PENN STATE
LAW REVIEW

Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence

Gary S. Gildin*

I. INTRODUCTION

The legal system's willingness to award a viable remedy to persons harmed by the government's invasion of individual liberty is a vital component of any regime of constitutional protection. English common law,[1] international human rights instruments,[2] and the seminal decision

* G. Thomas and Anne G. Miller Chair in Advocacy and Professor of Law, The Dickinson School of Law of the Pennsylvania State University. B.A. University of Wisconsin; J.D. Stanford Law School. I thank Allurie Kephart, Sylvia Marakas, Meghan McClincy and Ashley Zingaretti for their invaluable assistance in research for this article and Professor Kit Kinports for her typically unerring criticisms of an earlier draft. I am grateful to Professor Robert Williams for lending his name and prestige to this Symposium. The title of this article is derived from, and a tribute to, one of his many path-breaking works on state constitutionalism. *See* note 12, *infra*.

1. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 109 (London, A. Strahan 1803) ("[I]t is a [well] settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress."); Ashby v. White, (1703) 92 Eng. Rep. 126 (K.B.) (awarding 200 pounds to plaintiff for denial of the right to vote) ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. . . . [A]nd indeed it is a vain thing to imagine a right without a remedy; for want of [a] right and want of [a] remedy are reciprocal."). *See also* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 185 (3d ed. 1889) ("[T]he question [of] whether the right to personal freedom . . . is likely to be secure . . . depend[s] a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up[on] the constitution[s] of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured."); Lord Denning, *Misuse of Power*, AUSTR. L.J. 720, 720 (1981) ("The only admissible remedy for any [misuse] of power—in a civilized society—is by recourse to law. In order to ensure this recourse, it is important that the law itself should provide adequate and efficient remedies for [the] abuse or misuse of power from whatever quarter it may come."); *see also* Nelles v. Ontario [1989] 2 S.C.R. 170 (Can.) ("[A]ccess to a court of competent jurisdiction to

of the United States Supreme Court establishing the power of judicial review[3] concur that victims of official misconduct must have recourse to effective relief if limits on governmental power are to be meaningful. It is essential that money damages to compensate the citizen for injuries suffered as a result of a constitutional violation be available. For a person harmed by unconstitutional action that is not likely to recur to that individual—such as police misconduct—injunctive relief may be meaningless, if even procurable. Particularly if the successful plaintiff may not recover attorney's fees,[4] absent a damage remedy, victims of

seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the [*Canadian*] *Charter* [*of Rights and Freedoms*] which surely is to allow the courts to fashion remedies when constitutional infringements occur.") (emphasis added).

2. *See* Universal Declaration of Human Rights, G.A. Res. 217A, at art. 8, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the [C]onstitution or by law."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 2, U.N. Doc. A/6316 (Dec. 16, 1966) ("Each State Party to the present Covenant undertakes: to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy. . . ."); International Convention on the Elimination of All Forms of Discrimination, G.A. Res. 2106, at art. 6, U.N. Doc. A/6014 (Dec. 12, 1965) ("State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination . . . as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."); American Convention on Human Rights art. 25(1), July 18, 1978, 1144 U.N.T.S. 128 ("Everyone has the right to simple and prompt recourse . . . to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation[s] may have been committed by persons acting in the course of their official duties.").

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . 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."). *See also* Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("How 'uniquely amiss' it would be . . . if the government itself—'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct'—were permitted to disavow liability for the injury it has begotten.") (citation omitted). *But see* Parratt v. Taylor, 451 U.S. 527, 531 (1981) ("In the best of all possible worlds, the District Court's . . . statement that respondent's loss should not go without redress would be an admirable provision to be contained in a code which governed the administration of justice in a civil-law jurisdiction. For better or for worse, however, our traditions arise from the common law of case-by-case reasoning and the establishment of precedent.").

4. The United States Congress has authorized plaintiffs who prevail in actions against state and local officials and entities for deprivation of federal constitutional rights to recover reasonable attorney's fees. 42 U.S.C. § 1988. By contrast, only a few state legislatures have provided for an award of fees to citizens who successfully sue to redress

governmental wrongdoing will have neither the incentive nor the means to file a civil action to redress the deprivation of their constitutional rights. As a consequence, government officials may freely ignore constitutional constraints without formal legal consequence.

Despite the critical importance of remedies to the litigant and to the overall efficacy of a constitution in restraining the misuse of governmental authority, judicial prescription of when and from whom damages are recoverable historically emerges as a second-generation development. In the initial era of constitutionalism, courts are fully occupied by the process of defining the substantive scope of constitutional rights. Only after marshalling a sufficient jurisprudence of rights do courts tackle the appropriate remedy for losses caused by violation of those rights.

Federal constitutional limitations on state power tracked this two stage evolution. In 1927, the Supreme Court first incorporated the First Amendment right to freedom of speech into the Fourteenth Amendment's Due Process Clause to restrain the states from violating the citizenry's basic liberty to speak freely.[5] Over the succeeding twenty years, the Court similarly held that other safeguards of the First

state constitutional violations. *See, e.g*. Conn. Gen. Stat. §§ 52-251b (attorney fees recoverable in civil actions for violation of rights caused by discrimination based upon religion, national origin, alienage, color, race, sexual orientation, blindness or physical disability); Mass. Gen. Laws Ann. Ch. 12, §§ 11-I (allowing reasonable attorney's fees to plaintiffs where state constitutional rights violated by threats, intimidation or coercion); Or. Rev. Stat. § 20.107 (2010) (providing for prevailing party attorney fees in cases involving unlawful discrimination). Absent statutory authorization, the plaintiff's sole recourse is to persuade the court to exert its inherent authority to award fees to a citizen enforcing rights as a "private attorney general." *Compare* New Mexico Right to Choose/NARAL v. Johnson, 986 P. 2d 450, 459 (N.M. 1999) (declining to award fees because private attorney general doctrine lacks sufficient guidelines, is not a traditionally recognized equitable exception, and would erode policies underlying American rule under which parties to civil actions bear their own fees absent contractual agreement or statutory provision) *with* Armatta v. Kitzhaber, 959 P. 2d 49, 70 (Or. 1998) (prevailing plaintiff may recover attorney's fees where suit was "seeking to 'vindicate an important constitutional right applying to all citizens without any gain peculiar to himself,' as opposed to vindicating 'individualized and different interests', or 'any pecuniary or other special interest of his own aside from that shared with the public at large.'"). *See also* Dorwart v. Caraway, 58 P. 3d 128, 140 (Mont. 2001) (applying general American rule to refuse attorney's fees to plaintiff who prevailed in action for damages for violation of state constitution, while expressly noting that plaintiff had not argued entitlement to fees under private attorney general theory); Cal. Civ. Pro. Code §1021.5 (court may award attorney fees to prevailing plaintiff in civil action resulting in enforcement of important right affecting the public interest if a) significant pecuniary or non-pecuniary interest has been conferred upon general public or large class of persons; b) necessity and financial burden of private enforcement makes award appropriate; and c) in the interest of justice, fees should not be paid out of recovery).

5. Fiske v. Kansas, 274 U.S. 380, 385 (1927).

Amendment applied to the states through the Fourteenth Amendment.[6] In the 1960s, the Court found that various provisions of the Bill of Rights securing the rights of persons accused of crimes were "implicit in the concept of ordered liberty"[7] and thus were applicable to states under the Fourteenth Amendment.[8]

While the Court began holding that substantive rights were secured against state incursion in the 1920s, it was not until 1961 that the Court began to seriously contemplate the affirmative remedy authorized by 42 U.S.C. § 1983, the federal statute creating a civil action to redress violations of federal constitutional rights caused by persons acting under color of state law.[9] Over the succeeding half century, the Court developed a jurisprudence of remedies that defined immunities available to individual officials and resolved whether local and state governmental entities could be held liable for constitutional violations caused by their employees.

The protection of civil liberties under state constitutions has followed the same two-stage evolution. In theory, state charters stood as the lone constitutional bulwark against state and local governmental invasion of freedom until the Supreme Court's incorporation decisions of the early and mid-twentieth century. In reality, only in the 1970s did litigants "rediscover" state constitutional rights as an antidote to an increasingly conservative United States Supreme Court's stingy interpretation of rights secured by the Fourteenth Amendment of the federal constitution.[10] As was true of the first era of federal constitutionalism, the energy of litigants and courts construing state constitutions was initially directed at articulating the boundaries of state constitutional rights. Rights advocates labored to overcome the state

6. Everson v. Bd. of Education, 330 U.S. 1, 7-8 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (free exercise of religious belief); Hague v. CIO, 307 U.S. 496, 512-13 (1939) (right to petition); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697, 707-08 (1931) (freedom of the press).

7. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

8. Benton v. Maryland, 395 U.S. 784, 787 (1969) (prohibition of double jeopardy doctrine); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (trial by jury); Washington v. Texas, 388 U.S. 14, 19 (1967) (right to obtain favorable witnesses); Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400, 403-05 (1965) (right to confront witnesses); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (right of accused to avoid being compelled to be a witness); Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (right to counsel).

9. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961). That same year, the Court approved suppression of evidence as a remedy in state criminal cases; *see also* Mapp v. Ohio, 367 U.S. 643 (1961).

10. *See* Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

courts' instinct to interpret state constitutions in lockstep with United States Supreme Court opinions that denied protection to "analogous" federal constitutional provisions.[11] Courts and commentators articulated the rationales for and approaches to independently interpreting state constitutional provisions.[12] By the end of the twentieth century, failure of counsel for the rights-claimant to assert that the state constitution afforded more generous rights than the federal counterpart was tantamount to ineffective assistance of counsel.[13]

The second generation of state constitutional development is now emerging. With the methodology of autonomous state constitutional protection now more defined, courts are turning to the task of ascertaining the appropriate remedies for persons who have suffered infringement of a state constitutional right. State courts have not hesitated to issue declaratory relief or to enjoin unconstitutional conduct. However, state courts are finding it more difficult to determine when, and from whom, they should award damages to citizens deprived of their state constitutional rights.

Absent any other template, state courts (as well as legislatures contemplating statutes authorizing damage actions) will be tempted to borrow United States Supreme Court interpretations of 42 U.S.C. § 1983 in shaping civil relief for infringement of state constitutional rights.[14] For at least three reasons, the Supreme Court's Section 1983 doctrine is an inappropriate and flawed model for rules governing damages caused by deprivations of state constitutional rights.

First, just as state constitutions are a source of rights that is independent of the United States Constitution, the origin of the cause of action for violation of the state constitution is wholly separate from the fount of the cause of action to redress breaches of federal constitutional

11. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court's Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

12. *Id*. at 356-58. *See also* Hon. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. (forthcoming 2011).

13. *See* Commonwealth v. Kilgore, 719 A.2d 754, 757 (Pa. Super. Ct. 1998) (finding counsel ineffective by failing to challenge warrantless search of car under Article I, Section 8 of Pennsylvania Constitution, rather than Fourth Amendment to United States Constitution); Brennan, *supra* note 10, at 502 ("I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.").

14. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 7.03 (4th ed. 2006) [hereinafter FRIESEN] ("[T]he attorneys who pioneer the prosecution and defense of state civil rights litigation are likely to be educated in federal civil rights law. These attorneys, and the state [court] judges before whom they appear, may be inclined to use federal law as a reference point or even as a source of persuasive authority for the construction of parallel state remedies for deprivation of constitutional rights.").

rights. Limitations on the damage remedy for violation of federal constitutional rights are founded exclusively in the intent of the 1871 United States Congress that enacted Section 1983. State judges need not, and should not, be guided by that federal Congress' intent when determining liability for deprivation of state constitutional rights in civil actions that are prescribed by the state legislature or implied by state courts.

Second, it is well settled that the Supreme Court is constrained by federalism when asked to recognize a right under the United States Constitution. Likewise, the Court has consistently invoked the policy that the federal government should not unduly impinge upon state prerogatives as a basis for denying damages to citizens who have suffered invasions of federal constitutional rights. However, concerns over federal incursion on the prerogative of the states do not exist when a state court enforces the guarantees of the state's own constitution. State courts have reasoned that an interpretation of state constitutional rights independent of the Supreme Court's construction of the federal Constitution is justified by the absence of any issue of federalism. For this same reason, state courts need not and should not mimic the United States Supreme Court's federalism-induced remedies jurisprudence when shaping the legal remedy for violations of rights secured by state constitutions.[15]

Third, the Supreme Court departed from constitutional limits on its power as well as its entrenched prescriptions for judicial self-limitation and sound decision-making in seminal opinions limiting the liability of state and local governments and officers who breach the United States Constitution. The Court legislated obstacles to relief that a) were not raised before the lower federal courts; b) were not presented by advocates before the Court; and c) were not presented by the facts of the case or necessary to resolve. The Supreme Court's *sua sponte* interpretations of Section 1983 often leave citizens injured by deprivations of fundamental constitutional rights without a meaningful remedy.

The United States Supreme Court has preferred to promote the unfettered exercise of governmental decision-making over the competing goals of deterring constitutional wrongs and compensating losses caused by impingements on liberty. The Supreme Court's apportionment of the risk of loss is neither constitutionally mandated nor universally accepted

15. Professor Friesen has cited the difficulty facing courts and attorneys in applying the complexity of the Court's Section 1983 doctrines as an additional reason why state courts should not copy assignment of the risk of constitutional loss under federal law. *See* FRIESEN, *supra* note 14, at § 7.03.

as a matter of policy. Just as state courts may legitimately find rights to be guaranteed by state constitutions where the United States Supreme Court has refused to protect the right under the federal Constitution, state courts are free to adopt a remedial scheme that more generously compensates the rights-holder and incentivizes the government and its officials to abide by constitutional constraints.

II. WHY STATE COURTS WILL BE TEMPTED TO FOLLOW THE UNITED STATES SUPREME COURT'S DECISIONS ON REMEDIES FOR FEDERAL CONSTITUTIONAL VIOLATIONS

Save for the preservation of the writ of habeas corpus and the just compensation clause of the Fifth Amendment,[16] the text of the United States Constitution is silent as to the relief afforded to a citizen deprived of a constitutional right. In 1871, the United States Congress filled the void by enacting a statutory civil action to redress violations of federal constitutional rights caused by state and local officials. 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an[y] action at law, suit in equity, or other proper proceeding for redress. . . .[17]

While Section 1983 authorizes a cause of action for damages against persons acting under color of state or local law who violate the *federal* Constitution, the statute does not extend to the deprivation of rights guaranteed by *state* constitutions.

Like the federal charter, the texts of state constitutions generally do not spell out the remedies granted to citizens whose rights have been infringed by state or local officials.[18] In a handful of jurisdictions, the

16. U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation."); U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.").

17. 42 U.S.C. § 1983 (1996).

18. Most state constitutions include a general textual right to a remedy. *See e.g.* Pa. Const. Art. I, § 11 ("All courts shall be open; and every man for an injury done to him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without, sale, denial or delay."). Some courts have relied on these provisions to reject defenses to damages for violation of state constitutions. *See* Dorwart v. Caraway, 58 P. 3d 128, 140 (Mont. 2002) ("[T]he adoption of qualified immunity in Montana would also be inconsistent with the constitutional requirement that courts of justice afford a speedy remedy for those claims recognized by law for injury of person, property or character."); Ashton v. Brown, 660 A. 2d 447, 464-65 (Md. 1995)

state legislature has enacted a civil action for damages for invasion of state constitutional rights.[19] A few of these enabling acts are broadly worded so as to encompass deprivations of all state constitutional rights.[20] Some state legislatures have created causes of action only for violations of specifically enumerated rights.[21] Other statutes restrict the

("[T]he principle that individual state officials should not be immune from suit for state constitutional violations is bound up with the basic tenet, expressed in Article 19 of the Maryland Declaration of Rights, that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong."). Other courts have held the open courts provision does not mandate a right to recover damages for invasions of state constitutional rights. *See* Binett v. Sabo, 710 A. 2d 688 (Conn. 1998) (refusing to recognize cause of action for damages for violation of state constitution in absence of legislative authorization). *See* Friesen *supra* note 14 at §§ 6.02 and 6.04; Donald Marritz, *Courts to be Open: Suits Against the Commonwealth in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES § 14.1, § 14.1 (Ken Gormley, Jeffrey Bauman, Joel Fishman and Leslie Kozler, eds., 2004); John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of State Courts*, 26 WAKE FOREST L. REV. 237 (1991).

19. *See* FRIESEN *supra* note 14, at § 7.08 ("Broad legislative authorization for constitutional damage claims and attorney fees, long the rule with regard to federal constitutional rights asserted against state actors, is uncommon so far in the states.").

20. For example, the Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-105(a) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of this state or any political subdivision subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.

The Nebraska statute extends a cause of action to violations of federal as well as state constitutional rights, but explicitly exempts political subdivisions from liability. NEB. REV. STAT. § 20-148 (1997). While not supplying a dedicated cause of action to redress deprivations of rights secured by state constitutions, the New Mexico legislature has included state constitutional violations in its general Tort Claims Act. The Act requires the governmental entity to defend a public employee and to pay any damage award assessed in actions arising out of the employee's tortious conduct, including alleged violations of the federal or state constitution. N.M. STAT. ANN. § 41-4-4 (West 2001). *See also* N.J. STAT. ANN. § 10:6-2(a), et seq. (West 2004) (providing that the Attorney General or citizen may bring a civil action for damages or other relief against a person, "whether or not acting under color of law," who subjects the individual to deprivation of rights secured by the Constitution of New Jersey).

21. *See, e.g.,* CONN. GEN. STAT. ANN. § 31-51(q) (West 1983) (supplying cause of action in favor of employee disciplined or discharged because of exercise of right of expression or religious belief guaranteed by state constitution); N.H. REV. STAT. ANN. § 98-E:1 (2008) (while making no explicit reference to state constitution, protecting public employees' "full right to publicly discuss and give opinions as an individual on all matters concerning any government[al] entity and its policies."); Florida Civil Rights Act of 1992, FLA. STAT. ANN. § 760.01(2) (West 1992) (providing freedom from discrimination).

cause of action to state constitutional invasions caused by a public official who acts with a heightened level of culpability.[22]

In the vast majority of states, legislatures have not affirmatively established a civil action to recover damages for the deprivation of state constitutional rights. Several state courts have approved a damages action despite the absence of legislative authorization.[23] Some of these courts have looked to the text and constitutional history of the state constitutional provision in issue and concluded that the drafters intended that persons deprived of the right be permitted to recover compensation for their losses.[24] Other courts have authorized a cause of action by analogy to the United States Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[25] where the Court implied a civil damage action against federal officials. State judges also have invoked the Restatement (Second) of Torts § 874A,[26]

22. *See, e.g.*, Tom Bane Civil Rights Act, CAL. CIV. CODE § 52.1(a) (West 2007); 1979 Massachusetts Civil Rights Act, MASS. GEN. LAWS ANN. ch. 12, §§ 11(H)-(I) (West 2002); Maine Civil Rights Act, ME. REV. STAT. ANN. tit. 5, § 4681(1) (2002); New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:6-2 (West 2004) (private civil rights action available only where interference with rights was made through "threats, intimidation, or coercion."). *But see* TEX. CIV. PRAC. & REM. CODE ANN. §104.002(a)(2) (Vernon 2005) (waiving state's immunity when plaintiff sustains damages from deprivation of state constitutional right caused by public servant acting "in the course and scope of . . . employment;" immunity is not waived, however, where the individual official "acted in bad faith, with conscious indifference or reckless disregard.").

23. *See generally* FRIESEN, *supra* note 14, at § 7.07; Brown v. State, 674 N.E.2d 1129 (N.Y. 1996); Jennifer Freisen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1280-84 (1985); John M. Baker, *The Minnesota Constitution as a Sword: The Evolving Private Cause of Action*, 20 WM. MITCHELL L. REV. 313 (1994); Sharon N. Humble, Annotation, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5th 619 (2000); Gail H. Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447 (1998).

24. *See* Walinski v. Morrison, 377 N.E.2d 242 (Ill. App. Ct. 1970). *But see* Katzberg v. Regents of University of California, 58 P.2d 339 (Cal. 2002).

25. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

26. Section 874A provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose[s] of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

RESTATEMENT (SECOND) OF TORTS § 874A cmt. a (1979). While the text of § 874A empowers courts to recognize a cause of action to redress violations of "legislative provisions," comment (a) to the section makes clear that the term embraces provisions of constitutions. RESTATEMENT (SECOND) OF TORTS § 874A cmt. a (1979) ("As used in this Section, the term 'legislative provision' includes statutes, ordinances and legislative

which empowers the judiciary to provide appropriate remedies to assure the effectiveness of legislatively created rights.[27] Yet other state courts have invoked a combination of *Bivens* and the state's common law or English common law as the basis for judicially endorsing a cause of action for damages.[28]

While some courts have allowed civil damage actions in the absence of legislative approval, other judges have been loath to fill the remedial gap. Some state courts have refused to permit persons who have been deprived of a state constitutional right to recover damages in a civil action where other adequate remedies are available.[29] Other courts have permitted civil actions to enjoin conduct that violates the state constitution, but have refused recovery of damages.[30] Yet other state courts have flatly repudiated a cause of action, concluding that the legislature alone is empowered to establish the claim for damages.[31]

The instinct to adopt the United States Supreme Court's remedies decisions will be particularly strong where the state legislature has expressly instructed courts to consult Section 1983. The Arkansas Civil

regulations of administrative agencies at various levels of government. It also includes constitutional provisions.").

27. *See* Dorwart v. Caraway, 58 P. 3d 128, 133-36 (Mont. 2002); Binette v. Sabo, 710 A.2d 688, 693-94 (Conn. 1998).

28. *See* Bott v. DeLand, 922 P. 2d 732 (Utah 1996); Moresi v. State, 567 So. 2d 1081 (La. 1990); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984). *See also* Brown v. State, 674 N.E.2d 1129 (N.Y. 1996) (relying upon *Bivens*, the Restatement, and common law in authorizing civil action for damages for violation of New York Constitution). *Cf*. Benson v. State, 887 A.2d 525, 534 (Md. Ct. App. 2005) (finding that while private right of damages exists to redress government acts that violate individual rights secured by state constitution, only injunctive or declaratory relief is available to remedy provisions of state constitution "addressing principles akin to those of federalism, separation of powers, and the government's authority to tax.").

29. *See* Bd. of County Comm'rs of Douglas County v. Sundheim, 926 P.2d 545, 553 (Colo. 1996).

30. *See* Matthews v. Ala. Agric. & Mech. Univ., 787 So.2d 691, 697 (Ala. 2002) (determining that individual university officials are entitled to absolute immunity from damages liability under § 14 of the Alabama Constitution, but may be sued for injunctive relief); Katzberg v. Regents of the Univ. of Cal., 29 Cal. 4th 300, 332 (Cal. 2002) (holding that neither the language of the state constitution nor the constitutional history indicates the framers intended to permit damages as a remedy for deprivation of due process; however, court may issue declaratory relief or an injunction); Bird v. State, 375 N.W. 2d 36, 40-41 (Minn. Ct. App. 1985) (stating that equitable relief, but not money damages, available to remedy deprivation of due process rights under Minnesota Constitution).

31. Moody v. Hicks, 956 S.W.2d 398 (Mo. Ct. App. 1997); Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities, 594 N.E. 2d 959 (Ohio 1992); *cf.* City of Jackson v. Sutton, 797 So. 2d 977 (Miss. 2001) (finding that the Mississippi Tort Claims Act is the exclusive means of seeking damages for conduct alleged to violate the state constitution). Several states have yet to resolve whether an implied damage action is available to victims of state constitutional misconduct. *See* Cantrell v. Morris, 849 N.E. 2d 488 (Ind. 2006); Benjamin v. Wash. State Bar Ass'n, 980 P.2d 742 (Wash. 1999); Shields v. Gerhart, 582 A.2d 153 (Vt. 1990).

Rights Act of 1993 provides, "[w]hen construing this section [authorizing a civil action for state constitutional violations], a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871 . . . which decisions and act shall have persuasive authority only."[32] In *Jones v. Huckabee*,[33] the Arkansas Supreme Court relied upon the United States Supreme Court's repudiation of vicarious liability under Section 1983 to "[l]ikewise . . . conclude that the doctrine of *repondeat superior* is not a basis for liability under the Arkansas Civil Rights Act."[34]

Even where the state legislature has not directed courts to consult Section 1983, judges will be tempted to follow the Supreme Court's Section 1983 decisions when interpreting the state civil rights act. The language of the few existing state civil rights statutes is typically cast in general terms. The statutes do not always prescribe the immunity available to individual public officials and entities. Also, the statutes do not necessarily specify whether state and local entities are vicariously liable for all state constitutional violations committed by their public servants. Absent unambiguous guidance from the statutory text, courts may turn to what superficially appears to be the most analogous authority—relevant Supreme Court doctrine on defenses available to those same state and local officials and entities when they violate the federal constitution.[35]

Where the court implies a civil action to redress breaches of the state constitution in the absence of legislative authorization, the Supreme Court's Section 1983 jurisprudence is more alluring. With no statutory text to interpret, state judges may find case law on remedies for the infringement of federal constitutional rights to be the only available guide to their analysis. For example, in defining the defenses available in judicially created damage actions for deprivation of rights secured by the New Jersey Constitution, the Superior Court of New Jersey reasoned "[a] conflict between New Jersey law and federal law with respect to immunity rules is not in the public interest. It follows . . . that the

32. ARK. CODE ANN. § 16-123-105(c) (2003).

33. Jones v. Huckabee, 250 S.W.3d 241 (Ark. 2007).

34. *Id.* at 246.

35. *See* Morris, 849 N.E. 2d at 488 (applying qualified immunity standard for federal Section 1983 actions to claims against government official under Indiana Tort Claims Act); Jenness v. Nickerson, 637 A.2d 1152, 1158 (Me. 1994) (relying upon the United States Supreme Court's ruling that states are not "persons" under Section 1983 to hold state may not be sued for violation of state constitution under Maine Civil Rights Act (MCRA) and further holding that qualified immunity analysis under Section 1983 applies to MCRA); Leland v. State, 2001 Me. Super. LEXIS 55 (Superior Court 2001) (*quoting* Will v. Michigan Dep't. of State Police, 491 U.S. 58, 71 (1989)) (holding that a suit against state trooper in his official capacity under Maine Civil Rights Act is to be deemed a suit against the state, which is not a "person" under the Act).

immunities of municipalities and their officials sued directly under our constitution are identical to those provided by federal law."[36] The court further held that, as under Section 1983, local governments are liable for invasions of state constitutional rights only where the official's action represents the policy of the municipality.[37]

The state courts' instinct to clone the United States Supreme Court's Section 1983 doctrines, while understandable, is nonetheless misplaced. As discussed below, the Supreme Court has erected three significant obstacles to recovering damages for deprivation of federal constitutional rights. Purportedly, each of the hurdles is founded in the intent of the 1871 Congress that enacted Section 1983. The intent of that Congress does not bind, and should not guide, state courts crafting remedies for deprivations of state constitutional rights.

III. THREE FUNDAMENTAL OBSTACLES TO RECOVERY OF DAMAGES PURPORTEDLY ARE ROOTED IN THE INTENT OF THE 1871 CONGRESS THAT PRESCRIBED THE REMEDY FOR DEPRIVATIONS OF FEDERAL CONSTITUTIONAL RIGHTS

The unqualified language and legislative history of Section 1983 suggest that the statute would furnish a generous remedy to victims of governmental misconduct. The statute provides that "every person" acting under color of state law who deprives an individual of federal constitutional rights "shall be liable to the party injured."[38] Supporters and opponents alike acknowledged the breadth of the remedy that Section 1983 imparted to citizens whose federal constitutional rights were invaded. Senator Edmunds, the manager of the bill in the Senate, opined the statute "[is] so very simple and really [reenacts] the Constitution," only adding the civil remedy missing from the charter.[39]

36. Lloyd v. Borough of Stone Harbor, 432 A.2d 572, 583 (N.J. Super. Ct. Ch. Div. 1981). *See also Cantrell*, 849 N.E. 2d at 488 (finding that qualified immunity governing Section 1983 actions similarly applies to claims against government officials alleged to have violated Article I, Section 9 of Indiana Constitution); Moresi v. State, 567 So.2d 1081, 1093 (La. 1990) ("The same factors that compelled the United States Supreme Court to recognize qualified good faith immunity under Section 1983 requires us to recognize a similar immunity for them under any action arising from the state constitution.").

37. *Lloyd*, 432 A.2d at 583; *see also* Smith v. Mich. Dep't of Public Health, 410 N.W.2d 749, 794 (Mich. 1987) (Boyle, J., concurring) (determining that liability of state entities for deprivations of state constitutional rights should be limited to cases where states would be liable under §1983 absent Eleventh Amendment immunity).

38. 42 U.S.C. § 1983 (1996).

39. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 685 (1978) (citing CONG. GLOBE, 42d Cong., 1st Sess. 568-69 (1871)). Similarly, Representative Bingham "declared the bill's purpose to be 'the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the

Opposing the bill, Senator Thurman observed, "[there] is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used."[40] Representative Shellabarger advised that, as is characteristic of remedial statutes designed to protect individual liberty, Section 1983 is to be "liberally and beneficently construed" to afford a remedy to the aggrieved citizen.[41]

Despite the unbounded language and the legislative instruction to broadly and liberally construe the statute to extend a remedy, the Supreme Court's interpretation of Section 1983 has erected three often insurmountable obstacles to recovering damages caused by the violation of federal constitutional rights.

First, the Court has held that individual state and local officers sued under Section 1983 may assert either absolute or qualified immunity from liability for damages.[42] Even those officials protected only by qualified immunity escape liability for infringing constitutional rights whenever the right violated is not "clearly established"—even where that official acts maliciously.[43]

Second, the Court has held that local governments are not vicariously liable for deprivations of constitutional rights caused by public officials. Rather, the entity is liable only where the employee's unconstitutional act represents municipal "policy" or "custom."[44] Consequently, where a local official successfully invokes individual immunity and his conduct does not represent "policy or custom," the innocent citizen whose federal constitutional rights have been violated will not recover damages for his harms.

Constitution.'" *Monell*, 436 U.S. at 685 n.45 (citing CONG. GLOBE APP., 42d Cong., 1st Sess. 81 (1871)).

40. *Monell*, 436 U.S. at 685 n.45 (citing CONG. GLOBE APP., 42d Cong., 1st Sess. 216-17 (1871)); Monroe v. Pape, 365 U.S. 167, 179-80 (1961).

41. *Monell*, 436 U.S. at 684 (citing CONG. GLOBE APP., 42d Cong., 1st Sess. 68 (1871)) ("Th[e] [A]ct is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . .) Chief Justice Jay and also Story say, "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 429 (1833), *available at* http://mtweb.mtsu.edu/cewillis/Hermeneutics/Story%20Commentaries%20Interpretation.pdf.

42. Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

43. Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982).

44. *Monell*, 436 U.S. at 713-14 (1978).

Third, the Court has held that state governmental entities may never be held liable for damages under Section 1983.[45] As a result, whenever the state official who causes a constitutional violation is immune under Section 1983, the citizen who suffered the constitutional wrong is denied any compensation for his injuries.

These barriers to damages are not vested in either constitutional impediments to liability or a considered policy assessment of the appropriate allocation of the risk of constitutional loss. Instead, the Supreme Court purported to find each of the three doctrines sheltering state and local officials and entities from damages liability dictated by the intent of the United States Congress that enacted Section 1983.

A. The Immunity of Individual Officers is Derived from the Intent of the 1871 Congress to Incorporate Common Law Immunities

Individual state and local officials' immunity from liability for damages originates in the intent of the Congress that enacted Section 1983. The only immunity set forth in the United States Constitution is the clause that protects legislators from being challenged "for any [s]peech or [d]ebate."[46] The language of Section 1983 likewise makes no mention of immunity. Notwithstanding the absence of immunity in the Constitution or the text of the statute, the Supreme Court held that the 1871 Congress did not mean to hold individual officials liable for damages whenever they cross constitutional lines. By failing to expressly abrogate common-law immunity, the Court reasoned, Congress intended to permit individual officials to assert immunities that were well established when Congress passed Section 1983.[47] As of 1871, judges were absolutely immune at common law from suits for damages complaining of judicial acts within their jurisdiction.[48] Accordingly, they could invoke that same immunity in actions for damages under Section 1983 for violations of the United States Constitution.[49] At common law, police officers sued for wrongful arrest were freed from liability where

45. Quern v. Jordan, 440 U.S. 332 (1979).

46. U.S. CONST. art. I, § 6, cl. 1 ("[F]or any [s]peech or [d]ebate in either House, they shall not be questioned in any other [p]lace.").

47. *See* Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (holding that judges have absolute immunity for judicial acts within their jurisdiction); Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (finding that legislators have absolute immunity for acts within their legislative foundation). *But see* Briscoe v. Lahue, 460 U.S. 325, 346 (1983) (Marshall. J., dissenting) ("The extension of absolute immunity conflicts fundamentally with the language and purpose of the statute. I would therefore be reluctant in any case to conclude that § 1983 incorporates common-law tort immunities that may have existed when Congress enacted the statute in 1871.").

48. *Pierson*, 386 U.S. at 553-54.

49. *Id.* at 554-55.

they acted objectively with probable cause and subjectively in good faith.[50] Consequently, law enforcement officials could assert the same common law qualified immunity when named as defendants in Section 1983 damage actions.[51]

The Supreme Court subsequently legislated a qualified immunity standard that significantly expanded the bounds of common law immunity. However, the Court has never renounced the view that the genesis of individual immunity under Section 1983 is Congress' intent to incorporate immunities entrenched at common law in 1871. In *Antoine v. Byers*,[52] the Court refused to accord absolute immunity to a court reporter whose failure to timely produce a trial transcript delayed a criminal appeal until four years following conviction. The Court reasoned, "[i]n determining which officials perform functions that might justify a full exemption from liability, 'we have undertaken 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'"[53] Because courts did not utilize official court reporters until the late nineteenth century, they had no immunity at common law as of 1871.[54] Therefore, the court reporter was not shielded by absolute immunity under Section 1983. Similarly, in *Tower v. Glover*,[55] the Court denied immunity to public defenders because they were not protected by common law immunity when Congress enacted Section 1983.[56] The Court reaffirmed Congress' contemplation that immunity under Section 1983 would attach only where the official was extended immunity at common law.[57]

50. *Id.* at 555.
51. *Id.* at 557.
52. Antoine v. Byers, 508 U.S. 429 (1993).
53. *Id.* at 432 (citation omitted).
54. *Id*. at 433.
55. Tower v. Glover, 467 U.S. 914 (1984).
56. *Tower*, 467 U.S. at 920-21. As the first public defender program in the United States was opened in 1914, American common law immunity would not have immunized criminal defense counsel as of 1871. The Court also explored whether English common law extended immunity to barristers, who like public defenders could not select their clients. While barristers in England were immune from negligent actions, they could not successfully interpose that defense in actions for intentional wrongs. *Id.* at 921.
57. *Id*. at 920. *See also* Richardson v. McKnight, 521 U.S. 399 (1997) (finding that guards employed by a private management firm may not assert qualified immunity under Section 1983 because neither English nor American law conferred immunity upon private jailers). The Court also denied absolute immunity to a state police officer sued for allegedly submitting a complaint and an affidavit that failed to establish probable cause, stating, "[w]e reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition." *See* Malley v. Briggs, 475 U.S. 335, 342 (1986).

Despite declaiming power to prescribe immunity beyond that accorded at common law as of 1871, the Court extended absolute immunity to prosecutors sued for initiating

B. The Supreme Court Based the Rejection of Vicarious Liability of Local Governmental Entities Under Section 1983 Wholly on the Intent of the 1871 Congress

The Supreme Court's ruling that local governmental entities are not vicariously liable for constitutional infractions of their employees also rests entirely on the intent of the Congress that enacted Section 1983. In *Monroe v. Pape*,[58] the first high Court interpretation of local government liability, the Court held that Congress did not intend to include municipal entities among the "persons" suable under Section 1983.[59] The decision in *Monroe* turned solely upon Congress's rejection of the Sherman Amendment to the Civil Rights Act of 1871.[60] The Sherman Amendment, proposed as a response to local officials' inability or unwillingness to restrain the violent activities of the Ku Klux Klan, would have held local governmental entities liable for failing to prevent all acts of violence within their boundaries.[61] The *Monroe* Court reasoned that the defeat of the Sherman Amendment reflected a congressional antipathy to any suits against municipalities under Section 1983.[62]

Seventeen years later, in *Monell v. Department of Social Services of the City of New York*,[63] the Court ruled it had erred by equating Congress' repudiation of the Sherman Amendment with the legislature's intent to reject all forms of municipal liability. The *Monell* Court noted the Sherman Amendment did not seek to modify the section of the 1871 Civil Rights Act that became codified as 42 U.S.C. § 1983, but instead was proposed and debated independently as a separate section of the Act.[64] Furthermore, the Sherman Amendment would have held a local government liable for *private* acts of violence, even where the state had not empowered the locality to create a police force to forestall those

criminal actions by relying on cases decided after 1871 and policy considerations justifying immunity for judges and jurors. Kalina v. Fletcher, 522 U.S. 118, 124 n.11 (1997). The Court also has presumed any state or local official not protected by absolute immunity may invoke the qualified immunity defense, without inquiring whether common law afforded any immunity to the official. Procunier v. Navarette, 434 U.S. 555, 569 n.3 (1978) (Stevens, J., dissenting).

58. Monroe v. Pape, 365 U.S. 167 (1961).

59. *See generally id.*

60. *Id.* at 188-91.

61. *Id.* at 174-76.

62. *Id.* at 191. Given its view of Congress's intent, the Court expressly refused to consider plaintiff's argument that it was necessary to hold municipalities accountable for damages as a matter of policy because a) remedies against individual officials are ineffective, and b) entity liability would create incentives for institutional changes to eliminate the unconstitutional conduct. *Id.*

63. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

64. *Id.* at 666.

unlawful acts.[65] Opponents of the Sherman Amendment argued that by obligating municipalities to keep the peace, the federal government would invade the exclusive constitutional province of the states to determine the duties of their local governmental entities—including whether to authorize municipal law enforcement.[66]

The constitutional flaw in the Sherman Amendment extended only to the language which held local governments accountable for failing to prevent wrongful acts of private persons.[67] Congress inarguably harbors the power under Section 5 of the Fourteenth Amendment to impose liability on local governments for acts of their agents that trespass upon the Constitution.[68] Therefore, the Court reasoned, rejection of the Sherman Amendment did not signal the legislature's intent with respect to a municipality's liability for its own officials' violation of the Constitution.

Having undermined the lone basis for the rejection of local governmental liability in *Monroe*, the *Monell* Court began the analysis anew. The Court concluded that both the language[69] and the legislative history[70] of Section 1983 indicated that the 1871 Congress intended to subject local governments to suit.

65. *Id*. at 666-68.
66. *Id*. at 673.
67. *See id*. at 679.
68. *See id*. at 683 n.44.
69. *See id*. at 683. The Court reasoned the word "person" extended to local government, because as of 1871 it was settled that corporations—including municipal corporations—were deemed natural persons in both constitutional and statutory analysis. *Id.* at 687. Furthermore, mere months before the passage of Section 1983, Congress had enacted the Dictionary Act. *Id.* at 688. That Act provided, "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." *Id.* (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). Were the definition of "person" to be allowable rather than mandatory, as the Court had asserted in *Monroe*, the Act would cease to function as a dictionary. *Monell*, 436 U.S. at 689 n.53 (1976). Obviously under this definition, local governments were "persons."
70. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). The legislative record corroborated the Court's construction of the word "person" to embrace local governments. Because the act was remedial, it was to be "liberally and beneficently construed," with the language of the statute to be given "the largest latitude consistent with the words employed." *Id*. at 684 (citing CONG. GLOBE APP., 42d Cong., 1st Sess. 68 (1871)). In discussing Section 1983, Representative Bingham indicated he had authored Section 1 of the Fourteenth Amendment to correct the unjust result in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), where the Supreme Court had held the Bill of Rights constrained federal but not local government, and consequently provided no redress for a city's taking of private property for public use. *Monell*, 436 U.S. at 686-87 (citing CONG. GLOBE APP., 42d Cong., 1st Sess. 85 (1871). Finally, the Court observed, as of 1871 municipalities had been held liable in damages for common law wrongs. *Id*. at 687 n.47.

While reversing the *Monroe* Court's wholesale repudiation of municipal liability, the *Monell* Court further held that the 1871 Congress did not intend to hold a local government vicariously liable for all infringements of constitutional rights committed by its officials.[71] The Court believed that vicarious liability could not be squared with the textual requirement that a plaintiff prove the government defendant "caused" the constitutional infringement.[72] The Court further reasoned that since Congress rejected a form of vicarious liability proposed in the Sherman Amendment, Congress therefore could not have meant to embrace *respondeat superior* liability under Section 1983.[73] Instead, local entities would be suable only where the unconstitutional conduct of their employees "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" or was "visited pursuant to [a] governmental 'custom' even though [that] custom has not received formal approval through the body's official decisionmaking channels."[74]

The *Monell* Court expressly declined to undertake its own assessment of whether the complementary goals of compensating victims of constitutional wrongs and deterring governmental misconduct merited vicarious municipal liability. The Court simply concluded that Congress rejected those policies when it defeated the Sherman Amendment.[75] Thus, like the doctrine of individual immunity, rejection of vicarious liability of local governmental entities under Section 1983 is based wholly on the avowed intent of the 1871 Congress.

71. *Id*. at 691.

72. *Id*. at 692. The Court cited *Rizzo v. Goode*, 423 U.S. 362 (1976) where the Court had rejected holding an individual supervisor vicariously liable for actions of line officers. The doctrine of *respondeat superior* imposes liability only on the employer, not on the supervisor. Hence, rejection of vicarious supervisory liability in *Rizzo* says nothing about the appropriateness of vicarious liability of the City, who is the employer.

73. The Court recognized Congress' repudiation of unprecedented vicarious liability for acts of private individuals under the Sherman Act did not necessarily reflect hostility towards holding local government liable for the constitutional harms inflicted by its employees. Yet it believed that the legislature's constitutional objection to holding local governments liable for failing to prevent private acts of violence extended equally to imposing liability on local governments for its own officers' invasions of the Fourteenth Amendment. *Monell*, 436 U.S. at 692 n.57.

74. *Id*. at 690-91.

75. *See id*. at 694. Unlike its immunity decisions, the Court did not inquire whether local governments were vicariously liable at common law. As the Court later conceded, the Congress debating Section 1983 acknowledged that as of 1871 courts had held local governments vicariously liable for the torts of their agents when acting in the scope of their employment. Owen v. City of Independence, 445 U.S. 622, 643 n.23 (1980).

C. The Supreme Court Predicated Exemption of States From Liability Under Section 1983 Exclusively on the Intent of the 1871 Congress

When a citizen attempts to hold state, as opposed to local, governmental entities liable under Section 1983 for damages for constitutional wrongdoing, the plaintiff faces an additional obstacle—the Eleventh Amendment to the United States Constitution. The text of the Eleventh Amendment deprives federal courts of the power to entertain suits against a state by a citizen of *another* state.[76] In *Hans v. Louisiana*,[77] however, the Court ruled the Amendment equally bars suits against a state lodged by one of its own citizens.[78] The Eleventh Amendment is not an insuperable barrier to holding states accountable for damages caused by deprivations of liberties guaranteed by the federal Constitution. In *Fitzpatrick v. Bitzer*,[79] the Supreme Court ruled that Congress has the power under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity from unconsented suits in federal court. State liability under Section 1983 thus turns on whether the 1871 Congress intended to override the states' Eleventh Amendment immunity and to subject state governmental entities to actions for damages in federal court.

The Supreme Court took its first stab at discerning the intent of Congress in *Edelman v. Jordan*.[80] The *Edelman* Court held that by enacting Section 1983, Congress did not intend to authorize federal courts to order disbursement of funds from the state treasury to

76. "The [j]udicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another [s]tate. . . ." U.S. CONST. amend. XI.

77. Hans v. Louisiana, 134 U.S. 1 (1890).

78. *Id.* By adopting the fiction that a state official who offends the United States Constitution is "stripped of his official or representative character and is subject[] . . .to the consequences of his [official] conduct," the Supreme Court has permitted federal courts to issue injunctions against state officials in their official capacity to prospectively bar invasions of the federal Constitution. *Ex parte* Young, 209 U.S. 123, 160 (1908). However, where the relief retroactively would require disbursement of funds from the state treasury, the fiction is pierced and the action is deemed one against the State under the Eleventh Amendment. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

79. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The *Fitzpatrick* Court ruled Congress possessed power under Section 5 of the Fourteenth Amendment to enact Title VII of the Civil Rights Act of 1964, which approved suits in federal court against state entities that discriminate in employment "on the basis of 'race, color, religion, sex, or national origin.'" *Id*. at 447-48 (quoting Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e *et seq.* (1970 & Supp. IV)). *See also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (while the Fourteenth Amendment, ratified after the Eleventh Amendment, empowers Congress to abrogate the Eleventh Amendment, no such power exists under the Commerce Clause and Indian Commerce Clause adopted before the Eleventh Amendment).

80. Edelman v. Jordan, 415 U.S. 651 (1974).

compensate citizens harmed by the unconstitutional administration of the Aid to the Aged, Blind, or Disabled Program.[81] The Court's reasoning on the issue consisted of a single sentence, unsupported by citation to any authority: "[I]t has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself."[82]

The Court supplied the missing citation two years later. In *Fitzpatrick v. Bitzer*,[83] the Court explained why in *Edelman* it had found that Congress did not intend to subject states to suit when it enacted Section 1983: "The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape* [citation omitted] to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant."[84]

It was after issuing its opinion in *Fitzpatrick* that the Court in *Monell* held that Congress *did* intend to hold local governments liable under Section 1983. In overruling *Monroe v. Pape*, *Monell* undermined the lone basis for the *Edelman* Court's ruling that Congress had not intended to subject states to suit in federal court to redress deprivations of rights secured by the Constitution.

The Court revisited the issue of the liability of states under Section 1983 in *Quern v. Jordan*.[85] The Court reaffirmed that Congress did not intend to override the states' Eleventh Amendment immunity when it enacted Section 1983. The Court presumed that if Congress had intended to abrogate the states' traditional exemption from suit in federal court, both supporters and opponents would have extensively debated the issue.[86] The Court found no reference to the Eleventh Amendment or the financial consequences to the states in the legislative record. Therefore,

81. *Id*. at 676-77.

82. *Id*.

83. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

84. *Id.* at 452.

85. Quern v. Jordan, 440 U.S. 332 (1979). While the *Quern* Court saw fit to revisit Congress' intent to hold states liable under Section 1983, neither party before the Court briefed or argued that issue. *See infra* Section VI.

86. *See id.* at 343. The *Quern* Court believed the text of Section 1983 was insufficiently specific to abrogate the Eleventh Amendment. *See id*. at 341. The Court rejected the definition of the word "person" codified in the Dictionary Act, passed two months before Section 1983, finding that Act supplied only a "few general rules for the construction of statutes." *Id*. at 341 n.11 (quoting CONG. GLOBE, 41st Cong., 3d Sess., 1474 (1871)). However, the *Quern* Court's construction of the Dictionary Act contradicts its interpretation of the Act in *Monell*. *See supra* note 69.

the majority reasoned, Congress must have intended to preserve the states' historic immunity.[87]

As was true of its recognition of individual immunity and rejection of vicarious liability of local governments, the Court's repudiation of state liability for damages under Section 1983 turns exclusively on the Court's interpretation of the intent of the 1871 Congress, The Court did not find that the Constitution mandated these obstacles to recovery of damages. Nor did the Court contend that these impediments to liability reflected the desired level of compensation for and deterrence of constitutional violations.[88]

87. *Quern*, 440 U.S. at 343. The United States Supreme Court first held the Eleventh Amendment extended beyond its text barring suits against a State by its own citizen, nineteen years after passage of Section 1983. Thus, Congress would not necessarily have debated the ramifications of the Eleventh Amendment in enacting Section 1983, which principally sought to provide a remedy to citizens victimized by their home State's inability or unwillingness to secure rights newly guaranteed by the United States Constitution. Similarly, the Fourteenth Amendment had been ratified just three years before Section 1983, entrenching in the Constitution "a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . ." Mitchum v. Foster, 407 U.S. 225, 242 (1972). As Section 1983 was a product of that same federal-state recalibration, *id*., one might not expect to see a reprise of the debate over federalism that had recently been resolved in favor of increased federal power under the Fourteenth Amendment. *See* Hutto v. Finney, 437 U.S. 678 (1978) (express waiver of Eleventh Amendment immunity in language of statute not required where the legislation is enacted to enforce the Fourteenth Amendment). However, Justice Brennan's concurring opinion was found in the debates surrounding Section 1983 arguments of both supporters and opponents of Section 1983 regarding the statute's extension to states. *See Quern*, 440 U.S. at 357-65 (Brennan, J., concurring).

After *Quern* closed the door to Section 1983 damage actions against states in federal courts, plaintiffs sought to avoid the Eleventh Amendment's bar by filing suit in state court. Marrapese v. Rhode Island, 500 F. Supp. 1207 (D.R.I. 1980). In *Will v. Michigan Department of State Police*, the Supreme Court put a halt to this tactic, holding states are not suable "persons" within the meaning of Section 1983. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989). As in *Quern*, the *Will* Court's rejection of state liability for damages singularly rested on the intent of the 1871 Congress. *See id.* at 65-67. Indeed, much of the majority's analysis followed from its construction of Congress' intent in *Quern*. *See id.* at 66. The Court also pointed to the disruption in the allocation of federal and state power that would be caused by state liability, invoking "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intent[ ] to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65 *(*quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

88. The nearest the *Quern* Court came to considering the implication of its holding on risk allocation was its conclusory statement "[n]or does [repudiation of liability for damages] render § 1983 meaningless insofar as States are concerned." *Quern*, 440 U.S. at 345 (citing *Ex parte Young*, 209 U.S. 123 (1908)). The Court's optimism that states will be sufficiently deterred by the potential for injunctive relief, however, does not answer why the victim should not be compensated whenever the state official who caused the constitutional deprivation prevails on the qualified immunity defense. Furthermore, the Court's faith in the deterrent effect exerted by suits against state officials for prospective relief is belied by its ruling that a) injunctive relief is "to be used sparingly"

IV. STATE COURTS NEED NOT AND SHOULD NOT FOLLOW THE INTENT OF THE FEDERAL CONGRESS THAT ENACTED SECTION 1983 IN REMEDYING STATE CONSTITUTIONAL DEPRIVATIONS

Since the United States Supreme Court decisions limiting damages liability for federal constitutional violations are rooted in the intent of the federal Congress that enacted Section 1983, state courts must consult these opinions in suits for damages for violation of the state constitution only when two factors are present. First, the source of the civil action must be a state statute. Second, the state legislature that approved the damage action for deprivation of state constitutional rights must have intended to incorporate the United States Supreme Court interpretations of the intent of the 1871 federal Congress that enacted Section 1983. In all other instances, state courts are neither bound nor advised to graft Section 1983 jurisprudence on to state constitutional claims.

A. Actions for Violation of the State Constitution Authorized by the Legislature

The intent of the 1871 Congress certainly is relevant where the action for damages resulting from violations of the state constitution is authorized by legislation that is meant to be informed by Section 1983. The Arkansas Civil Rights Act expressly provides that a "court may look for guidance" to court decisions interpreting Section 1983, and those decisions "shall have persuasive authority only."[89] Given the textual instruction to consult Section 1983, the Arkansas Supreme Court appropriately considered the United States Supreme Court's rejection of vicarious liability under Section 1983 in ruling that the Arkansas Civil Rights Act does not create *respondeat superior* liability for infringement of the state constitution.[90]

and only "in the most extraordinary circumstances" because of "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs,'" Rizzo v. Goode, 423 U.S. at 378-79 (citations omitted); (b) equitable relief is more offensive "to principles of federalism" than an award of damages, City of Los Angeles v. Lyons, 461 U.S. 95, 133 (1983); and c) the Article III case and controversy requirement deprives federal courts of power to enjoin patently unconstitutional conduct unless the victim can demonstrate a "real and immediate" rather than "conjectural" or "hypothetical" risk of being subjected to the invasion in the future. City of Los Angeles v. Lyons, 461 U.S. at 101-02.

89. ARK. CODE ANN. § 16-123-105(c) (2010).

90. Jones v. Huckabee, 250 S.W.3d 241, 246 (Ark. 2007). While the Arkansas Supreme Court properly was "guided by," the United States Supreme Court's repudiation of vicarious liability, the Court did not engage in the required analysis to determine whether the rationale for rejection of vicarious liability was "persuasive." The 1871 Congress' repudiation of the Sherman Amendment was based upon considerations of federalism that are irrelevant where a state court enforces constitutional norms against its

Even where the text of the state statute authorizing a civil damage action does not explicitly instruct judges to look to interpretations of Section 1983, state courts should consult the United States Supreme Court's decisions where the history of the statute indicates that the legislature intended to incorporate Section 1983 doctrines. After reviewing the Governor's legislative file, which included the history of the enactment process and statements concerning the nature and effect of the proposed law, the Massachusetts Supreme Court concluded the legislature that enacted the 1979 Massachusetts Civil Rights Act[91] intended to create a remedy that is "coextensive" with Section 1983.[92] However, the Court subsequently reasoned that the legislature's intent to adopt Section 1983 extended only to judicial interpretations issued as of the date the state civil rights act was passed. In *Duarte v. Healy*,[93] the Court held the Massachusetts legislature would have been aware of, and intended to approve, the then-existing test for qualified immunity of state and local officials sued under Section 1983 for discretionary functions.[94] The Court emphasized it was applying only Section 1983 doctrine that was in place when the legislature enacted the state civil rights act, believing subsequent Supreme Court decisions had not changed the test for qualified immunity under Section 1983.[95] The court expressly cautioned that "[w]e have had no occasion to consider whether it is appropriate under the Civil Rights Act to adopt all of the current Supreme Court precedent under § 1983."[96]

Where the state legislature that enacted a civil rights act did not intend to adopt Section 1983 doctrine, state courts interpreting the act should not incorporate the obstacles to relief endorsed by the United States Supreme Court. For example, in *Venegas v. County of Los Angeles*,[97] the California Court of Appeals properly refused to allow state

own officials and entities. *See infra* Section V. Furthermore, the *Monell* Court never considered the fact that local governments were vicariously liable under state common law. *See supra* note 69.

91. MASS. GEN. LAWS ANN. Ch. 12, § 11 (H and I) (West 2002).

92. Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1130-31 (Mass. 1985) (Construction of when plaintiff "prevails" for purposes of recovering attorney's fees in action under state civil rights act should be the same as determination when a plaintiff is prevailing party under 42 U.S.C. § 1983).

93. Duarte v. Healy, 537 N.E. 2d 1232 (1989).

94. *See generally id.*

95. *Id.* at 1232. The Court was mistaken when it concluded that the qualified immunity standard had not changed since 1979. Among other things the Supreme Court abrogated the requirement that an official must subjectively act in good faith to be immune. Harlow v. Fitzgerald, 457 U.S. 800 (1982). While citing *Harlow*, the *Duarte* Court assumed immunity was governed by a two-part test, requiring the official to satisfy both objective and subjective tiers. *Duarte*, 537 N.E. 2d at 1232.

96. *Duarte*, 537 N.E. 2d at 1237.

97. Venegas v. County of Los Angeles, 63 Cal. Rptr.3d 741 (Cal. App. 2007).

officials to assert the Section 1983 qualified immunity defense in an action for damages arising out of a violation of the search and seizure protections of the California Constitution. Plaintiff brought his claim under Section 52.1 of the California Civil Code, which authorizes a damage action against those who, by threats, intimidation or coercion, interfere with rights secured by the state constitution.[98] The language of Section 52.1 makes no mention of immunity.[99] At the time it enacted Section 52.1, the California legislature was fully aware of how to express an intent to prescribe immunity in the language of its enactments.[100] Thus, the *Venengas* court concluded, the legislature's election not to include any immunity, either when it originally enacted Section 52.1 or amended the statute to provide a civil remedy, indicated that the legislature did not intend to recognize the Section 1983 immunity defense in actions for damages caused by deprivation of state constitutional rights.

The court in *Venengas* supported its construction of the statutory language by using the Civil Code's legislative history. The legislative record of the 1990 amendment providing a civil damage remedy included no mention of either a statutory immunity or an immunity established by court decisions.[101]

Finally, the origin of qualified immunity under Section 1983 reinforced the court's conclusion that the California legislature did not intend to adopt that immunity defense. The court recognized that the source of Section 1983 immunity is Congress' presumed intent to incorporate immunities recognized at common law in 1871. The court reasoned that the California legislature would not have intended to incorporate common law immunities from 1871 when it provided a civil remedy in 1990, particularly since the legislature already had abolished common law immunity for tort liability.[102]

98. CAL. CIV. CODE. §52.1(a) (West 2007).

99. *Id*.

100. The legislature had conferred immunity from civil liability for false arrest upon police officers who "had reasonable cause to believe the arrest was lawful," CAL. PENAL CODE § 847(b)(1)(West 2007), or who made the arrest "pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant." CAL. CIV. CODE § 43.55(a) (West 2007).

101. *Venegas*, 63 Cal. Rptr.3d at 751.

102. *Venegas*, 63 Cal. Rptr. 3d at 753. For the same reason, the court rejected the argument that the California legislature intended to adopt Massachusetts court decisions extending Section 1983 qualified immunity to officials sued under the Massachusetts Civil Rights Act. The court found illogical the Massachusetts court's decision to apply 1871 common law immunity to its Civil Rights Act rather than immunities prescribed by the Massachusetts Tort Claims Act. *Venegas*, 63 Cal. App. 3d at 753. *See also* Washington v. Robertson County, 29 S.W. 3d 466 (Tenn. 2000) (rejecting argument that

B. Actions for Violation of the State Constitution Authorized by the Judiciary

The case for ignoring Section 1983 remedies jurisprudence is even stronger where the cause of action for deprivation of state constitutional rights is authorized by the judiciary rather than the legislature. Under these circumstances, the court is neither interpreting a statutory text nor construing a legislative intent that incorporates Section 1983. The appropriate starting point for ascertaining rules for liability for state constitutional violations then is state law, not the intent of the 1871 federal Congress. As Maryland's highest court reasoned in *DiPino v. Davis*,

> Although, as noted, the State Constitutional provisions allegedly violated here mirror, for the most part, the Federal provisions underlying the Section 1983 action, different rules apply with respect to the remedies available for those violations. . . . [T]he right of recovery for Federal violations arises from statute—§ 1983—whereas the redress for state violations is through a common law action for damages.[103]

Adopting the Supreme Court's interpretations of Section 1983 is especially problematic where the intent of the federal Congress that enacted Section 1983 is contrary to state law. In *Dorwart v. Caraway*,[104] the Montana Supreme Court applied the United States Supreme Court's qualified immunity test to the count of plaintiff's complaint that alleged

city is liable only for custom or policy under Tennessee statute providing civil cause of action for malicious harassment, where no language in the act limits governmental liability to acts furthering custom or policy and *respondeat superior* liability is well settled under common law).

103. DiPino v. Davis, 729 A.2d 354, 371 (Md. 1999) (local government may be liable for violation of federal constitution only where official's actions represent custom or policy but is vicariously liable for violation of state constitution). *See also* Fleming v. City of Bridgeport, 935 A.2d 126 (Conn. 2007) (applying United States Supreme Court qualified immunity test to claim under Section 1983 while applying different state common law immunity standard to claim for deprivation of rights secured by state constitution); Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002) (applying federal qualified immunity test to Section 1983 but refusing to create analogous immunity for claim under state constitution); Brown v. State of New York, 674 N.E. 2d 1129 (N.Y. 1996) (rejection of vicarious liability of governmental entities for federal constitution violation is based upon interpretation of federal statute that is inapposite to actions based on state constitution governed by state statute imposing vicarious liability); Ashton v. Brown, 660 A.2d 447 (Md. 1995) (individual officer may assert qualified immunity to Section 1983 count but may not assert any immunity to count complaining of infringement of state constitutional right); Ross/Pitts v. Cramer, 1998 Del. Super. LEXIS 206 (Del. Super. Ct. 1998) (applying state law immunity standard, less protective of officials, to prisoner's allegation of pattern of racial discrimination violative of Delaware constitution).

104. Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002).

local officers conducted a search and seizure that violated the Fourth and Fourteenth Amendments of the United States Constitution.[105] However, the court refused to recognize any immunity under the count of the complaint that averred the officers' actions contravened the right to privacy and right to be free of unreasonable searches and seizures guaranteed by the Montana Constitution. Immunity under Section 1983, the court reasoned, is founded in Congress' intent to incorporate "deeply rooted common law traditions for immunity."[106] By contrast, Montana had no tradition of immunity; in fact, the Montana Constitution prohibits immunity except where specifically provided by a two-thirds vote of each house of the legislature.[107]

C. Applicability of State Statutory and Common Law Defenses to Actions for Violation of the State Constitution

Once courts properly look to state law rather than Section 1983 as the source of defenses to liability, a separate issue emerges. While defenses provided by the state constitution obviously apply, state courts should not necessarily recognize obstacles to liability that emanate from state statutory and common law.

Of course, provisions of the state constitution that squarely address liability and immunity should govern damage actions for deprivations of state constitutional rights. Courts correctly have shielded states from liability where the state constitution prescribes immunity.[108] Conversely, where the state constitution prohibits immunity, courts should not permit individuals and entities sued for invasion of rights secured by the state charter to assert immunity as a defense to liability.[109]

State courts are divided over whether the government may assert defenses established by state statutory and common law in suits seeking damages for breaches of the state constitution. Some courts have held

105. *Id*. at 143.

106. *Id.* at 140.

107. *Id.* (*citing* MONT. CONST. art. II, §18). Where state law holds governmental entities vicariously liable for wrongs of their officials, state courts similarly have declined to follow the Supreme Court's rejection of *respondeat superior* liability under Section 1983. DiPino v. Davis, 729 A.2d 354 (Md. 1999); Brown v. State, 674 N.E.2d 1129 (N.Y. 1996); Ashton v. Brown, 660 A.2d 447 (Md. 1995).

108. McKenna v. Julian, 763 N.W.2d 384 (Nev. 2009) (fact that state constitutional right violated was self-executing does not constitute waiver of state's sovereign immunity prescribed by Nebraska Constitution); Ross/Pitts v. Cramer, 1998 Del. Super. LEXIS 206 (Del. Super. Ct. June 16, 1998) (Article I, § 9 of Delaware Constitution bars suits against state employees in their official capacities unless the state consents).

109. *See Dorwart*, 58 P.3d at 128.

state statutes[110] and common law doctrines[111] limiting the liability of entities and public officials apply equally to civil actions complaining of violation of the state constitution. However, the Court of Appeals of Maryland has recognized that the rationale of defenses created by state statutes and common law doctrines do not automatically extend to actions for invasion of the state constitution. In *Clea v. Mayor and City Council of Maryland*,[112] the plaintiffs sued Baltimore police officer Robert Leonard for unlawfully searching their house. Leonard conducted the search pursuant to a warrant that mistakenly listed the Clea's address rather than the address of the intended subject of the search, Adam Thomas. Maryland common law immunizes public officials from civil liability for discretionary acts unless they act with malice. The court ruled that because Officer Leonard did not act maliciously, he was immune from liability under the count of the Complaint alleging the non-constitutional torts of negligence, defamation and invasion of privacy. However, Officer Leonard could not assert that common law immunity in the count seeking damages for violation of the search and seizure provisions of the Maryland Constitution. The Court premised its ruling on the different functions served by the common law and state constitutions:

> [T]here are sound reasons to distinguish actions to remedy constitutional violations from ordinary tort suits. The purpose of a negligence or other ordinary tort action is not specifically to protect government officials or to restrain government officials. The purpose of these actions is to protect one individual against another individual. . . . On the other hand, constitutional provisions . . . are specifically designed to protect citizens against certain types of

110. *See McKenna*, 763 N.W.2d 384 (Neb. 2009) (holding that Political Subdivision Torts Act insulates city from liability for deprivation of state constitutional rights); Cantrell v. Morris, 849 N.E.2d 488, 507 (Ind. 2006) ("Unless the state Constitution precludes statutory limitation of remedies for constitutional violations, the damage remedy is itself subject to those statutory restrictions."); *Dorwart*, 58 P.3d at 128 (applying state statute defining immunity of individual officials to damage action for violation of Montana Constitution); Begay v. New Mexico, 723 P.2d 252 (N.M. Ct. App. 1985) *rev'd sub nom* Smialek v. Begay, 721 P.2d 1306 (1986) (holding that because New Mexico Tort Claims Act did not waive state's immunity for type of claim asserted by plaintiff, state is immune from alleged violation of free exercise of religion guaranteed by New Mexico Constitution).

111. *See* Fleming v. City of Bridgeport, 935 A.2d 126 (Conn. 2007) (applying common law immunity for discretionary acts of municipal employees to suit for damages for violations of Connecticut Constitution); Figueroa v. State, 604 P.2d 1198 (Haw. 1979) (fact that state constitutional right was self-executing does not override sovereign immunity of state from liability for damages); Ross/Pitts, 1998 Del. Super. LEXIS 206 (applying common law qualified immunity of state employees to action for violation of state constitution).

112. Clea v. Mayor & City Council of Baltimore, 541 A.2d 1303 (Md. 1988).

> unlawful acts by government officials. To accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions.[113]

The United States Supreme Court has recognized that the rationale justifying common law immunities may be inapplicable to unconstitutional governmental conduct. In *Owen v. City of Independence*,[114] the Court held that local governments sued under Section 1983 could not assert immunities available to individual officials. At common law, municipalities were protected from liability for their agents' good faith exercise of discretionary powers. Immunity was accorded in order to prevent courts from second guessing policy judgments of the local government. That immunity, however, lost its raison d'etre when the conduct of the local government was challenged as unconstitutional:

> That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.[115]

In sum, unless expressly adopted by a state legislature authorizing civil actions to redress violation of state constitutions, the intent of the 1871 federal legislature that enacted Section 1983 is irrelevant to the construction of the state civil rights act. The intent of that Congress,

113. *Clea*, 541 A.2d at 1314.

114. Owen v. City of Independence, Mo., 445 U.S. 622 (1980).

115. *Owen*, 445 U.S. at 649. Maryland courts similarly have refused to extend common law immunity for governmental (as opposed to proprietary) activities to local governments sued for deprivation of rights secured by the state constitution. *See* Ashton v. Brown, 660 A.2d 447 (Md. 1995). Unlike local governments, the State of Maryland is immune from suits for damages for violation of the state constitution:

> The theory that, in the absence of a statute, the State itself cannot be held liable in damages for acts which are unconstitutional rests upon public policy and a theoretical notion of the "State." . . . "The 'State' spoken of in this rule [of sovereign immunity] 'itself is an ideal person, intangible, invisible, immutable'" which can "'act only by law, [and] whatever it does say and do must be lawful.'" When the State's agents act wrongly, their acts are ultra vires, and it is "the mere wrong and trespass of those individual persons. . . ."

Ritchie v. Donnelly, 597 A.2d 432, 444 (Md. 1991).

reflected in decisions of the United States Supreme Court interpreting Section 1983, is similarly inapposite to judicially authorized civil actions seeking compensation for deprivations of state constitutional rights. State law, rather than Section 1983, is the appropriate source of defenses to liability for violation of the state constitution.

Even where the state legislature instructs courts to consult the United States Supreme Court opinions interpreting Section 1983, there is a second, independent reason state courts should not mimic the Court's Section 1983 jurisprudence—the disparate bearing of federalism.

V. THE OBSTACLES TO RECOVERY OF DAMAGES UNDER SECTION 1983 ARE ANIMATED BY CONCERNS WITH FEDERALISM THAT ARE IRRELEVANT TO STATE COURT ACTIONS TO REMEDY VIOLATIONS OF STATE CONSTITUTIONS

The three doctrines that inhibit the recovery of damages under Section 1983 are fueled by Congress' and the Supreme Court's regard for limiting the untoward federal regulation and supervision of state and local governments. Just as the disparate relevance of federalism justifies an independent construction of the substance of federal and state constitutional rights, the absence of federalism constraints in state constitutional litigation demands an assessment of remedies distinct from Section 1983.

State courts have identified criteria that support interpreting state constitutions to extend greater liberty to the citizenry than the protection secured by the United States Constitution.[116] The text or constitutional history of the state right may signal the framers' intent to accord broader protection to the citizen than kindred rights in the federal Constitution. Even where state and federal constitutional provisions are textually identical and are aimed at balancing the same individual autonomy and collective governmental interests, an additional factor justifies independent interpretation of the state charter—the differential pertinence of federalism.

The United States Supreme Court has acknowledged that whenever it is asked whether the Fourteenth Amendment protects a liberty, the Court will be mindful that recognizing a federal constitutional right supplants the prerogative of states to regulate their own officials. In ruling that the Texas system of funding public education did not offend the Equal Protection Clause of the Fourteenth Amendment, the Court reasoned, in pertinent part:

116. *See* State v, Hunt, 450 A.2d 952 (N.J. 1982).

> It must be remembered, also, that *every* claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are *always* inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. . . . "[T]he maintenance of the principles of federalism is a foremost consideration in interpreting *any* of the pertinent constitutional provisions under which this court examines state action."[117]

Where a court is asked to declare whether government has violated the state constitution, encroachment of federal power is no longer a concern because the constitutional limitation on official conduct flows from state law.[118] Furthermore, the restraint exerted by the constitution does not extend beyond the geographic boundaries of the state. With federalism removed from the calculus, a court may be more likely to find that governmental interests do not outweigh the individual autonomy protected by the state constitution.

117. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (quoting Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530 (1959) (Brennan, J., concurring)). The Court has admitted that the distribution of authority between the federal court and state governments similarly impacts the Court's interpretation of the Due Process Clause of the Fourteenth Amendment. The Court has sought to avoid a construction of due process that would convert every injury inflicted by a state official, ordinarily remedied by state tort law, into a constitutional violation redressed by federal courts. In *Parratt v. Taylor*, the Court held a prison official's negligent loss of a prisoner's hobby kit did not violate due process where it was impracticable to provide a hearing in advance of the loss and the state provided an effective post-deprivation remedy. Parratt v. Taylor, 451 U.S. 527 (1981) *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986). To hold otherwise, the Court reasoned, "'would make the Fourteenth Amendment a font of tort law to be superimposed on whatever systems may already be administered by the States.'" *Parratt*, 451 U.S. at 544 (*quoting* Paul v. Davis, 424 U.S. 693, 701 (1976)). In *Daniels v. Williams*, the Court ruled a prisoner could not file a federal constitutional claim to recover damages suffered when he slipped on a pillow negligently left on the stairs by a correctional officer because negligent action does not rise to a "deprivation" within the meaning of the Fourteenth Amendment. *See also* DeShaney v. Winnebago County Dep't of Soc. Services, 489 U.S. 189, 202 (1989) (local officials have no duty under the Fourteenth Amendment to protect a child from danger of abuse by his father that the state played no part in creating; Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation."). Daniels v. Williams, 474 U.S. 327 (1986).

118. *See* Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976) *supplemented* 569 P.2d 1303 (1977) (finding the United States Supreme Court's holding in *Rodriguez* distinguishable because "[t]he constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this court in its determination of whether our own state's public school financing system runs afoul of state constitutional provisions.").

Although the 1871 Congress intended federal courts to displace state courts as the enforcers of federal rights,[119] the Supreme Court has persistently invoked federalism to limit the availability of damages under Section 1983. The lone basis on which the Supreme Court repudiated vicarious municipal liability under Section 1983 was Congress' reluctance to exert federal power over the states. Opponents of the Sherman Amendment successfully argued that by seeking to hold local governments liable for failing to prevent private acts of violence, the federal government was indirectly mandating that local governments organize and fund police departments—a power that rightfully reposed in the states. That same hesitation to encroach on state autonomy, the Court reasoned, led Congress to conclude that a municipality should not be vicariously liable for constitutional deprivations caused by its employees.[120]

The Court's rulings that Congress did not intend to subject states to liability for damages under Section 1983 also rests entirely upon regard for federalism. In *Quern v. Jordan*, the Court held Congress did not exercise its power to abrogate the States' Eleventh Amendment immunity because there was no sufficiently explicit evidence in the legislative history showing that Congress meant to disturb the traditional immunity of states from having their conduct adjudged by federal courts.[121] The Court's later holding in *Will v. Michigan Department of*

119. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law. . . .").

120. The Supreme Court also has incanted federalism as a reason to heighten the standard of culpability the plaintiff must prove to hold a local government liable for deprivation of federal constitutional rights visited as a result of municipal "policy" under Section 1983. In *City of Canton v. Harris*, the Court held cities are liable for constitutional violations caused by failure to properly train their employees only where the inadequacy in training rose to deliberate indifference. City of Canton v. Harris, 489 U.S. 378 (1989). The Court reasoned a higher standard of fault was necessary to pre-empt "serious questions of federalism" that would be triggered were federal courts to second-guess local government's choice of employee training programs. *Id.* at 392. In Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997), the Court required plaintiffs to prove even greater fault to subject local governments to Section 1983 liability for hiring decisions. As with its failure to properly train, a municipality could be held liable only where it was deliberately indifferent to the risk that the hired employee would violate the Constitution. *Id*. at 410. However, the fact it was obvious that the employee would disregard his constitutional obligations once retained would not constitute deliberate indifference. *Id.* at 410-11. Rather, the local government would be responsible only where it was "a plainly obvious consequence of the hiring decisions" that the person hired "was highly likely to inflict the *particular* injury suffered by the plaintiff. *Id.* at 411. Any lesser standard of fault, the Court reasoned, "raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that states have themselves elected not to impose." *Id.* at 415.

121. Quern v. Jordan, 440 U.S. 332, 340-45 (1979).

State Police that states are not "persons" within the meaning of Section 1983, and therefore not subject to suit in state court, is similarly grounded in federalism.[122] The Court found Congress' use of the general term "person" in Section 1983 did not manifest the requisite clear intent to "alter 'the usual constitutional balance between the States and the Federal Government.'"[123] The Court further concluded that the debates fell short of the "clearly expressed legislative intent" necessary to conclude Congress intended to invade the states' traditional insulation from suit.[124]

The role that federalism plays in the Supreme Court's qualified immunity opinions is less explicit. However, federalism is implicit in the origin of the immunity defense under Section 1983. Individual immunity under Section 1983 is born from the presumption that Congress did not intend to tamper with the common law rules by which states fixed the liability of their officials for acts that violate state law.[125]

The federalism tinge to individual immunity is not limited to the origins of the defense. At least one Justice has approved the enlargement of qualified immunity in order to abate what he viewed as Section 1983's untoward federal incursion into the rightful power of the states. While conceding that qualified immunity is rooted in the 1871 Congress' incorporation of then-existing state common law immunities, Justice Scalia has refused to be shackled by that common law in defining immunity under Section 1983.[126] In his dissenting opinion in *Crawford-El v. Britton*, Justice Scalia confessed that in construing the qualified immunity defense, he uncharacteristically drifted from Congress' intent in order to limit the expansion of federal power triggered by the Supreme Court's decision in *Monroe v. Pape*:

122. Will v. Mich. Dep't. of State Police, 491 U.S. 58 (1989).

123. *Id*. at 65.

124. *Id*. at 69.

125. Pierson v. Ray, 386 U.S. 547 (1967).

126. In *Anderson v. Creighton*, Justice Scalia rejected as "procrustean" the argument that because officers conducting such searches were strictly liable at English common law, FBI officials who searched plaintiffs' home could not assert a qualified immunity defense :

> [W]e have never suggested that the precise contours of official immunity can or should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law. . . .

Anderson v. Creighton, 483 U.S. 635, 645 (1987). *See also* Kalina v. Fletcher, 522 U.S. 118, 135 (Scalia, J. concurring) (stating that Court's functional approach to absolute immunity yields outcome dramatically opposed to common law; retreat from "faithful adherence to the common law embodied in § 1983" is "so deeply embedded in our § 1983 jurisprudence that, for reasons of *stare decisis*, I would not abandon them now.").

> As I have observed earlier, our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume. That is perhaps just as well. The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe v. Pape* [citation omitted], which converted an 1871 statute covering constitutional violations committed "*under color of* any statute, ordinance, regulation, custom or usage of any State" into a statute covering constitutional violations *without* the authority of any statute, ordinance, regulation, custom or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law. . . . *Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution into a general tort law. . . . Applying normal common law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress would have enacted.[127]

When a plaintiff asks a state court to remedy the deprivation of rights secured by the state's own constitution, the federalism concerns that impelled the Supreme Court to limit remedies under Section 1983 disappear. The Supreme Court itself has acknowledged that a state court may grant equitable relief to redress state and local deprivations of federal constitutional rights under circumstances where a federal court must deny injunctive relief. In *City of Los Angeles v. Lyons*,[128] the federal district court ordered the City of Los Angeles to suspend its policy that authorized law enforcement officers to use potentially lethal chokeholds against citizens who posed no threat of death or serious bodily injury. The Supreme Court reversed the injunction. The Court reasoned that "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the state's criminal laws. . . ."[129] The Court then observed that because considerations of federalism are absent where suit is brought in state court, the state judiciary could adopt more generous standards for awarding equitable relief against state and local police:

> [T]he state courts need not impose the same standing or remedial requirements that govern federal court proceedings. The individual

127. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J. dissenting).
128. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
129. *Id*. at 112.

> States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court. . . .[130]

As the *Lyons* Court recognized, with the yoke of federalism cast aside, state courts may be more generous than federal courts in remedying constitutional wrongs committed by state and local actors. The principal obstacles to recovering damages under Section 1983—the immunity of individual officials, the repudiation of vicarious entity liability, and the absolution of states—all hinge upon Congress' and the Court's ambition to moderate federal interference with the affairs of the state. Accordingly, those Section 1983 doctrines are not appropriate models for assigning responsibility for damages resulting from deprivations of rights afforded by state constitutions. In *Brown v. State of New York*,[131] the Court of Appeals of New York authorized a damage action against the state for deprivation of state constitutional rights. The majority properly refused the dissent's urging to follow the United States Supreme Court's repudiation of state liability under Section 1983:

> The dissent, relying on the restraint sometimes evident in Supreme Court decisions involving constitutional torts, fails to recognize that [ ] concerns of federalism underlie much of the Supreme Court's reluctance to expand the relief available under section 1983 and thereby unduly interfere with States' rights.[132]

Even when interpreting state civil rights acts modeled after Section 1983, state courts must appreciate the heavy sway that federalism exerted on current Section 1983 doctrine. In *Sarvis v. Boston Safe Deposit and Trust Company*,[133] the state court of appeals held that the Massachusetts Civil Rights Act (MCRA)[134] imposes vicarious liability on employers for civil rights violations committed by their agents. The defendant argued that because the Massachusetts legislature used Section 1983 as a template, the legislature intended to adopt the United States Supreme Court's rejection of *respondeat superior* liability in *Monell*.[135] The court dismissed the argument, reasoning that "issues of federalism which led Congress and the Supreme Court to reject vicarious liability under

130. *Id*. at 113.
131. Brown v. State of New York, 674 N.E.2d 1129 (N.Y. 1996).
132. *Id*. at 1143.
133. Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911 (Mass. App. Ct. 1999).
134. MASS. GEN. LAWS ANN. ch. 12, §§ 11H-I (West 2010).
135. The United States Courts of Appeals for the First Circuit had predicted that the Massachusetts courts would adopt the Supreme Court's reasoning to reject vicarious liability under the MCRA. Lyons v. Nat'l Car Rental Sys. Inc., 30 F.3d 240, 245-47 (1st Cir. 1994).

§ 1983 do not bear on the MCRA, as our Legislature has authority to impose liability on municipalities for the tortious acts of municipal agents."[136]

This article so far has accepted the Supreme Court's representation that the Congress that enacted Section 1983 intended a) to incorporate common law immunities available to public officials, b) to reject vicarious liability of local governmental entities, and c) to wholly exempt states from liability for the wrongs of their agents. Even taking the Court's reasoning at face value, the source of these doctrines, and the federalism concerns that animate the outcomes, establish that state courts should not extend the obstacles to Section 1983 liability to civil actions claiming infringement of state constitutional rights. A critical examination of the process by which the Supreme Court derived the impediments to recovery of damages in its seminal Section 1983 opinions yields a third reason state courts should not uncritically adopt the Court's constitutional remedies jurisprudence.

VI. IN ESTABLISHING THE OBSTACLES TO RECOVERY OF DAMAGES UNDER SECTION 1983, THE SUPREME COURT CONSISTENTLY VIOLATED THE LIMITS ON ITS AUTHORITY DESIGNED TO PREVENT THE COURT FROM ACTING AS A LEGISLATURE

The Supreme Court's consistent departure from what it has prescribed as the ordinary and desired decision-making process supplies an additional reason why state courts should not mindlessly follow that Court's Section 1983 opinions. While the Court avowed to be interpreting the intent of the legislature that enacted Section 1983, the hurdles to recovering damages caused by deprivation of constitutional rights are a product of the Supreme Court's own legislation.[137]

The notion of "Supreme Court legislation" ought to be an oxymoron. The Constitution assigns the power to legislate to Congress.[138] Where the issue before the Court is the interpretation of a valid[139] federal statute, the Court's sole role is to carry out the intent of the Congress that enacted the law. The Court will not substitute its policy preferences for the choices made by Congress, even where the

136. *Sarvis*, 711 N.E.2d at 919.

137. The Supreme Court's legislative behavior is more fully documented in Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333 (2010).

138. U.S. CONST., art. I, § 8.

139. Of course, the Court will and should strike down legislation where Congress lacked the power to enact the statute. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding Congress did not have power under Section 5 of the Fourteenth Amendment to enact the Religious Freedom Restoration Act).

Court vigorously disagrees with congressional judgment. In *Tower v. Glover*,[140] the Court held that public defenders sued under Section 1983 may not assert immunity because no immunity protected public defenders at common law. The Court rejected the public defenders' entreaty that the policies justifying immunity for judges and prosecutors supported similar immunity for public defenders:

> Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interest of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.[141]

The Court has accepted three limits on its authority that are designed to keep the Court from behaving like a legislature. First, as a general rule, the Court will not address an issue that was not presented to the district court and court of appeals.[142] Rather than forward its own policy agenda, the Court sits as a court of review, scrutinizing only those matters that actually were lodged before the lower courts.[143] Only in the most exceptional cases will the Court deviate from the requirement that an issue be preserved below in order to merit consideration by the Court.[144]

The Supreme Court's own rules create a second buffer against judicial legislation. Even when an issue has been raised and preserved in the lower courts, the Court will not address the issue unless the parties also have properly presented the matter to the Court. The Court limits its review to issues set out in, or fairly comprised within, the question presented in the petition for a writ of certiorari.[145] Neither the briefs of

140. Tower v. Glover, 467 U.S. 914 (1984).

141. *Id*. at 922-23.

142. *See*, *e.g*., DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189, 195 n.2 (1989) (refusing to consider an argument supporting constitutional duty of government to take affirmative action to protect Joshua DeShaney from abuse).

143. *See* Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) ("This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.").

144. The Court limited the circumstances under which it will review an issue that was not raised below to remedy a "plain error." *See* United States v. Marcus, 130 S. Ct. 2159 (2010); Puckett v. United States, 129 S. Ct. 1423 (2009); United States v. Olano, 507 U.S. 725 (1993); United States v. Young, 470 U.S. 1 (1985); FED R. CRIM. P. 52; FED. R. EVID. 103(d).

145. SUP. CT. R. 14(1)(a). *See also* SUP. CT. R. 15(2) (party opposing certiorari waives "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction . . . unless called to the Court's attention in the brief in opposition.").

the parties nor their oral argument may raise additional questions that were not presented in that initial petition.[146] Like the preservation of error requirement, the Supreme Court's rules envision the Justices as the umpires of legal and policy arguments raised by the litigants, rather than legislators. As then-Judge Scalia explained, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[147]

Finally, the Court has strictly applied the constitutional limitation on the authority of the judiciary. Article III confines judicial power to actual "cases and controversies."[148] The Court has interpreted the "case and controversy" requirement to deprive the Court of the power to decide an issue unless a) the issue is actually presented by the facts of the case, *and* b) it is necessary for the Court to resolve the issue.[149] Unless both requisites are satisfied, Article III precludes the Court from addressing an issue, even where the argument is both properly preserved before the lower courts and actually presented to the Supreme Court in the petition for writ of certiorari and briefs on the merits. Once again, the Court has shied away from exercising any legislative function, viewing its lone role as evaluating arguments developed and proffered by litigants who possess an actual, extra-legal interest in the position asserted. The Court will refuse to decide issues "not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary arguments exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests."[150]

In contrast to the Court's self-professed aversion to behaving as a legislature, the Court habitually exceeded all three limitations on its power in promulgating the obstacles to recovery of damages under Section 1983. In a trilogy of qualified immunity cases—*Wood v.*

146. SUP. CT. R. 24.1(a) and 28.1. "[O]nly in most exceptional cases" will the Court decide matters not included in the question presented to cure "plain error." Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 32 (1993).

147. Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983).

148. U.S. CONST. art. III, § 2, cl.1.

149. In *City of Los Angeles v. Lyons*, the Court overturned the preliminary injunction that prohibited City of Los Angeles police officers from using potentially deadly chokeholds against citizens who posed no risk of causing serious harm. City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Lyons had been subjected to a chokehold after being stopped for a burnt out tail light, and sued for damages caused by application of the chokehold. However, the Court held Lyons did not meet the article's "case or controversy" requirement for an injunction because it was speculative that he would be subjected to an unwarranted chokehold in the future. *Id.* at 100-01.

150. United States v. Fruehauf, 365 U.S. 146, 157 (1961).

Strickland,[151] *Procunier v. Navarette*,[152] and *Harlow v. Fitzgerald*[153]—the Court expanded the circumstances under which a public official would escape liability for damages caused by her unconstitutional conduct. In each of these cases, the Court not only departed from the common law test it had held Congress intended,[154] but legislated a new, pro-government immunity standard that a) was not argued to or ruled upon by the lower courts; b) was not advocated by the parties before the Supreme Court; and c) was not presented by the facts and necessary to the decision as required by Article III.[155]

The Court similarly disregarded limitations on its power when it held that local governments are not vicariously liable for deprivations of constitutional liberties caused by their employees. Neither party in *Monell*[156] raised the issue of *respondeat superior* liability before the lower courts or the Supreme Court.[157] Indeed, during oral argument, plaintiff's counsel expressly told the Court that he was *not* advocating that local governments should be vicariously liable under Section 1983.[158] As Justice Stevens later acknowledged, "[t]he commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party."[159] Since it was undisputed that the actions of the government constituted "policy," it was not necessary for the *Monell* Court to adjudge whether, under a different set of facts, local governments could be vicariously liable for all unconstitutional acts of their officials.

In *Quern v. Jordan*,[160] the Court ruled that Congress did not intend to abrogate the states' Eleventh Amendment immunity from suit in federal court when it enacted Section 1983. In the lower courts, neither party raised the issue of Congress' intent to override the Eleventh Amendment. Both parties advised the Supreme Court that the Court need not decide whether Congress meant to permit damage actions

151. Wood v. Strickland, 420 U.S. 308 (1975) (introducing the concept of "clearly established law" into immunity analysis).

152. Procunier v. Navarette, 434 U.S. 555 (1978) (providing that an official automatically satisfies the objective tier of immunity whenever a right violated was not clearly established).

153. Harlow v. Fitzgerald, 457 U.S. 800 (1982) (providing that an official is immune whenever a right is not clearly established, even if that official is acting maliciously).

154. *See* Richardson v. McKnight, 521 U.S. 399, 415-16 (1997) (Scalia, J., dissenting) ("The truth to tell, *Procunier v. Navarette* . . . did not trouble itself with history . . . but simply set forth a policy prescription.").

155. *See* Gildin, *supra* note 137, at 1347-63.

156. Monell v. Dep't. of Soc. Services., 436 U.S. 658 (1978).

157. *See generally id*.

158. Transcript of Oral Argument at 12, *Monell*, 436 U.S. 658 (No. 75-1914).

159. City of Oklahoma v. Tuttle, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting).

160. Quern v. Jordan, 440 U.S. 332 (1979).

against states under Section 1983.[161] As Justice Brennan lamented in *Quern*, "[i]t is deeply disturbing . . . that the Court should engage in today's gratuitous departure from customary judicial practice and reach out to decide an issue unnecessary to its holding."[162]

State courts and legislatures tempted to look to Section 1983 jurisprudence in determining the rules for recovering damages for deprivation of state constitutional rights must be mindful that the United States Supreme Court unnecessarily decided the pivotal issues that shelter public officials and entities from liability—and did so without the benefit of the views of the lower federal courts or the parties before the Court. The perspective of the lower courts and vigorous advocacy by the parties are prerequisites to sound decision-making. As one commentator noted, when a court decides an issue on its own volition, "the losing party has had no opportunity to rebut the argument accepted by the court, which may in fact be erroneous, and the court has received no assistance in deciding the question from the litigants who are well informed in the matter."[163] Accordingly, United States Supreme Court interpretations of federal law on matters not argued by counsel exert less precedential sway, even upon courts bound by those decisions. In *Monell*, Justice Powell concurred in the Court's departure from *stare decisis* since the *Monroe* Court had repudiated municipal liability on a ground not advanced by either party nor required to dispose of the case:

> Any overruling of prior precedent, whether of constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases.[164]

Of course, United States Supreme Court interpretations of Section 1983 are not binding on state courts determining when to award damages for deprivations of state constitutional liberties. The Court's departures from its normal decision-making processes, however, supply an additional reason why state courts (and legislatures) must be wary of mimicking the Court's Section 1983 interpretations in actions for damages for violation of state constitutional rights.

161. Brief for the Respondent at 55 n.37, *Quern*, 440 U.S. 332 (No. 77-841); Reply Brief from the State Petitioner at 14, *Quern*, 440 U.S. 332 (No. 77-841). *See* Gildin, *supra* note 137, at 1368-74.

162. *Quern*, 440 U.S. at 350 (Brennan, J., concurring).

163. Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 487 (1958-59).

164. Monell v. Dep't of Soc. Services, 436 U.S. 658, 709 (Powell, J., concurring).

VII. CONCLUSION

The Supreme Court's *sua sponte* interpretations of Section 1983 do not set forth a constitutionally mandated or universally accepted view of who should bear the risk of loss when a public official trammels a constitutionally-guaranteed liberty. The Court's decisions are an admixture of 1) the purported intent of the 1871 Congress; 2) the concern that the federal government not unduly interfere with state courts and state officials; and 3) the Court's own policy preferences, unnecessarily "legislated" without the views of the lower courts and parties before the Court.

The Supreme Court neglected to consider the cumulative effect of its decisions on the ability of victims of constitutional wrongdoing to be compensated for their injuries.[165] In order to allow officials to exercise their discretion free from the undue fear of liability or the burdens of litigation, the Court has continually expanded the circumstances under which qualified immunity shelters individual public officials from paying damages. While the common law required official action to be in good faith and reasonable under all the circumstances to merit immunity, qualified immunity under Section 1983 is extended whenever the constitutional right violated was not clearly established.[166] By the Court's own reckoning, qualified immunity now protects "all but the plainly incompetent or those who knowingly violate the law."[167] In separate silos of cases, the Court entirely exonerated states from paying damages and repudiated *respondeat superior* liability of local governments. The Court did not consider the interaction of the three lines of doctrine. However, whenever a state official is immune, the person whose constitutional rights have been violated will receive no compensation for the damages suffered as a consequence of the deprivation. Similarly, except in the increasingly narrow circumstances where the infringement of constitutional liberties represents governmental policy or custom,[168] persons injured by local government officials will be denied damages whenever the right violated was not clearly established.

The combined effect of the Court's individual decisions may not even fulfill the Court's own view of the optimal apportionment of the risk of loss from constitutional wrongs. In *Owen v. City of*

165. *See* Gary S. Gildin, *Strip Searches and the Silo Effect: Accepting a Holistic Approach to Charter Remedies*, *in* TAKING REMEDIES SERIOUSLY 229, 229-54 (Justice Robert Sharpe & Kent Roach eds., 2009).

166. Procunier v. Navarette, 434 U.S. 555 (1978).

167. Malley v. Briggs, 475 U.S. 335, 341 (1986).

168. *Monell*, 436 U.S. at 713-14 (1978).

Independence,[169] the Court held that local governmental entities could not assert any immunity defense in Section 1983 actions. The Court reasoned that allowing the citizen to recover damages for his injuries is "a vital component of any scheme for vindicating cherished constitutional guarantees."[170] The prospect of damages liability also deters future deprivations of constitutional rights by "creat[ing] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[171] Holding entities accountable to pay damages supplies an additional deterrent, "encourag[ing] those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[172] The Court's current doctrine is a far cry from the ideal it articulated in *Owen*. Yet, the Court has never offered a rationale for leaving the victim without compensation for losing the most fundamental and precious liberties in society.

There are several alternate models of risk allocation available to state courts and legislatures crafting remedies for deprivation of rights secured by the state constitution. First, the state could opt to ensure compensation to the citizen and maximize the deterrence of state constitutional violations by holding both the entity and public official liable. The Maryland high court endorsed the compensatory scheme envisioned by *Owen v. City of Independence* in explaining why it is appropriate that individual officials and entities have no immunity from payment of damages for violations of the state constitution:

169. Owen v. City of Independence, 445 U.S. 622 (1980).

170. *Id*. at 651. The case law in effect at the time the Court decided *Owen* already had undermined the professed goal of assuring compensation to victims of constitutional wrongdoing. Because the Court had rejected vicarious municipal liability, the citizen could not recover damages where the individual official was immune and the violation of the constitution did not amount to governmental policy or custom. The Court's post-*Owen* decisions further undermined the compensation and deterrence idealized in *Owen*. The Court's restrictive interpretation of which local governmental acts constitute policy and the Court's complete repudiation of state liability widened the circumstances in which the public will not bear the cost of its government's unconstitutional activities. *See* Bd. of the County Comm'rs v. Brown, 520 U.S. 397 (1997) (local government not liable for constitutional violation caused by hiring decision unless entity was deliberately indifferent to risk that applicant would commit the particular constitutional violation giving rise to the Section 1983 action); City of Canton v. Harris, 489 U.S. 378 (1989) (city not liable for constitutional violations caused by failure to train unless need for training was so plainly obvious that failure to provide guidance amounts to deliberate indifference); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (only acts of select officials who exercise "final authority" under state law constitute policy giving rise to municipal liability).

171. *Owen*, 445 U.S. at 651-52.

172. *Id*. at 652.

> It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. . . . Even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.[173]

The New York Court of Appeals reasoned that holding the entity as well as the individual liable would best deter deprivations of state constitutional rights by creating a financial incentive a) to afford adequate training; b) to supply proper supervision; and c) to discipline or fire incompetent employees. Beyond the compensation and deterrent functions, the court noted, guaranteeing a damage remedy confers legitimacy upon a government proclaiming that its power is limited by rights enshrined in the state constitution:

> [N]o government can sustain itself, much less flourish, unless it affirms and reinforces the fundamental values that define it by placing the moral and coercive powers of the State behind those values. When the law immunizes official violations of substantive rules because the cost or bother of doing otherwise is too great, thereby leaving victims without any realistic remedy, the integrity of the rules and their underlying public values are called into question.[174]

Secondly, if the state believes the specter of liability for state constitutional violations will unduly hinder individuals from seeking public office or executing their duties once on the job, the state could afford absolute immunity to the individual officer but hold the entity vicariously liable.[175] In *Corum v. University of North Carolina*,[176] the

173. Ashton v. Brown, 660 A.2d 447, 463 (Md. 1995) (quoting Owen v. City of Independence, 445 U.S. 622, 654-55 (1980)).

174. Brown v. State, 674 N.E.2d 1129, 1144 (N.Y. 1996).

175. Several foreign jurisdictions have held entities liable for damages caused by their officials' infringement of constitutional rights. *See* Vancouver (City) v. Ward, [2010] S.C.R. 27 (Can.) (affirming award of $5000 in damages against province of British Columbia for breach of a citizen's rights under Canadian Charter of Rights and Freedoms); Attorney General of Trinidad and Tobago v. Ramanoop, [2005] UKPC 15, [2006] 1 A.C. 328, *available at* http://www.privy-council.org.uk/files/other/Att%20General%20v.%20ramanoop.rtf (finding that because deterrence of future breaches of a constitutional right is valid object of public law damages, and fact right was constitutionally protected "adds an extra dimension to the wrong,"); New South Wales v. Ibbett, [2006] HCA, *available at* http://www.austlii.edu.au/cases/cth/HCA/ 2006/57.html (Crown liable for compensatory and punitive damages for actions of plainclothes police officer who pointed gun at plaintiff mother, ordered her to open door, and took son from home in handcuffs). Similarly, under the European Court of Human Rights system, the

state supreme court held that the purpose of the Declaration of Rights of the North Carolina Constitution was to protect the citizenry against the State rather than against individuals. Hence, courts may not require state officials to pay damages caused by deprivation of rights secured by the state constitution. Rather, it is the state itself that should bear the loss. The court rejected the state's assertion of sovereign immunity, finding immunity inimical to the nature of state constitutional rights:

> [I]n determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violation of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected by encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity. . . .
>
> [T]he doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court. . . . Thus when there is a clash between these constitutional rights and sovereign immunity, the constitutional right must prevail.[177]

Third, the court could hold the entity liable while preserving individual accountability for conduct that not only violates the state constitution, but also is accompanied by an additional quantum of culpability. Should the state opt to afford a qualified immunity to individual officials, that immunity need not and should not replicate the immunity crafted by the United States Supreme Court for Section 1983 actions. This article has reviewed the statutory origin, federalism tinge, and Supreme Court legislation that accounts for the present scope of qualified immunity in Section 1983 actions. As a result, Section 1983 affords more extensive protection to official wrongdoing than immunity currently extended by state law.[178] It is difficult to muster a policy

nation responsible for the human rights violation is held accountable for the softline damages resulting from the encroachment. *See European Court of Human Rights Finds Violations in Bulgarian Police Brutality Case involving Romani Victims*, EUROPEAN ROMAN RIGHTS CENTRE, Jan. 8, 2010, *available at* http:www.errc.org/cikk.php?cikk=3059 (awarding three Bulgarian nationals 4,500 euros each for inhuman and degrading treatment at the hands of Bulgarian police in violation of Articles 3 and 41 of the European Convention on Human Rights).

176. Corum v. Univ. of N.C., 413 S.E.2d 276 (N.C. 1992).

177. *Id*. at 291-92.

178. When it abrogated the subjective prong of the test, the Supreme Court immunized intentional and malicious violations of the Constitution. *Harlow v.*

justification for freeing public officials from accountability for deprivations of state constitutional rights under circumstances where they would be liable for infringement of common law rights. If the state elects to provide immunity for violation of the state constitution, that immunity should be equivalent to, or narrower than, state law immunity for non-constitutional wrongs.

Finally, states could devise alternatives to civil actions for damages that will afford a measure of meaningful relief to the innocent citizen while not unduly deterring government's ability to perform and fund its necessary functions. Among other things, the state could adopt or extend administrative or special tort claim tribunals to redress assertions of state constitutional violations.[179] In *Brown v. State*, the Court of Appeals of New York construed actions for violation of the state constitution to be a species of tort that fall within the statute waiving immunity and providing jurisdiction in the Court of Claims for tort actions against the state.[180]

Justice Brandeis famously stated of state constitutionalism, "It is one of the happy incidents of the federal system that a single courageous

Fitzgerald, 457 U.S. 800 (1982). State statutes, however, routinely deny immunity to officials for intentional wrongs and actions taken in bad faith. *See* statutes compiled at Gary S. Gildin, *Dis-Qualified Immunity for Discrimination Against the Disabled*, 1999 U. ILL. L. REV. 897, 942 n.236 (1999). The Supreme Court's re-definition of the objective tier immunized conduct that is objectively unreasonable under all the circumstances whenever the constitutional right was not clearly established. *Davis v. Scherer*, 468 U.S. 183 (1984); *Procunier v. Navarette*, 434 U.S. 555 (1978). By contrast, some state statutes deny immunity to officials who act negligently or recklessly. *See* ARIZ. REV. STAT. ANN. § 12-820.02 (2009) (public employee immune unless he "intended to cause injury or was grossly negligent."); CAL. GOV'T CODE § 844.6(d) (West 2009) (immunity of public employee for injury to prisoner does not extend to "injury proximately caused by his negligent or wrongful act or omission."); IDAHO CODE ANN. § 6-904(1) (2011) (employee acing without malice not liable for claims arising out of act or omission of the employee "exercising ordinary care" in reliance on performance of statutory or regulatory function).

180. France utilizes an administrative body to adjudicate claimed civil wrongs committed by government officials. The Conseil d'Etat (Council of State) sits as the nation's highest administrative court and is organized into five sections. *See* James E. Pfander, *Governmental Accountability in Europe: A Comparative Assessment*, 35 GEO WASH. INT'L L. REV. 611, 623 (2003) (citing John Bell, FRENCH CONSTITUTIONAL LAW (1992)). The section du Contentieux (Litigation Division) hears constitutional tort claims. *See* Case Tomaso-Grecco, Conseil d'Etat [CE] [Council of State], Feb. 10, 1905,139, *translated in* http://www.utexas.edu/law/academics/centers/transnational/work_new/French/case.php?id=1041 (holding that state is liable for damages in the amount of 15,000 francs for gendarme's firing of a gun in an attempt to stop mad bull on the loose, striking claimant inside his house). The Federal Tort Claims Act establishes a procedure by which claims of damages caused by actions of federal officials that are tortious under state law are initially adjudicated by the agency out of whose actions the claim arose. *See* 28 U.S.C. §2401(b) (2011).

181. Brown v. State, 674 N.E.2d 1129 (N.Y. 1996).

State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[181] States have the opportunity to live up to Justice Brandeis' exhortation as they embark on the designing of remedies for invasions of state constitutional rights. The remedial doctrines each state ultimately adopts will dictate 1) the extent to which its citizens are compensated for injuries suffered as a result of deprivations of rights secured by state constitutions; 2) the degree to which its public officials will feel deterred from violating state constitutional constraints; and 3) the fullness of the state's commitment to limits on its power to invade fundamental freedoms of its citizenry enshrined in the state constitution.

State courts and legislatures must be cognizant of the unique factors that have shaped the United States Supreme Court's jurisprudence of remedies for violating the federal Constitution. Over the first generation of state constitutionalism, state courts have come to acknowledge that many of the forces influencing the definition of federal constitutional rights do not apply to liberties ensured by state constitutions. In the same vein, the United States Supreme Court's Section 1983 remedies doctrine is a product of statutory, structural, and institutional variables that do not automatically or comfortably extend to the state constitutional realm. Accordingly, as state courts and legislatures enter the second generation of state constitutionalism, they must step outside the shadow of the Supreme Court's Section 1983 decisions to develop an independent scheme of redressing deprivations of state constitutional rights.

182. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).