Articles

A BETTER PATH FOR CONSTITUTIONAL TORT LAW

*John M. Greabe**

Author's Note: The Supreme Court issued an opinion in Pearson v. Callahan*—a case I discuss in this paper—just as the paper was about to go to press. In* Pearson, *a unanimous Court reached the result for which I argue on narrower grounds than I propose. The* Pearson *decision does not affect the arguments I present in the paper.*

There is a fundamental contradiction at the heart of constitutional tort law. On the one hand, the Supreme Court has repeatedly said that the federal statute under which most constitutional tort claims are brought, 42 U.S.C. § 1983,[1] is not substantive; it merely channels positive law rights created elsewhere, primarily in the Constitution.[2] But on the other hand, the doctrinal regime the Court has created under section 1983 (as well as the parallel regime authorized by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[3]) avoids difficult governmental im-

* Associate Professor of Law, Vermont Law School. The author would like to thank Seth Aframe, Lowell Brickman, Alan Chen, Erin Curley, Bruce Duthu, Jackie Gardina, Judge Jeffrey Howard, Heidi Kitrosser, Gil Kujovich, Ed Kulschinsky, Ken Sansone, Ryan Searle, Judge Norman Stahl, and Ernie Young for their excellent comments and suggestions.

1. In pertinent part, 42 U.S.C. § 1983 states:

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

42 U.S.C. § 1983 (2000).

2. *See infra* note 22 and accompanying text.

3. 403 U.S. 388 (1971). To simplify, I will limit my references to section 1983 throughout this paper. But readers should construe my arguments also to apply to the Supreme Court's parallel *Bivens* jurisprudence.

munity issues by requiring that nearly all claims for damages formally be brought against personal defendants *in their individual capacities*.[4] The fact that nearly all damages claims under section 1983 are brought as individual-capacity actions cannot be squared with characterizing section 1983 as non-substantive. Outside of the Thirteenth Amendment's ban on slavery or involuntary servitude, the Constitution does not impose limits on individuals as individuals—i.e. as private jural persons separate and distinct from the government whose power they are said to have abused.[5] Thus, personal defendants cannot "violate" the Constitution in their individual capacities, and a section 1983 plaintiff's right to claim against a personal defendant in an individual capacity cannot arise directly from the Constitution. And this leaves only one other potential source of this important substantive right: section 1983.

This paper seeks to explain how recognizing the substance of section 1983 insofar as it authorizes individual-capacity claims could pave the way for a clarifying reform of the quagmire that is constitutional tort doctrine.[6] Part I starts with an elaboration of why section 1983 is substantive and an explanation of why an individual-capacity claim, while containing an imbedded constitutional issue, is not itself truly "constitutional."[7] Part I then discusses some implications of these observations for a problem that the Supreme Court is poised to revisit when it decides *Pearson v. Callahan* later this term: the wisdom and legality of the order-of-decisionmaking rule prescribed in *Saucier v. Katz*.[8] The *Saucier* rule directs that, in individual-capacity actions in which the defendant asserts a qualified immunity from damages liability because the challenged conduct was not obviously unlawful,[9] courts should enable the ongoing development of constitutional law by deciding whether the defendant's conduct caused a constitutional deprivation before proceeding to decide whether the defendant is entitled to immunity.[10]

---

4. *See infra* note 23 and accompanying text.

5. *See infra* notes 25–26 and accompanying text.

6. For why constitutional tort doctrine is a quagmire, *see infra* note 49 & notes 58–88 and accompanying text.

7. *See infra* notes 22–27 and accompanying text.

8. 533 U.S. 194 (2001), *receded by* Pearson v. Callahan, 129 S. Ct. 808 (2009). In Pearson v. Callahan, 129 S. Ct. 808 (2009), the Supreme Court issued an order granting a writ of certiorari and directing the parties to brief "[w]hether the Court's decision in [*Saucier*] should be overruled." 128 S. Ct. 1702 (2008).

9. *See infra* note 30.

10. 533 U.S. at 201.

Part I concludes with an argument that the *Saucier* rule, which was imposed because of concerns about the "freezing" of constitutional law,[11] should be relaxed and modified to take account of the fact that binding constitutional rulings should not be made in statutory claims against individuals as individuals—claims to which the government is not formally even a party.[12] In those cases where the law-development concerns underlying *Saucier* lead a court to conclude that it should address the constitutional issue that is imbedded within an individual-capacity claim, the government should first be invited to intervene and to brief its position on the constitutionality of the conduct that the lawsuit has put into issue.[13]

Part II turns to a larger doctrinal consequence of the erroneous assumption that section 1983 is non-substantive: the emergence over the past 40 years of the non-textual affirmative immunity defenses that the Supreme Court has read into the statute and made available to individual-capacity defendants.[14] Part II argues that, once one appreciates that section 1983 is substantive insofar as it authorizes individual-capacity claims, the door opens to important questions that the Court has not asked: Is there really any reason to read a conflict of laws into individual-capacity claims under section 1983, as the Court has done in creating these affirmative immunity defenses? More specifically,

---

11. *See id.*; *see also infra* note 35 and accompanying text.

12. *See infra* notes 39–43 and accompanying text.

13. *See infra* notes 44–48 and accompanying text. This argument modifies my prior position, which was that courts should be sensitive to law-freezing concerns and address the imbedded constitutional issue unless case-specific reasons counsel against doing so. *See also* John M. Greabe, Mirabile Dictum!: *The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 426–37 (1999). My prior position took as a given the foundational proposition that this paper criticizes: that the threshold question in an individual-capacity damages claim is itself "constitutional."

By requiring that courts *always* address the constitutional issue that is imbedded within the threshold statutory question presented in an individual-capacity claim, *Saucier* went beyond the "presumptive[]" approach for which I argued and adopted an unduly inflexible approach. *See id.* at 437 (describing situations where bypassing the constitutional issue is "the wiser jurisprudential course"). For this additional reason, I would like to see the Court relax the *Saucier* mandate when it decides Pearson v. Callahan. And yet, the Court should continue to emphasize the costs of law-freezing and chart a course by which courts entertaining individual-capacity claims in which it is important to settle the law may solicit government intervention and then legitimately address the imbedded constitutional issue. Below, I argue that the Court might look to and borrow from the procedures specified in FED. R. CIV. P. 5.1 and FED. R. APP. P. 44, which mandate notice to the government and an opportunity to intervene in cases where private parties challenge the constitutionality of statutes and the government is not a named party. *See infra* note 47 and accompanying text.

14. *See infra* notes 77–78 and accompanying text.

is there really any reason to treat the substantive entitlements to sue individuals that section 1983 creates as coextensive with true constitutional rights but subject to being trumped by affirmative immunity defenses, drawn from the common law, that the statute does not authorize? And is there anything worthwhile accomplished by this giving-with-the-one-hand-while-taking-with-the-other construction of the statute, which often results in a section 1983 plaintiff being told that a remedy is being withheld even though there has been a rights-violation?

Part II contends that the answer to each question is no. Constitutional tort litigation would be far better off if the Supreme Court reinterpreted section 1983 to avoid this conflict between statutory text and common law (which it has inexplicably resolved in favor of the common-law rule!), eliminated all affirmative immunity defenses, and instead construed the entitlements to sue individuals that section 1983 authorizes as *narrower* than the true constitutional rights that limit government entities.[15] Such a reading, which is rooted in existing Court precedent,[16] would do far less violence to the text of the statute than that inflicted by current doctrine.[17] Moreover, narrowing the substantive reach of the statute could help to promote the early resolution of groundless damages claims at the pleading stage, minimize costly disagreements over issues peripheral to liability, and preserve the substantive rights and procedural protections that parties to section 1983 actions presently enjoy—all within a litigation framework that is built on ground rules familiar to judges and practitioners, and therefore less likely to cause unnecessary confusion or to invite lawless judicial tinkering.[18] Finally, the proposed reform would help to clarify that, whatever else might be said of it, the limited damages-liability regime authorized by section 1983 involves no disregard of Chief Justice Marshall's promise of a remedy for every invasion of a constitutional right,[19] as many commentators have charged.[20] For it would drive home the point that an individual-capacity damages action

15. *See infra* notes 89–92 and accompanying text.

16. *See infra* notes 93–104 and accompanying text.

17. *See infra* notes 58–78 and accompanying text.

18. *See infra* notes 105–114 and accompanying text.

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

20. *See* Greabe, *supra* note 13, at 404–05 & n.11 (collecting a representative sampling of such criticisms).

is merely a unique statutory tort claim that Congress has authorized against *some* personal defendants involved in constitutional violations, and that it is *cumulative* of any direct remedy the plaintiff might have against the government agency which actually committed the constitutional violation.[21]

I. THE SUBSTANCE OF SECTION 1983 AND THE FALSE PREMISE OF *SAUCIER*

The Supreme Court appears to have taken the non-substantive nature of section 1983 as a given.[22] But at the same time, the Court has avoided the potentially difficult immunity problems that would be raised in suits for damages brought directly against government entities by requiring that nearly all claims for damages under section 1983 be filed as individual-capacity claims against the personal defendants who have acted under color of law during the incident underlying the lawsuit.[23]

---

21. For an interesting discussion of what remedies might be constitutionally required for invasions of constitutional rights, see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 88–89 (1999) (suggesting, among other things, that "[T]he only constitutionally mandatory, as distinct from normatively desirable, remedial scheme is the right of a target of government prosecution or enforcement to defend against that action on the ground that it violates the superior law of the Constitution.").

22. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002) (asserting without elaboration that § 1983 merely creates remedies for federal rights created elsewhere); Albright v. Oliver, 510 U.S. 266, 271 (1994) (similar); City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) (similar) (Rehnquist, J., plurality opinion); Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (similar); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything."). So too with *Bivens*. *See also* Wilkie v. Robbins, 127 S. Ct. 2588, 2597 (2007) (describing *Bivens* as a mechanism for fashioning a "damages remedy for a claimed constitutional violation"); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66–70 (2001) (emphasizing the limited remedial purpose of the *Bivens* doctrine).

23. Civil rights damages claims almost always target individuals because the Supreme Court has held that states and their subdivisions are not "persons" subject to suit under section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989), and that sovereign immunity shields the federal government from damages claims under the *Bivens* doctrine, *see* Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485 (1994). Municipalities are potentially subject to constitutional damages liability, Monell v. Department of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978) (overruling Monroe v. Pape, 365 U.S. 167, 187–91 (1961), and holding that municipalities are "persons" subject to suit under § 1983), but they are not liable for the conduct of municipal actors under a theory of *respondeat superior*, *id.* at 691. Rather, municipalities are only subject to section 1983 liability when the plaintiff's injuries are caused by municipal "policy or custom," *id.* at 694–95, a concept that has been narrowly defined and is quite difficult to prove, *see, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 463 (2002); Jeffries, *supra* note 21, at 93.

As Dean Jeffries has observed, the predominance of "individual capacity" claims in constitutional damages actions, and the concomitant freedom from damages liability for-

By proceeding down this path, the Court has created a doctrinal incoherence.[24]

The problem is this: If we are to take seriously the proposition that, outside of rare situations involving the Thirteenth Amendment, only *the government* (acting, necessarily, through living agents) can violate the Constitution,[25] the reality of individual-capacity damages claims is fundamentally at odds with treating section 1983 as merely remedial. Individuals as individuals lack the legal capacity to violate the Constitution. Only a government entity, or an individual serving as an agent of the government and therefore acting in a *public* capacity because the individual (1) is employed by the government and has acted within the scope of his employment, (2) has exercised a "public function," or (3) has received tacit governmental ratification of the conduct in circumstances sufficient to warrant application of the Supreme Court's state-action "entanglement" cases, has the inherent capacity to infringe constitutional rights.[26] Thus, insofar

---

mally enjoyed by government entities other than municipalities, have less practical significance than one might think. It is common for the government to insure against the costs of defending individual-capacity claims (the defense is typically provided by insurance defense lawyers and not publicly employed lawyers) and to indemnify their employees against individual-capacity judgments. *See* Jeffries, *supra* note 21, at 92–93; *see also* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998).

24. *See supra* notes 1–5 and accompanying text.

25. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 18-1, at 1688 (2d ed. 1988) ("Nearly all of the Constitution's self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action."); *id.* at 1688 n.1 (recognizing that only "[t]he thirteenth amendment's prohibitions of slavery encompass both governmental and private action") (citing The Civil Rights Cases, 109 U.S. 3, 20 (1883)); *see also* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991); National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988); Flagg Bros., Inc., v. Brooks, 436 U.S. 149, 156 (1978); The Civil Rights Cases, 109 U.S. at 13–14.

26. *See* TRIBE, *supra* note 25, at 1688–89. In the excellent casebook from which I teach, Dean Erwin Chemerinsky calls conduct falling within these "public function" and "entanglement" categories "exceptions to the state action doctrine." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 472 (2d ed. 2005). He also describes these categories as "situations where private conduct must comply with the Constitution." *Id.* I find these characterizations of the state-action cases, aptly described by one prominent commentator as "a conceptual disaster area," Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967), to confuse more than they clarify. The phrase "exceptions to the state action doctrine" can be read to suggest that the Constitution applies even though there is no state action, and the term "private" invites the reader to regard the conduct in question as not attributable to the government. But the state-action cases are better read to hold precisely the opposite: they involve instances in which conduct that might initially be thought to fall beyond the Constitution's regulatory compass because it was undertaken by persons who are not government employees is *nonetheless treated as state action attributable to the government*. *See* CHEMERINSKY, *supra*, at 474–518; *see also* TRIBE, *supra* note 25, at 1688–91. For

as section 1983 creates individual-capacity lawsuits, the statute is necessarily substantive. By authorizing causes of action against individual persons *in their capacities as private jural entities separate and apart from their public capacities as agents through whom the government acts*, section 1983 creates substantive entitlements, and imposes on individual-capacity defendants substantive duties, that otherwise would not exist. A natural person adjudged individually liable under section 1983 for what the Supreme Court frequently terms a "constitutional violation"[27] has not, in fact, personally "violated" the Constitution. Individual-capacity liability arises only by virtue of the fact that the personal defendant has violated *a federal statute*—one whose substantive reach is defined by reference to the Constitution but which *itself* creates substantive entitlements and duties insofar as it authorizes suits against individuals as individuals for their roles in constitutional violations.

Why does it matter that we resist the tendency to think that our constitutional "rights" are enforceable (either defensively, as in a motion to suppress unconstitutionally seized evidence in a criminal case, or offensively, as in a section 1983 action) against not only an overreaching government but also against the human agents through whom the government acts in their capacities as private citizens? Why does it matter that we recognize the substantive nature of an individual-capacity claim under section 1983? It matters because, if one accepts that section 1983 creates substantive entitlements that otherwise would not exist, and that it does not merely specify remedies for substantive rights created in the Constitution, there is no longer any reason to presume that the substantive entitlements to sue individuals that section 1983 creates are the same as, or coextensive with, true constitutional rights. And this opens the door to considering whether these statutory entitlements might be regarded as *narrower* than true constitutional rights.

---

purposes of understanding my argument, it is crucial that readers not misread the state-action cases to hold that there are categories of cases where entirely "private" conduct that is not attributable to the government nonetheless can violate the Constitution.

27. *See, e.g.*, Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006) ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.") (quoting Carlson v. Green, 446 U.S. 14, 18 (1980) (internal quotation marks omitted)); Kalina v. Fletcher, 522 U.S. 118, 123 (1997) ("Section 1983 is a codification of § 1 of the Civil Rights Act of 1871. The text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights.") (footnote omitted).

The possibility that the entitlements to sue individuals that section 1983 creates might be narrower than true constitutional rights is intriguing because, under current law, many infringements of constitutional rights *cannot* ground a damages remedy under section 1983, notwithstanding the statute's sweeping and unqualified language.[28] While acknowledging that "[s]ection 1983 creates a species of tort liability that on its face admits of no immunities," the Supreme Court has "[n]onetheless . . . accorded certain government officials either absolute[29] or qualified[30] immunity from suit if the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine."[31] Current doctrine thus

---

28. *See* 42 U.S.C. § 1983 (2000).

29. The Court has recognized an absolute immunity that protects legislators acting in a legislative capacity, Tenney v. Brandhove, 341 U.S. 367, 379 (1951), judges acting in a judicial capacity, Pierson v. Ray, 386 U.S. 547, 554–55 (1967), prosecutors acting in a prosecutorial capacity, Imbler v. Pachtman, 424 U.S. 409, 417–20 (1976), grand jurors, *id.* at 423 n.20, and witnesses, Briscoe v. LaHue, 460 U.S. 325, 335 (1983). The Court has also strongly suggested, although it has never held, that some sort of affirmative "good-faith" defense should be available to individuals who are not government employees but who face liability under section 1983 pursuant to the state-action doctrine. *See* Richardson v. McKnight, 521 U.S. 399, 413–14 (1997); Wyatt v. Cole, 504 U.S. 158, 169 (1992).

30. The qualified-immunity doctrine shields individual-capacity defendants from damages awards under section 1983 and *Bivens* to the extent that "their conduct does not violate clearly established . . . rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *Harlow* reformulated the qualified-immunity defense from one requiring both objective reasonableness and subjective good faith into a wholly objective inquiry designed to permit claims subject to a qualified-immunity defense to be resolved as early in the litigation as possible. *See id.* at 814–18. Since *Harlow*, the Court has continued to emphasize the importance of early resolution of any qualified-immunity issues by describing the immunity as one from suit as well as liability, Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985), which "ordinarily should be decided . . . long before trial," Hunter v. Bryant, 502 U.S. 224, 228 (1991). The Court has also treated law-based denials of pretrial motions for dismissal based on an assertion of qualified immunity as collateral orders subject to immediate appeal under 28 U.S.C. § 1291 (2006). *Mitchell*, 472 U.S. at 524–30; *see also* Johnson v. Jones, 515 U.S. 304, 311–12 (1995).

31. *Wyatt*, 504 U.S. at 163–64 (citations and internal quotation marks omitted).

Initially, the Court explained its creation of the immunity doctrines in policy terms by emphasizing a need to avoid overdeterring state actors who perform important public functions. The Court feared that without an immunity that shields state actors from liability when they have acted reasonably, "executive officials would hesitate to exercise their discretion in a way injuriously affect[ing] the claims of particular individuals even when the public interest require[s] bold and unhesitating action." Nixon v. Fitzgerald, 457 U.S. 731, 744–45 (1982) (citation and internal quotation marks omitted) (alteration in original).

More recently, as Professor Alan Chen has explained, the Supreme Court has tended to highlight the social costs of civil rights litigation in justifying the immunity doctrines. *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236–37 (2006). Of course, as Professor Chen recognizes, overdeterrence and the costs of civil rights litigation are closely related phenomena. *See also* Alan K. Chen, *The Burdens of*

contemplates a two-step inquiry in any individual-capacity damages claim in which an individual defendant asserts an affirmative immunity defense: First, has the individual defendant committed a constitutional tort? Second, is the defendant nonetheless entitled to avoid liability under the affirmative immunity defense asserted?[32]

Part II of this paper argues that the reasons the Supreme Court has given for creating non-textual affirmative immunity defenses better support a narrower reading of section 1983 that would reduce the statutory analysis to a single step, render affirmative immunity defenses conceptually unnecessary, and eliminate the anomalous subordination of statutory text to contrary common law that makes the doctrine governing constitutional tort litigation seem lawless at its most basic level.[33] But even if one were to reject the arguments made in Part II, recognition of the fact that an individual-capacity damages claim under section 1983 substantively differs from a true "constitutional" claim permits us to bring a new perspective to a controversy that the Supreme Court appears ready to revisit when it decides *Pearson v. Callahan* later this term: whether a court entertaining an individual-capacity claim involving an assertion of a qualified-immunity defense should make a preliminary, law-settling determination whether there has been a constitutional violation before proceeding to the immunity issue.[34]

Under current law, the answer is yes. Prompted by concerns about law "freezing"—that is, failing to establish what the Constitution requires and thus inviting repeated constitutional violations without accountability—the Supreme Court in *Saucier* directed federal courts entertaining individual-capacity damages claims to which an affirmative qualified immunity defense is interposed to settle the law by *always* addressing the constitutional issue that is imbedded within the plaintiff's claim before discussing the defendant's entitlement to immunity.[35] The *Saucier* rule has given rise to a spirited debate about the wisdom of requiring such "unnecessary" constitutional rulings[36] and whether the rul-

---

Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 AM. U. L. REV. 1, 24–27 (1997).

32. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 197–98 (2004).

33. *See infra* notes 105–114 and accompanying text.

34. *See supra* notes 8–10 and accompanying text.

35. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), *receded by* Pearson v. Callahan, 129 S. Ct. 808 (2009); *see also* Greabe, *supra* note 13, at 408–11 (explaining how the qualified-immunity doctrine can cause law freezing).

36. The chief critic of the *Saucier* mandate on the Supreme Court has been Justice

ings are barred by the case-or-controversy requirement of Article III.[37]

In fact, however, *Saucier* is flawed in a more fundamental respect. The *Saucier* rule is premised on an assumption that the threshold issue raised in any section 1983 individual-capacity claim is constitutional. But as explained above, the threshold issue in an individual-capacity claim, properly framed, is not itself constitutional; it is whether the defendant has engaged in conduct that would constitute *a section 1983 violation* in the absence of any applicable affirmative defense.[38] True, there is a constitutional issue imbedded within this threshold statutory question. And true, if (as current law assumes) the entitlements and duties created by section 1983 happen to be the same as, or coextensive with, those created by the Constitution—if, in other words, one commits a threshold "violation" of section 1983 every time one engages in conduct that brings about a deprivation of a right secured by the Constitution—answering the threshold statutory question positively would imply that the non-party government entity whose power the defendant has employed has violated the plaintiff's true constitutional rights. But the threshold statutory ruling is not itself "constitutional," the government is not a formal party to such a claim, and government lawyers typically do not defend against such a claim.[39] Thus, a ruling on the imbedded constitutional issue might properly be thought to lack any legal significance whatsoever, whatever might be said about its legiti-

---

Breyer. *See* Morse v. Frederick, 127 S. Ct. 2618, 2638–43 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); Scott v. Harris, 550 U.S. 372, 387–89 (2007) (Breyer, J., concurring); *Brosseau*, 543 U.S. at 201–02 (Breyer, J., concurring). But four other Justices also have criticized *Saucier*. *See Morse*, 127 S. Ct. at 2642 (Breyer, J., concurring in the judgment in part and dissenting in part) (summarizing other Justices' criticisms). So have other federal judges, *see id.* (summarizing criticisms from lower courts); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006).

An article by Professor Sam Kamin contains a very nice summary of the academic commentary on this issue. *See* Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 55–56 & nn.16–18 (2008).

37. *Compare* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 920 (2005) ("Unnecessary constitutional rulings in qualified immunity . . . cases violate the ban on advisory opinions because a decision on the constitutional issue has no effect on the outcome of the dispute."), *with* Kamin, *supra* note 36, at 78–97 (rejecting Healy's argument other than in the rare situation in which it is apparent from the outset of the case that no remedy will be available to the plaintiff). *See also* Greabe, *supra* note 13, at 418–26 (rejecting the argument that a bypass of the merits of the imbedded constitutional issue is required by Article III).

38. *See supra* notes 22–27 and accompanying text.

39. *See supra* note 23.

macy under Article III.[40] In any event, for the same reasons that courts should not entertain constitutional challenges to statutes without affording the government notice and an opportunity to intervene and defend their legality,[41] a court should not issue a law-settling ruling about the constitutionality of conduct undertaken under color of state law—a ruling that could give rise to future damages liability that will likely be passed along to the government[42]—without affording the government the same opportunity.[43]

What does this mean for the law-freezing debate and *Pearson v. Callahan*? Certainly, it means that, in *Pearson*, the Supreme Court should relax the *Saucier* rule, which in any event went too far in prescribing an inflexible approach to every case.[44] But the Court also should remain sensitive to the concerns about law development that led to the *Saucier* rule in the first place.[45] One way to strike a balance would be for the Court to emphasize an option available to lower courts faced with individual-capacity claims to which a qualified-immunity defense is raised: if the imbedded constitutional issue is one that should be settled for notice-giving reasons, courts can and should invite the relevant government entity to intervene and defend the constitutionality of the challenged conduct.[46] In issuing such an invitation, courts might borrow from the procedures outlined in Fed.

---

40. *Cf.* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4458, at 567 & n.20 (2d ed. 2002) ("[A] judgment against a government or one government official does not bind a different official in subsequent litigation that asserts a personal liability against the official . . . ."); Willner v. Budig, 848 F.2d 1032, 1034 n.2 (10th Cir. 1988) ("Government employees in their *individual* capacities are not in privity with their government employer."); Hurt v. Pullman Inc., 764 F.2d 1443, 1448 (11th Cir. 1985) ("Under basic principles of *res judicata* jurisprudence, for a party to be bound by or take advantage of a prior suit that party or its privy must not only have been present in both suits, but it has to appear in the same capacity in both suits.").

41. *See* FED. R. CIV. P. 5.1; FED. R. APP. P. 44, the requirements of which are summarized *infra* at note 47; *see also* 28 U.S.C. § 2403 (2000), which authorizes intervention by the federal government or the state into any case in which the constitutionality of a federal or state statute is questioned but the government is not a party.

42. *See supra* note 23.

43. Certainly, the government's interest in such a ruling is sufficient to authorize intervention under FED. R. CIV. P. 24, notwithstanding the fact that an individual-capacity action challenges only government *conduct* and not the constitutionality of a federal or state statute. *See* 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1908.2 (3d ed. 2008 Supp.) (recognizing that the stare decisis effect of a judgment is frequently sufficient, by itself, to support intervention as of right under FED. R. CIV. P. 24(a)).

44. *See supra* note 13.

45. For a discussion of these concerns see Greabe, *supra* note 13, at 426–37.

46. *See supra* note 43.

R. Civ. P. 5.1 and Fed. R. App. P. 44, which must be followed in cases where the government is not a party but the constitutionality of a federal or state statute is called into question.[47] For an adverse, law-settling ruling on the constitutional issue imbedded within a section 1983 individual-capacity claim can impose costs on the government that are similar in nature and scope to those which prompted the adoption of these Rules and 28 U.S.C. § 2403.[48]

II. THE FALSE CONFLICT THAT HAS BEEN READ INTO SECTION 1983 INDIVIDUAL-CAPACITY CLAIMS

I turn now to an argument that seeks to capitalize on the possibility for doctrinal reform[49] created if one accepts that the substantive statutory entitlements that section 1983 creates vis-à-vis individuals *need not be* the same as, or coextensive with, the true constitutional rights which are their referents but not their source, and that an individual state actor therefore does not *necessarily* violate section 1983 every time he or she engages in conduct that causes another to suffer an infringement of a constitutional right. As previewed above, my argument is that the Supreme Court should adopt a narrower interpretation of the cause of action section 1983 creates against individual defendants that would (or at least could) preserve current liability

47. FED. R. CIV. P. 5.1 requires, *inter alia*, that a federal district court entertaining a lawsuit to which the government is not a party but which challenges the constitutionality of a federal or state statute notify the appropriate attorney general of the challenge and then permit sixty days for intervention before striking down the statute. Similarly, FED. R. APP. P. 44 requires, *inter alia*, that a federal appeals court entertaining an appeal to which the government is not a party but which challenges the constitutionality of a federal or state statute send notice of the challenge to the appropriate attorney general.

48. *See* FED. R. CIV. P. 5.1; FED. R. APP. P. 44; *see also* 28 U.S.C. § 2403 (2000), which authorizes intervention by the federal government or the state into any case in which the constitutionality of a federal or state statute is questioned but the government is not a party.

49. One judge recently characterized "[w]ading through the doctrine of qualified immunity" as "one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000); *see also* McMillian v. Johnson, 101 F.3d 1363, 1366 (11th Cir. 1996) (Propst, J., concurring specially) (describing keeping up with the law of qualified immunity as a full-time job); Flatford v. City of Monroe, 17 F.3d 162, 166 (6th Cir. 1994) ("[T]he difficulty for all judges with qualified immunity has not been articulation of the rule, but rather the application of it."). These quotes are collected in Chen, *The Facts About Qualified Immunity*, *supra* note 31, at 230 & n.4 (internal quotation marks omitted) (alteration in original).

boundaries[50] while doing away with the non-textual, affirmative immunity defenses that complicate current doctrine and make constitutional tort law seem fundamentally lawless.[51] More specifically, I contend that the reasons the Supreme Court has given for reading affirmative immunity defenses into section 1983 better support reading the statutory term "person"[52] to exclude those defendants presently protected by absolute immunity, and the statutory phrase "causes to be subjected"[53] to require proof that individual-capacity defendants[54] have acted with the same negligence with respect to illegality[55] that now is required to overcome an assertion of the qualified-immunity defense.[56]

Below, I argue that such a reinterpretation of section 1983 could streamline and simplify the resolution of individual-capacity claims without affecting any substantive entitlements or procedural protections that parties enjoy under current law.[57] But at the outset, I wish to emphasize that my argument is *not* premised on a claim that the proposed approach is compelled by the statute's text or history. Rather, I contend only that narrowing the substantive reach of the statute is preferable to the current state of affairs as an interpretative matter because it eliminates the present regime's subordination of lawful, democratically enacted statutory text to contrary common law. The proposal is purely instrumental; it is prompted by a desire to more plausibly root constitutional tort law in the positive law text that is its source. My hope is that such reform would reduce the number of unnecessary and costly disagreements that are common in constitutional tort litigation, and that tend to arise from judicial adventurism invited by the Supreme Court's many

50. Whether present liability boundaries *should* be redrawn is frequently debated. *see, e.g.*, Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 587–88 & n.15 (1998) (providing an overview of the critical literature), but is beyond the scope of this paper. Here, I limit my argument to the systemic and conceptual benefits that would flow from a clarifying reform of constitutional tort law.

51. *See infra* notes 86–88 and accompanying text.

52. *See* 42 U.S.C. § 1983 (2000)).

53. *See* 42 U.S.C. § 1983.

54. As non-government entities, individual-capacity defendants cannot directly "subject" someone to a constitutional deprivation, but can only indirectly "cause" another to be subjected to a constitutional deprivation by misusing the government power they wield. *See infra* note 104 and accompanying text.

55. I follow the lead of Dean Jeffries in using the phrase "negligence with respect to illegality" as shorthand for the kind of fault required to impose individual-capacity damages liability under section 1983. *See* Jeffries, *supra* note 21, at 90; *see also supra* note 30.

56. *See infra* notes 108–110 and accompanying text.

57. *See infra* notes 111–114 and accompanying text.

indications that the usual rules of statutory interpretation and civil trial practice do not apply in this doctrinal area.

I start with an overview of current law, refracted through the lens of section 1983's statutory language, to give readers a sense of its mind-numbing and at times illogical complexity. The Supreme Court has recognized that there are four types of "person" subject to suit under section 1983: "official-capacity" persons,[58] municipalities,[59] individuals employed by the State or one of its political subdivisions in their "individual capacities,"[60] and other private parties who sometimes are said to act "under color of" State law.[61] "Official-capacity" defendants may not be sued for damages[62] because the State is not a "person" within the meaning of section 1983[63] and a suit *for damages* against an official-capacity defendant is treated as a suit against the State.[64] By contrast, "official-capacity" defendants may be sued for *injunctive relief* because such suits are *not* treated as suits against the State.[65]

Although municipalities are political subdivisions of the State, they are "persons" within the meaning of section 1983.[66] Unlike the States, municipalities may be sued for damages under section 1983.[67] But municipalities are not liable for damages under a theory of *respondeat superior*; rather, they face damages liability only if a municipal "policy or custom" can be said to

58. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 & n.10 (1989) (noting that official-capacity persons are subject to suit under section 1983 for equitable relief even though the States are not "persons" subject to suit under section 1983 and official-capacity claims *for damages* are regarded as de facto claims against the State). I prefer the term "public-capacity defendants" to "official-capacity defendants" to account for the fact that individuals who are not public officials can be sued in a representational capacity under the state-action doctrine. For example, there is no reason why a section 1983 plaintiff could not seek injunctive relief from the warden of a private prison in his or her capacity as the holder of an office performing a public function. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 403–13 (1997).

59. Monell v. Department of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978).

60. Hafer v. Melo, 502 U.S. 21, 25–29 (1991).

61. *Richardson*, 521 U.S. at 403. Private state actors may be either individual, *see id.*, or corporate, *see* Lugar v. Edmondson Oil Co., 457 U.S. 922, 925 (1982).

62. *Will*, 491 U.S. at 71.

63. *Id.* at 62–71.

64. *Id.* at 71.

65. *Id.* at 71 n.10. The Supreme Court has "explained" this anomaly by saying that it is "commonplace in sovereign immunity doctrine," *id.* (citation omitted), and that it "would not have been foreign to the 19th-century Congress that enacted § 1983," *id.* (citations omitted).

66. *Monell*, 436 U.S. at 690 (overruling Monroe v. Pape, 365 U.S. 167, 187–91 (1961)).

67. *Id.*

have "cause[d]" the plaintiff "to be subjected" to the deprivation of a right secured by the Constitution (or some other federal law).[68] Again, it is quite difficult to prove an unlawful custom or policy, so most damages claims under section 1983 are brought against individual defendants.[69]

As explained above, individuals who are employed by a State or its subdivisions may be sued for damages,[70] but such individuals are entitled to assert as an affirmative defense either a qualified immunity[71] or, if they are fulfilling a legislative, judicial, or prosecutorial function, an absolute immunity.[72] Private parties who are not employed by a State or its subdivisions but who nonetheless are accused of unlawfully exercising state power under the state-action doctrine may also be sued for damages,[73] but such persons are *not* entitled to qualified immunity.[74] They may, however, be able to assert an affirmative "good faith" defense that would substantially overlap with the qualified-immunity defense that state employees are entitled to assert.[75] Yet a narrow subset of individuals who exercise state power under the state-action doctrine—witnesses and grand jurors—*is* entitled to assert an absolute immunity defense that shields them from suit and liability.[76]

Once again, the Supreme Court has acknowledged that none of the affirmative immunity defenses available to individual defendants facing damages claims is expressly contemplated by the text of section 1983, which "on its face admits of no immunities."[77] But the Court has justified its recognition of these immunities by pointing to the fact they existed at common law at

---

68. *Id.* at 694–95.
69. *See supra* note 23.
70. Hafer v. Melo, 502 U.S. 21, 25–29 (1991).
71. *See supra* note 30.
72. *See supra* note 29.
73. *See* Wyatt v. Cole, 504 U.S. 158, 163–69 (1992).
74. *See id.*
75. *See id.* at 168–69. Justice Scalia has powerfully criticized the different treatment accorded prison guards employed by the State and guards at private prisons sued under the state-action doctrine with respect to their entitlement to qualified immunity. *See* Richardson v. McKnight, 521 U.S. 399, 422 (1997) (Scalia, J., dissenting). My proposed reinterpretation of section 1983 would do away with this differential treatment by declining to impose damages liability on *any* individual who does not act negligently with respect to illegality and therefore does not "cause" the plaintiff to suffer a constitutional deprivation within the meaning of section 1983. *See infra* notes 99–110 and accompanying text.
76. *See supra* note 29.
77. *Wyatt*, 504 U.S. at 163 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)) (internal quotation marks omitted); *see also supra* notes 28–30 and accompanying text.

the time of the enactment of section 1983's statutory predecessor, and by concluding that Congress surely would have been explicit had it intended to override them. Moreover, the Court has stated, these defenses are necessary to ensure fairness to those who wield state power, to avoid overdeterring state actors as they perform their important public functions, and to keep in check the high social costs generated by civil rights litigation.[78]

Given the byzantine nature of its ground rules, it will come as no surprise that constitutional tort law is beset with disputes that devour judicial resources but frequently have little bearing on the ultimate liability question that prompted the lawsuit in the first place. A partial list of the disagreements that have divided Supreme Court justices and federal appellate judges attempting to administer the constitutional tort regime (some of which have been discussed earlier in this paper) includes whether courts entertaining individual-capacity actions may and should decide the constitutional issues imbedded within individual-capacity claims under section 1983 in situations where a defendant has a meritorious qualified-immunity defense;[79] whether "reasonableness" in the qualified-immunity context differs from "reasonableness" in the substantive constitutional context presented in Fourth Amendment cases;[80] whether and to what extent private persons not employed by the government who engage in state action are entitled to assert the qualified-immunity defense available to government employees, a substantively different "good-faith" defense, or neither;[81] whether a heightened-pleading requirement governs section 1983 claims brought against a defendant entitled to assert qualified immunity;[82]

78. *See Wyatt*, 504 U.S. at 163; *see also supra* note 31 and accompanying text.

79. *Compare* Saucier v. Katz, 533 U.S. 194, 201 (2001), *receded by* Pearson v. Callahan, 129 S. Ct. 808 (2009) (majority opinion answering this question yes), *with* Morse v. Frederick, 127 S. Ct. 2618, 2638–43 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (arguing that the question should be answered no).

80. *Compare Saucier*, 533 U.S. at 204 (majority opinion answering this question yes), *with id.* at 209–17 (Ginsburg, J., concurring in the judgment) (arguing that the question should be answered no).

81. *Compare* Richardson v. McKnight, 521 U.S. 399, 404–12 (1997) (majority opinion rejecting claim that private prison guards should be entitled to assert qualified immunity), *with id.* at 414–23 (Scalia, J., dissenting) (arguing that private prison guards should be able to assert qualified immunity); *Wyatt*, 504 U.S. at 163–69 (majority opinion rejecting claim that private individuals conspiring with state officials should be entitled to assert qualified immunity), *with id.* at 175–80 (Rehnquist, C.J., dissenting) (arguing that such individuals should be entitled to assert qualified immunity).

82. *Compare* Swann v. Southern Health Partners, Inc., 388 F.3d 834, 837 (11th Cir. 2004) (indicating that the Eleventh Circuit does impose such a requirement), *with* Gann v. Cline, 519 F.3d 1090, 1092 (10th Cir. 2008) (stating that the Tenth Circuit does not impose a heightened-pleading requirement in such circumstances).

whether denials of Fed. R. Civ. P. 12, 50, or 56 motions for judgment based on qualified immunity, to the extent that they turn on issues of law, may be immediately appealed as "collateral orders" within meaning of 28 U.S.C. § 1291;[83] whether the qualified-immunity inquiry has two or three "prongs";[84] and whether the jury must resolve factual disputes bearing on an individual defendant's entitlement to immunity.[85]

Yet complexity alone fails to explain the nature, frequency, and intensity of the disagreements in this area. The greater problem is that the Supreme Court has openly acknowledged its willingness to rewrite the text of section 1983 to create a regime that "better" balances competing policy considerations than does the actual law that Congress passed.[86] And so we have the Court saying that affirmative immunity defenses drawn from the common law need to be read into the statute, even though the statute makes no mention of any affirmative defenses and even though statutory text usually trumps conflicting common law.[87] Even if one likes the end result as a policy matter, judicial lawlessness of this sort comes at a cost: it suggests that the usual ground rules do not apply to constitutional tort law, and it invites ongoing tinkering based on nothing more than a judge's subjective sense that a better policy balance could be achieved.[88] And thus does

83. *Compare* Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (majority opinion answering this question yes), *with id.* at 543–56 (Brennan, J., concurring in part and dissenting in part) (arguing that the question should be answered no).

84. *Compare* Higgins v. Penobscot County Sheriff's Dep't, 446 F.3d 11, 13–15 (1st Cir. 2006) (majority opinion applying First Circuit's three-pronged qualified-immunity analysis), *with id.* at 15–17 (Howard, J., concurring in the judgment) (arguing that the First Circuit's three-prong approach to qualified immunity misapprehends the text and arguing for a return to the two-prong approach limned in the Supreme Court's qualified-immunity cases).

85. *Compare* Jennings v. Jones, 499 F.3d 2, 9–10 (1st Cir. 2007) (majority opinion strongly suggesting that a factual dispute material to whether a defendant is entitled to qualified immunity should be resolved by the jury), *with id.* at 22 (Lynch, J., dissenting) (suggesting that the trial judge might need to resolve such disputes prior to trial to honor a qualifiedly immune defendant's entitlement to avoid trial as well as liability) (citing Kelley v. LaForce, 288 F.3d 1, 7 n.2 (1st Cir. 2002)).

86. *See, e.g.*, *Wyatt*, 504 U.S. at 163 (acknowledging that the text of section 1983 creates no immunities); *id.* at 165–66 (acknowledging that Harlow v. Fitzgerald, 457 U.S. 800 (1982) "reformulated qualified immunity along principles not at all embodied in the common law") (quoting Anderson v. Creighton, 483 U.S. 635, 645 (1987) (internal quotation marks omitted)); *see also* 504 U.S. at 170–71 (Kennedy, J., concurring) (acknowledging that the *Harlow* formulation is without textual or historical roots).

87. *See, e.g.*, City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 317–19 (1981).

88. Professor Chen provides an excellent account of how the Supreme Court has encouraged the lawlessness that permeates this doctrinal area by repeatedly stating that qualified immunity is an entitlement to avoid suit as well as liability, by repeatedly admonishing courts to resolve qualified-immunity issues at the earliest possible stage of the litigation, but by failing to explain *how* such early resolutions might be accomplished in

the vicious circle continue to turn, burdening the lower federal courts with the costly disputes that inevitably follow the objections from those who challenge the legitimacy of freewheeling judicial lawmaking in an area that involves cherished rights and is supposed to be governed by the text of a federal statute.

We can do better than this without altering the liability boundaries that the current regime establishes or making it harder for a defendant presently entitled to immunity to avoid a trial.[89] If one accepts that section 1983 is substantive insofar as it contemplates individual liability, and that its entitlements to sue individuals are not necessarily the same as or coextensive with the true constitutional rights from which they are derived, one quickly sees that the "conflict" between statutory text and the common law that led the Supreme Court to create section 1983's affirmative immunity defenses is entirely avoidable. The common-law tradition of individual immunity with which the text of section 1983 is said to conflict, and that led the Court to read affirmative immunity defenses into the statute, can be *harmonized* with the text if it is invoked to explain that Congress almost certainly would not have regarded the "persons" cloaked with absolute immunity at common law to be "persons" subject to suit under section 1983,[90] and almost certainly would not have wanted individual defendants who act in an objectively reasonable manner to face damages liability for "causing" another to be subjected to the deprivation of a right secured by the Constitution. Indeed, as the Court has recognized, at least some of the common-law "defenses" said to underlie today's doctrines were not affirmative defenses at all; they were elements of the claim to be disproved by the plaintiff.[91] It thus seems clear that the only rea-

---

the many cases where a defendant's entitlement to qualified immunity turns on a factual dispute that must be resolved by a factfinder. *See* Chen, *The Facts About Qualified Immunity*, *supra* note 31, at 233–62. The Court's frequent admonitions without explanation have provided the impetus for innovations in the lower federal courts such as the imposition by judicial fiat of a heightened-pleading requirement applicable to claims subject to a qualified-immunity defense, *see supra* note 82, and speculations about whether the Seventh Amendment jury-trial right attaches to claims to which a qualified-immunity defense has been interposed, *see supra* note 85.

89. Again, whether altering liability boundaries is desirable is beyond the scope of this paper. *See supra* note 50.

90. Although section 1983 now purports to impose liability on "[e]very" person who engages in the conduct it proscribes, the statute originally referred to "[a]ny" person. The reviser who prepared the Revised Statutes of 1878 altered the text of the statutory predecessor to section 1983. *See* Pierson v. Ray, 386 U.S. 547, 563 (1967) (Douglas, J., dissenting).

91. For example, at common law, the plaintiff needed to establish that the defendant acted with malice and without probable cause in order to make out a viable mali-

son for treating these "immunities" as affirmative defenses in conflict with the text of the statute, rather than as grounds for considering a narrower reading of the statute, is the assumption that section 1983 merely channels substantive rights created in the Constitution and therefore is violated by the state's human agent every time the state infringes the plaintiff's constitutional rights.[92] But as argued in Part I, nothing compels this assumption.

Indeed, the Supreme Court has already laid the foundation for a narrower interpretation of section 1983. Although federal judges routinely refer to the absolute immunities that the Court has identified as "affirmative defenses,"[93] and have stated that they are subject to forfeiture under Fed. R. Civ. P. 12(h)(1) if they are not pleaded or made the subject of a Rule 12 motion,[94] a careful reading of the cases that first recognized these defenses strongly suggests that those held to be absolutely immune from section 1983 claims—legislators acting in a legislative capacity, judges acting in a judicial capacity, prosecutors acting in a prosecutorial capacity, grand jurors and witnesses[95]—are simply not "persons" against whom section 1983 claims can be stated. True, the Court has not come right out and said that the term "absolute immunity" is but another way of saying that those who are entitled to claim the immunity are not "persons" within the meaning of the statute. But it has emphasized that a section 1983 defendant's entitlement to absolute immunity is a "question of

---

cious prosecution or abuse-of-process claim. *See Wyatt*, 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting) (stating that it "is something of a misnomer" to describe the common law as providing a "defense" to a malicious prosecution or abuse-of-process claim); *see also id.* at 166 n.2 (majority opinion) (accepting Chief Justice Rehnquist's characterization of these torts).

92. When there were subjective elements to the qualified immunity inquiry, there also were policy reasons for making qualified immunity an affirmative defense as to which the individual defendant bore the burden of proof. *See* Gomez v. Toledo, 446 U.S. 635, 640–42 (1980) (explaining that a successful assertion of qualified immunity required a defendant to make both objective and subjective showings and noting that the facts as to the defendant's subjective state of mind at the time of the incident in question are "peculiarly within the knowledge and control of the defendant" and therefore appropriately matters as to which the defendant should bear the burden of proof). But with *Harlow*'s transformation of qualified immunity into a wholly objective inquiry, *see supra* note 30, this reason for making qualified immunity an affirmative defense has disappeared.

93. *E.g.*, San Filippo v. United States Trust Co. of N.Y., 470 U.S. 1035, 1035 (1985) (White, J., dissenting from denials of petitions for certiorari); Shmueli v. City of New York, 424 F.3d 231, 236 (2d Cir. 2005); Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 428 (3d Cir. 2003).

94. *E.g.*, Cozzo v. Tangipahoa Parish Council-President Gov't, 279 F.3d 273, 283 (5th Cir. 2002); *see also* Chestnut v. City of Lowell, 305 F.3d 18, 22 (1st Cir. 2002) (en banc) (Torruella, J., concurring).

95. *See supra* note 29.

statutory construction"[96] that is to be resolved not by giving the phrase "[e]very person" a "literal" reading, but rather by giving it a reading that is sensitive to the historical context in which the statutory predecessor to section 1983 was enacted—a context that has been said to require a presumption that Congress would not have intended section 1983 to reach those who were not amenable to suit at common law.[97] By stating that the statutory term "[e]very person" is not to be given a literal reading, the Court more strongly implies that those entitled to absolute immunity are not "persons" within the meaning of section 1983 than that absolute immunity is an affirmative defense to be read into the statute.[98]

The Supreme Court also has read section 1983's "causes to be subjected to" language to require a showing of fault. In *Monell v. New York City Department of Social Services*,[99] the Court overruled *Monroe v. Pape*[100] and held that municipalities are "persons" subject to a damages claim under section 1983 if they can be said to have "caused" one to be subjected to the deprivation of a constitutional right.[101] But the Court further held that the simple act of delegating municipal power to an official who directly "subjects" another to such a deprivation is insufficient to ground a finding of municipal liability under a theory of *respondeat superior*.[102] Rather, what is needed is *blameworthy* conduct on the city's part, such as when a city adopts an unconstitutional custom or policy and charges a city official with carrying out that custom or policy.[103] In other words, a city does not "cause" one to be subjected to a deprivation of a constitutional right merely by hiring an official who, in his or her official capacity, directly

96. Briscoe v. LaHue, 460 U.S. 325, 326 (1983).

97. *Id.* at 330; *see also id.* at 347–48 (Marshall, J., dissenting) (framing the issue in terms of whether the statutory term "person" includes those who assert an entitlement to absolute immunity); Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (stating that the argument in favor of construing the term "[e]very person" to apply "as stringently as it reads" has "not prevailed").

98. Of course, this reading of the Court's cases also would suggest that absolute immunity is not subject to forfeiture pursuant to FED. R. CIV. P. 12(h)(1) if not pleaded or made the subject of a FED. R. CIV. P. 12(b)(6) motion; rather, it is grounds for an argument that the plaintiff has not stated a claim on which relief may be granted that can be raised prior to or at trial, regardless whether it was raised in the initial response to the complaint. *See* FED. R. CIV. P. 12(h)(2).

99. 436 U.S. 658 (1978).

100. 365 U.S. 167 (1961).

101. 436 U.S. at 690–91.

102. *Id.* at 691.

103. *Id.* at 694–95; *see also* City of Oklahoma City v. Tuttle, 471 U.S. 808, 816–18 (1985) (Rehnquist, J., plurality opinion).

"subjects" another to a constitutional deprivation. But a city does "cause" one to be subjected to such a deprivation when it adopts an unconstitutional custom or policy and then confers power to carry out that custom or policy on an individual who, in an official capacity, directly "subjects" another to a constitutional deprivation.

As just suggested, *Monell* is instructive not only on what is needed to establish culpable "causation" within the meaning of section 1983, but also on what type of statutory "person" can be said to directly "subject" another to a constitutional deprivation, and what type of "person" merely "causes" another to be subjected to such a deprivation. *Monell* makes clear that an unconstitutional municipal custom or policy does not itself "subject" one to a constitutional deprivation; it only indirectly "causes" one to be subjected to such a deprivation by empowering the human agent who, in his or her official capacity, directly "subjects" one to the abridgement of a constitutional right.[104] Similarly, I would submit, because an individual cannot violate any provision of the Constitution other than the Thirteenth Amendment, an individual acting in one's individual capacity does not directly "subject" another person to a constitutional deprivation. Rather, an individual acting in an individual capacity merely "causes" one to be subjected to a constitutional deprivation by using the power of the office, or otherwise by bringing state power to bear, in a way that the Constitution prohibits. Thus, while a person can act in both an individual and official capacity, a person can only directly "subject" one to a constitutional deprivation in an official capacity—i.e., as a state officer or by otherwise being an agent of the State.

To summarize: When one considers the types of "persons" subject to section 1983 liability, the ways in which such persons can violate the statute, and the types of remedies section 1983 authorizes, an interpretation of the statute suggests itself that respects current liability boundaries and remedy limitations, but also recognizes the critical differences between and among the types of "persons" who can violate section 1983, how they can violate the statute, and the types of relief to which they are subject:

> (1) An official-capacity defendant is intrinsically governmental and therefore intrinsically capable of directly "subject-

104. *See Monell*, 436 U.S. at 692; *see also Tuttle*, 471 U.S. at 818 (Rehnquist, J., plurality opinion).

> ing" another to a constitutional deprivation. Such an official "person" is strictly liable for a direct constitutional deprivation—otherwise, a plaintiff could not invoke section 1983 to secure forward-looking equitable relief, and plaintiffs could not recover attorney's fees under 42 U.S.C. § 1988 for litigation accomplishing reform of this sort—but is subject only to equitable relief because the State is not a "person" subject to a suit for damages under 1983, and a claim *for damages* brought against an official-capacity person, unlike such a claim for equitable relief, is treated as a suit against the State.[105]
>
> (2) An individual-capacity defendant, by contrast, is intrinsically non-governmental and therefore intrinsically incapable of directly "subjecting" a person to a constitutional deprivation outside of the Thirteenth Amendment; an individual-capacity defendant may only indirectly "cause" one to suffer a constitutional deprivation by misusing power conferred under color of state law. Unlike an official-capacity defendant, an individual-capacity defendant who "causes" such a constitutional deprivation is a "person" subject to the damages remedy that section 1983 explicitly contemplates. But *Monell* and *Tuttle* make clear that section 1983 "causation" requires more than proof of mere causation-in-fact; it requires proximate causation in the form of proof of *blameworthy* conduct on the part of the "person" from whom damages are sought.[106]
>
> (3) A municipality is a section 1983 "person" that is subject to suit in its own name and may be ordered to pay damages, but only if it indirectly "causes" a person to be subjected to a constitutional deprivation through its own blameworthy conduct. Municipalities do not directly "subject" one to a constitutional deprivation; they (like States) act only through human agents who are the immediate source of any alleged constitutional deprivation.[107]

We have already seen how a municipality may incur damages liability for blameworthy conduct that indirectly "causes" a constitutional deprivation: the promulgation of an unconstitutional custom or policy that leads a municipal official directly to

---

105. *See supra* notes 62–65 and accompanying text.

106. *See supra* notes 99–103 and accompanying text.

107. *See Will*, 491 U.S. at 71 n.10 (noting that claims for injunctive relief are to be brought as official-capacity claims directly against the involved official); *Monell*, 436 U.S. at 692 (treating the offending employee as the one who directly "subjects" one to a constitutional deprivation); *see also Tuttle*, 471 U.S. at 818 (Rehnquist, J., plurality opinion) (similar).

subject one to a constitutional deprivation.[108] But how may an individual-capacity defendant—whether a state employee or an individual sued under the state-action doctrine—incur such liability? Again, because *Monell* holds that section 1983 "causation" requires a showing of blameworthy conduct as a prerequisite to the imposition of a damages remedy, a showing of fault is and should be a prerequisite to such liability.[109] And what better proxy is there for fault on the part of an individual defendant than the objectively unreasonable, and therefore objectively blameworthy, conduct that must be shown to overcome an assertion of the qualified-immunity defense under current law?[110]

It follows that any viable individual-capacity claim for damages should be held to require a properly supported allegation that the individual acting under color of law "caused" the plaintiff to suffer a constitutional deprivation by means of conduct that was objectively unreasonable because it was negligent with respect to illegality.[111] Under the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*,[112] this means that a well-pleaded individual-capacity claim should include sufficient allegations to "show" that the individual defendant, in an individual capacity, not only engaged in conduct that resulted in a constitutional deprivation, but also acted in an objectively unreasonable manner in light of the reasonably perceived facts as analyzed against the backdrop of binding law (which the defendant is charged with knowing).[113] So too at the summary judgment stage: the plaintiff must adduce competent evidence that, if believed by the jury, would ground a finding that the individual defendant acted in an objectively unreasonable manner in "causing" the plaintiff to suffer the deprivation of a constitutional right.[114] Otherwise, an individual-capacity defendant should not have to face trial and is entitled to the early dismissal, and trial avoidance,

108. *See supra* notes 99–103 and accompanying text.
109. *See id.*
110. *See supra* note 30.
111. *See id.*; *see also supra* note 55.
112. 550 U.S. 544 (2007).
113. *See id.* at 554–556.
114. Because of the tradition of common-law immunity that the Supreme Court has cited as one of the primary grounds for recognizing a qualified-immunity defense, section 1983 would still be regarded as a limited waiver of immunity under such a construction of the statute. Accordingly, denials of dispositive pretrial motions brought on the ground that the defendant's conduct (as alleged by the plaintiff) was not objectively unreasonable would still be collateral orders subject to immediate appeal, per 28 U.S.C. § 1291 (2006), under the rule adopted in Mitchell v. Forsyth, 472 U.S. 511 (1985) (and refined in subsequent cases). *See supra* note 30.

now available under the qualified-immunity defense. But if material factual disputes preclude resolution of the case by pretrial motion, then so be it. Section 1983 exists, and there is no reason to deny Seventh Amendment jury-trial rights to a plaintiff who invokes its protections and adduces credible evidence of a constitutional deprivation caused by a defendant unreasonably wielding state power.

To be sure, this narrower construction of section 1983 is not perfectly neat and tidy. It may seem weirdly formalistic, and contrary to modern legal conventions, to draw such fine distinctions between and among the statutory terms "subjects" and "causes to be subjected" and actions undertaken by persons in "official" or "individual" capacities.[115] Moreover, it would take some finessing to harmonize the proposed construction of the statutory term "subjects" in section 1983 with the same term as it is used in 18 U.S.C. § 242, section 1983's criminal counterpart.[116] But this narrower reading certainly would be more faithful to the text of section 1983 than is the present doctrinal regime, and it has the additional virtue of being rooted in the Court's absolute immunity cases, *Monell*, and the plurality opinion in *Tuttle*. More importantly, it would do away with the non-textual affirmative defenses that unnecessarily complicate constitutional tort law, and it would help to clarify that the limited damages liability authorized by section 1983 involves no breach of *Marbury*'s promise of a remedy for every invasion of a right.[117] The proposed reform could thus pave the way for the resolution of constitutional tort law claims under ground rules that are at least somewhat more intuitive to judges and lawyers than those established by current law. And it might forestall the tendency of some judges to propose additional "refinements" to constitutional tort law—e.g.,

115. Of course, the liberal spirit of modern civil practice would require courts to recharacterize improperly pleaded claims and defenses to achieve substantial justice in this complicated doctrinal area. *Cf.* FED. R. CIV. P. 8(f) (2000) (amended 2007) ("All pleadings shall be so construed as to do substantial justice.").

116. Under my proposed interpretation of section 1983, only an official-capacity "person" can directly "subject" one to a constitutional deprivation; all other section 1983 "persons" (i.e., individuals and municipalities) can only indirectly "cause" one to be subjected to a constitutional deprivation by misusing government power or, in the case of a municipality, giving some human agent the authority to implement an unconstitutional custom or policy. But the criminal liability created by 18 U.S.C. § 242 (2000) attaches only to those who "willfully subject[]" one to a constitutional deprivation, and not to those who "cause" one to be subjected to a constitutional deprivation. One would have to say, then, that section 242 proscribes only conduct willfully undertaken in an official capacity.

117. *See supra* notes 19–21 and accompanying text.

heightened pleading standards[118] or the suggestion that Seventh Amendment jury-trial rights do not attach to claims subject to a qualified immunity defense[119]—based on nothing more than a notion that such refinements would better serve public policy. Lawlessness begets more lawlessness, and it is well past time to do away with the lawlessness that permeates constitutional tort law.

III. CONCLUSION

To succeed in law school, students must learn to regard with skepticism their intuitive reactions to legal problems. Early in their careers, students are advised against assuming that the moral answer to a problem is also the legal answer,[120] and they are warned that the law will depart from the dictates of logic and history when practical considerations so require.[121] If all goes well, students quickly internalize these lessons and learn to check any tendency to assume that people must honor their contractual commitments or rescue a drowning child. So too do they come to understand that legal progress is frequently achieved through facile treatments of precedent, willful blindness to logical inconsistencies, and even out-and-out dishonesty. And thus do law students learn to "think like lawyers."

But even if "[t]he life of the law has not been logic: it has been experience,"[122] there is usually room for improvement when legal doctrine carves completely unpredictable paths and the ordinary operational principles of law do not apply. When legal doctrine is not intuitive or predictable to seasoned judges and lawyers, it becomes costlier to administer. Those who must conform their conduct to the law find it difficult to anticipate the liability boundaries that courts will enforce, lawyers more frequently make mistakes, the courts are more frequently called on to sort things out, disagreements among judges become more common, and lawless judicial adventurism ensues.

Such is the case with constitutional tort doctrine, and at least some of the problem lies in the fact judges have failed to

---

118. *See supra* note 82.

119. *See supra* note 85.

120. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), *reprinted in* 110 HARV. L. REV. 991, 992–97 (1997).

121. *See id.* at 998–1001; *see generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

122. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

appreciate the substantive nature of section 1983 insofar as it authorizes causes of action against individuals for their roles in constitutional deprivations. By recognizing the substance of section 1983, the Supreme Court could open a door to much-needed doctrinal reform that would help to restore a sense of predictability and lawfulness to this important area of the law.