 409, 422-33 (1980) (criticizing exclusion of reputation from liberty interests as "unwise and short-sighted"); Henry Paul Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 426 (1977) (arguing that *Paul* "cut[s] sharply against the grain of our political-constitutional order with its central emphasis on individual dignity").

[113] *Paul*, 424 U.S. at 711-12.

that *Paul* was a Section 1983 action for money damages. The Court was so anxious that the Fourteenth Amendment not become "a font of tort law"[114] that it gutted a constitutional guarantee to avoid that result. It is almost inconceivable that *Paul* would have come out the same way had injunctive relief been the only remedy. Rather, it was the prospect of money damages that allowed the Section 1983 tail to wag the constitutional dog.[115]

Similar interactions of right and remedy have occurred elsewhere in constitutional law. An important example is the old (that is, pre-*Teague v. Lane*[116]) nonretroactivity doctrine.[117] Nonretroactivity is sometimes described as a limitation on constitutional rights. In fact, it was just the opposite. Nonretroactivity facilitated the creation of new rights by reducing the costs of innovation. It is hard to imagine that *Miranda v. Arizona*[118] would ever have been decided if every confessed criminal then in custody had to be set free.[119] The Court's

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[114] Id. at 701.

[115] See Monaghan, supra note 112, at 429 (describing the Court's concern to limit § 1983 as "understandable, if not acceptable," and suggesting that perhaps it would have been better to read § 1983 "less than literally . . . so as not to embrace all the interests encompassed by the 'liberty' (and 'property') of the due process clause"). It is an interesting question whether, as I suspect, the *Paul* problem could have been solved by the law of qualified immunity. If so, that would have been a healthier solution.

[116] 489 U.S. 288 (1989).

[117] See, e.g., Stovall v. Denno, 388 U.S. 293, 297 (1967) (making the rule of *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), regarding identification evidence nonretroactive); Linkletter v. Walker, 381 U.S. 618, 640 (1965) (holding the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), nonretroactive). In *Teague v. Lane* the Supreme Court abandoned this approach and declared that all decisions would be fully retroactive to all cases pending on direct review and inapplicable on collateral review. *Teague*, 489 U.S. at 299-310 (O'Connor, J.).

[118] 384 U.S. 436 (1966). *Miranda* established the now-familar warnings required to make a defendant's statement to police presumptively admissible. Id. at 467-79.

[119] See, e.g., Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part) (describing nonretroactivity as a "technique" that facilitated "long overdue reforms, which otherwise could not be practicably effected") (quoting Jenkins v. Delaware, 395 U.S. 213, 218 (1969)). The same recognition appears—I think too grudgingly—in Fallon & Meltzer, supra note 75, at 1734 ("Even the Warren Court might have hesitated to move as far and as fast as it did if each decision recognizing a 'new' right required opening the prison gates for all victims of past violations.").

In one of the oddest decisions ever, *Miranda* was made to apply to the relatively small population of pre-*Miranda* interrogations that had not yet come to trial. Johnson v. New Jersey, 384 U.S. 719, 734 (1966). For the much larger population of cases that had already gone to trial, however, *Miranda* was, quite logically, denied retroactive application. Today, of course, the retroactivity question as it arose in the Warren Court era would be resolved by restrictions on the availability of federal habeas corpus. See 28

ability to avoid that result was simultaneously a curtailment of the *Miranda* right and a necessary precondition of its birth.

It should come as no surprise, therefore, that the elimination of nonretroactivity as an element of the substantive right and the expanded application of new rights on direct review had a conservative, not a liberal, impetus.[120] As the Justices well know, the functional consequence of increasing the costs of expanded rights is to inhibit the expansion of rights. To put the point oversimply, more remedy may mean less right.

The same dynamic is at work in the law of qualified immunity. Constitutional rights were originally conceived as disabilities placed on government, not as predicates for compensatory damages. For nearly two centuries, damages for violations of constitutional rights (as distinct from common law tort claims that sometimes lie on the same facts) were not routinely available.[121] The addition of a damages remedy for constitutional violations is one of the great innovations of modern American law, but there is no reason to think that damages should supplant or supersede the older and more basic function of constitutional rights as a defensive shield against government illegality. The content of constitutional rights should be defined in that context. If qualified immunity were eliminated and strict liability imposed for all constitutional violations, money damages would increase exponentially. Far from being a minor consideration, apt to impinge on the definition of rights only in unusual cases, damages liability would become a primary concern in constitutional adjudication. The result would be a potent constraint on constitutional innovation, not only in *Miranda*-like cases of announced in-

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U.S.C.A. § 2254(d)(1) (West Supp. 1997) (denying habeas review of claims adjudicated on the merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

[120] The attack on nonretroactivity began with the second Justice Harlan's dissent in *Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting). Harlan's view was adopted, with modifications, in *Teague*, by a plurality consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. *Teague*, 489 U.S. at 304-10 (O'Connor, J.). Justice White acquiesced in that result, id. at 317, and Justices Stevens and Blackmun agreed in part, id. at 319-20.

[121] For the relevant date, I use *Monroe v. Pape*, 365 U.S. 167 (1961), rather than 1871, on the ground that whatever the original version of § 1983 may have been intended to provide, the availability of a damages remedy based on the defendant's apparent authority was not widely known until explicitly recognized by the Supreme Court. See id. at 170-87.

vention, but also in the more common and more necessary cases of evolutionary change.

Of course, no one can say exactly what the world would look like if qualified immunity were eliminated and strict damages liability were imposed for all violations of constitutional rights. What one can say—and with confidence—is that constitutional rights defined in a world of strict liability would be different from and narrower than those rights that would be defined (by the same judges) under a regime of qualified immunity.

CONCLUSION

It is customary in ending an Article of this sort to recount conclusions reached or positions taken. As those positions are clear enough, I prefer to outline an agenda for research.

First, we need to bring the Eleventh Amendment and Section 1983 into the same field of vision. The law limiting damage remedies against states and the law allowing damage remedies against state officers obviously have much to do with each other, yet analyses of one have tended to ignore the other. As has been noted, my research shows that the area where Eleventh Amendment immunity actually bars all relief (functionally) against states is vanishingly small.

Second, there is pressing need for a more detailed understanding of the law of qualified immunity and its interaction with specific rights. Like most academics,[122] I have studied the law of qualified immunity from the vantage point of Supreme Court decisions. This top-down approach fits the doctrine, which asserts that the law of qualified immunity applies categorically to all rights, but it does not fit the reality of the cases. I suspect that careful investigation will show that qualified immunity is an issue chiefly with respect to certain rights and that its content varies significantly from right to right. That kind of detailed knowledge is more expensive to acquire than a mastery of Supreme Court decisions, but would be deeply informative.

Third, I think we should take seriously the dominant academic criticism of current law and try to picture what the world would be

[122] Schuck, supra note 15, is an important exception, as is Kathryn R. Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force, 62 Temp. L. Rev. 61, 67 (1989) (contending, on the basis of a highly contextual examination of Fourth Amendment excessive force claims, that qualified immunity is unnecessary in that context).

like with strict, *respondeat superior* liability for all constitutional violations. Though overwhelmingly popular with academics, this position would be a radical departure from the law as it stands. It behooves us, I think, to try to specify just how it would work. As I have argued, there are substantial concerns about strict damages liability for constitutional torts, specifically the risk of unintended deterrence and the associated risk that too much remedy might lead to too little right. I hope that this Article will draw attention to those problems and perhaps spark a renewed interest in a systematic examination of the role of fault in the law of constitutional torts.