The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations

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* Professor of Law and G. Thomas and Anne G. Miller Chair in Advocacy, The Dickinson School of Law of the Pennsylvania State University. The author thanks Rebecca Faulkner and Cristin Lantz for their valuable research assistance. The author also is grateful to Professor Kit Kinports for her feedback on a draft of this article.

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I. INTRODUCTION

In *Bell Atlantic Corp. v. Twombly*,[1] the Supreme Court adopted a new standard of factual particularity a plaintiff must meet to satisfy the requirement of Federal Rule of Civil Procedure 8(a)(2) that a complaint plead a "short and plain statement of the claim showing that the pleader is entitled to relief."[2] In *Ashcroft v. Iqbal*,[3] the Court made clear that the *Twombly* pleading standard extended to civil actions seeking redress for deprivation of constitutional rights in particular, and universally to all Complaints filed in federal court. Commentators have debated whether

1. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
2. Fed. R. Civ. P. 8(a)(2).
3. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

after *Iqbal*, victims of constitutional wrongdoing will be able to survive a 12(b)(6) motion to dismiss where the government and its officials exclusively harbor knowledge of the facts that animated the deprivation.[4] Where constitutionality turns on the government's motive or justification for its actions, how can the plaintiff assert factual allegations sufficient to "nudge [his] claims across the line from conceivable to plausible?"[5]

A second, less-discussed aspect of *Iqbal* is not new at all. Rather, *Iqbal* is but the latest instance in a long line of cases in which the Supreme Court, acting *sua sponte*, legislates a doctrine freeing government and its officials from accountability for proven violations of the Constitution. The *Iqbal* Court held that a supervisory official who is aware of, and deliberately indifferent to, the unconstitutional conduct of subordinates is not liable for damages caused by the deprivation. Rather, plaintiff must prove the supervisor independently violated the Constitution. Notably, Attorney General Ashcroft and FBI Director Mueller never argued before either the district court or court of appeals that plaintiff must prove a heightened level of culpability to establish their liability for infringements of constitutional rights physically inflicted by public employees under their command. Likewise, Ashcroft and Mueller did not ask the Supreme Court to revise the law of supervisory liability by elevating the requirements of plaintiff's prima facie case.

The *Iqbal* Court's abandonment of well-entrenched limits on judicial authority in order to unilaterally shelter the government from

4. *See* Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS AND CLARK L. REV. 157 (2010) (arguing plaintiffs in civil rights cases may have difficulty pleading factually plausible claims where constitutionality turns on defendant officials' subjective state of mind or evidence of government conduct that took place outside public purview); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS AND CLARK L. REV. 65 (2010) (contending *Twombly* and *Iqbal* will make it difficult to plead factually plausible claims of intentional discrimination because of informational inequities between parties); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS AND CLARK L. REV. 185, 200 (2010) (noting *Iqbal* makes it difficult for victims of discrimination to state a claim where they do not have access to facts necessary to sustain plausibility); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS AND CLARK L. REV. 43, 52 (2010) (noting information asymmetry makes it particularly difficult to plead plausible claim for violation of civil rights and discrimination); Ray Worthy Campbell, *Getting a Clue: Two Stage Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 114 PENN ST. L. REV. 1191 (2010) (noting information asymmetries may stand in the way of plaintiff's ability to satisfy *Iqbal* pleading standard even for meritorious claims).

5. *Twombly*, 550 U.S. at 570. As Professor Brown details in his contribution to this Symposium, *Iqbal* also expands the circumstances in which courts of appeal, on interlocutory review, will reverse district court rulings that deny defendants' motion to dismiss. Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317 (2010).

accountability to persons deprived of their constitutional rights is not an aberration. This article will examine the Court's penchant, without the benefit of the views of the lower courts and advocates, to excuse government entities and public officials from paying damages for injuries caused by their constitutional wrongdoing. As a result of the Court's judicial legislation, the innocent citizen is often left to bear the losses caused by the government's invasion of the most fundamental rights, those secured by the United States Constitution.

II. THE SUPREME COURT HAS SUBSCRIBED TO FOUR LIMITATIONS ON ITS ROLE AND POWER

The reference to the Supreme Court's "legislative agenda" in the title of this article ought to be a misnomer. For the Supreme Court has categorically endorsed four limitations on its role and power designed to ensure the Court does not inappropriately behave as a legislature.

A. Where the Issue Before the Court is Governed by a Valid Federal Statute, the Court's Lone Role is to Interpret the Intent of the Congress that Enacted the Statute

The Supreme Court has taken pains not to tread upon the power of the legislature enumerated by Article I, Section 8 of the Constitution. The Court will adjudge whether Congress has acted within its prescribed authority, and will not hesitate to void a statute Congress was not empowered to enact.[6] Where Congress has the power to promulgate legislation, however, the Court's lone role is to faithfully interpret the intent of the Congress that enacted the statute. Even where sympathetic to the policy arguments raised by a litigant, the Court will not depart from the contrary intent of the legislature expressed by the language of the statute.[7] Deference to the prerogative of the legislature also has led the Court to pay special respect to precedent when resolving issues regarding the intent of Congress. The Court has admonished that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."[8]

6. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (holding Congress lacked the power under Section 5 of the Fourteenth Amendment to pass the Religious Freedom Restoration Act).

7. *See, e.g.*, Jones v. Bock, 549 U.S. 199, 222 (2009) (rejecting the argument that the Prison Litigation Rights Act requires total exhaustion of administrative remedies); Tower v. Glover, 467 U.S. 914, 920-23 (1984) (denying immunity to public defenders sued under 42 U.S.C. § 1983).

8. Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

B. Absent Extraordinary Circumstances, the Court will Decline to Address Issues Not Presented to the Lower Courts

Except in the rare instances where it sits as a court of original jurisdiction,[9] the Supreme Court acts solely as a court of review. In that capacity, the Court ordinarily will address only issues that were advanced before the trial court and court of appeals.[10] By deeming a claim or argument forfeited unless lodged with the district court, and raised again before the court of appeals, the Court cultivates respect for the lower courts, promotes judicial efficiency, reaches sound decisions, and ensures fairness to the litigants.[11] As the Court explained in *Hormel v. Helvering*, requiring the party to advocate its claim before the inferior courts,

> is essential in order that the parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that the litigants may not be surprised on appeal by final decisions there of issues upon which they have had no opportunity to introduce evidence.[12]

The Court will depart from the preservation requirement only in "exceptional cases"[13] where "the obvious result would be a plain miscarriage of justice"[14] or where "the proper resolution is beyond any doubt."[15]

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9. U.S. CONST. art. III, § 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction.").

10. *See e.g.*, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168-69 (2004); DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 n.2 (1989); Prudential Fed. Sav. and Loan Ass'n v. Flanigan, 478 U.S. 1311 (1986) (denying application for writ of injunction raising constitutional issues that had not been presented to the state's highest court until a petition for rehearing); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945); Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that . . . a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."); Hormel v. Helvering, 312 U.S. 552, 556 (1941). *See also* 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.").

11. *See* Puckett v. United States, 129 S. Ct. 1423, 1428 (2009).

12. *Hormel*, 312 U.S. at 556.

13. Youakim v. Miller, 425 U.S. 231, 234 (1976); *Hormel*, 312 U.S. at 557.

14. *Hormel*, 312 U.S. at 558. *See also* Kolstad v. Am. Dental Ass'n., 527 U.S. 526, 540 (1999); Yee v. City of Escondido, 503 U.S. 579, 535 (1992). *But see* Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("The matter of what questions may be taken up and

Like other courts of appeal, the Supreme Court will adjudge issues that were not presented or preserved below to remedy "plain error." The plain error doctrine first was recognized judicially. In *Wiborg v. United States*,[16] Chief Justice Fuller wrote, "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it," even where the defendant had not "duly excepted" to the error at trial.[17] The Supreme Court and United States Congress subsequently approved a rule codifying the plain error doctrine for criminal cases. Federal rule of criminal procedure fifty-two provides, "[a] plain error or defect that affects substantial rights may be considered even though it was not brought to the court's attention."[18]

The Supreme Court has rigorously circumscribed the conditions under which appellate courts may invoke the plain error doctrine to review issues not raised and preserved below. Addressing arguments presented for the first time on appeal is a "limited power"[19] confined to "particularly egregious errors," and should be done "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[20] Claims newly presented on appeal may be considered only where the party seeking review satisfies the "difficult" burden of meeting

resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases.").

15. Turner v. City of Memphis, 369 U.S. 350 (1962). *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1034-61 (1987) (critiquing the inconsistent and unprincipled basis on which courts elect to decide issues raised for the first time on appeal).

16. Wiborg v. United States, 163 U.S. 632 (1896).

17. *Id*. at 658-59. *See also* United States v. Atkinson, 297 U.S. 157, 160 (1936) (in "exceptional situations, especially in criminal cases, appellate courts . . . may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.").

18. FED. R. CRIM. P. 52. While the Federal Rules of Civil Procedure contain no global plain error rule, FED. R. CIV. P. 46 and 51 generally require a party to present an objection, and the grounds for the objection, to the trial court. FED. R. EVID. 103(a)(1) precludes parties from seeking appellate review of rulings admitting evidence unless the party made a timely objection at trial and the court was aware of the ground for the objection. FED. R. EVID. 103(a)(2) similarly requires a party complaining on appeal of a ruling excluding evidence to have made the substance of the evidence known to the trial court. The lone exception to the preservation requirement is that reviewing courts may take "notice of plain errors affecting substantial rights although they were not brought to the attention of the court." FED. R. EVID. 103(d).

19. United States v. Olano, 507 U.S. 725, 731 (1993)

20. United States v. Frady, 456 U.S. 152, 163 n.14 (1982). In United States v. Young, 470 U.S. 1, 15 (1985), the Court reiterated that the plain error doctrine was to be invoked "sparingly," and that any "unwarranted extension" of Rule 52's "exacting definition" would distort the Rule's "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed" (quoting *Frady*, 456 U.S. at 163).

all four prongs of the exception.[21] First, defendant must prove he did not affirmatively waive the claimed error. Second, defendant must establish the legal error was "clear or obvious, rather than subject to reasonable dispute."[22] Defendants invoking the plain error doctrine bear the further burden of proving that the error "must have affected the outcome of the district court proceedings" and thus was patently prejudicial.[23] Finally, even when a defendant proves the mistake necessarily affected his conviction, the appellate court retains discretion whether to address the issue presented for the first time on appeal.[24] In exercising that discretion, the court should resolve the newly-raised issue only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[25] The Court has warned against "unwarranted extension" of the plain error rule, and has admonished that "creation of an unjustified exception to the Rule would be 'even less appropriate.'"[26]

C. The Supreme Court's Own Rules Limit the Court to Issues Presented by the Parties

Even where an issue has been raised and preserved before the lower courts, the Supreme Court will not address the argument unless the litigants properly present the issue to the Court. Supreme court rule fourteen provides, in pertinent part, "A petition for a writ of certiorari shall contain . . . [t]he questions presented for review. . . . Only the questions set out in the petition, or fairly included therein, will be considered by the Court."[27] Supreme court rule fifteen similarly specifies that the party opposing certiorari waives "[a]ny objection to consideration of a question presented below, if the objection does not go to jurisdiction . . . unless called to the Court's attention in the brief in opposition."[28] Once the Court grants certiorari, the petitioner's brief may

21. Puckett v. United States, 129 S. Ct. 1423, 1429 (2009); *Olano*, 507 U.S. at 732.

22. *Puckett*, 129 S. Ct. at 1429.

23. *Olano*, 507 U.S. at 734. The Court acknowledged there may be structural errors that could be reviewed absent any proof that they affected the outcome, as well as errors that may be presumed prejudicial, but declined to address either category. *Id*. The independent requirement that an error be prejudicial to justify reversal of a lower court judgment also is set forth in 28 U.S.C. § 2111, FED. R. CRIM. P. 52(a), and FED. R. CIV. P. 61.

24. *Olano*, 507 U.S. at 735.

25. *Puckett*, 129 S. Ct. at 1435 (quoting *Olano*, 507 U.S. at 732).

26. *Id*. at 1435 (quoting Johnson v. United States, 520 U.S. 461, 466 (1997)).

27. SUP. CT. R. 14(1)(a). *See* Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 177 (1938). Supreme Court Rule 15 similarly provides that the 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." SUP. CT. R. 15(2).

28. SUP. CT. R. 15(2).

not raise additional questions or change the substance of the questions presented in the petition for certiorari.[29] Nor can the parties expand the issues during their oral argument; instead, oral advocacy is limited to "emphasiz[ing] and clarify[ing] the written arguments in the briefs on the merits."[30]

The Court may decide matters not included in the questions presented only if they rise to "plain error."[31] Like the doctrine precluding review of issues not preserved below, the rules limiting the Court to consideration of issues presented for review by the petition for writ of certiorari are "more than a precatory admonition," to be disregarded only in the "most exceptional cases."[32] The Supreme Court generally has declared any issue not both presented to the lower courts and raised by the petition for certiorari to be forfeited.[33] The Court has been loathe to depart from this restraint, announcing that even "the

29. SUP. CT. R. 24.1(a).

30. SUP. CT. R. 28.1.

31. SUP. CT. R. 24(1)(a). If the Court wishes to entertain an issue that the parties did not raise in their petition or briefs, the Court may instruct the parties to file supplemental briefs on the issue. Citizens United v. Fed. Election Comm'n, 129 S. Ct. 2893 (2009) (restoring the case to the Court's calendar for re-argument and directing parties to file supplemental briefs addressing issue posed by the Court); Slack v. McDaniel, 529 U.S. 473 (2000); Vt. Agency of Natural Res. v. United States, 528 U.S. 1044 (1999); Reno v. Bossier Parish Sch. Bd., 527 U.S. 1033 (1999); Swint v. Chambers County Comm'n, 513 U.S. 958 (1994); Gustafson v. Alloyd Co., 512 U.S. 1280 (1994); Allied-Signal, Inc. v. Dir., Div. of Taxation, 503 U.S. 928 (1992); Doggett v. United States, 502 U.S. 976 (1991); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Some Justices have viewed seeking supplemental briefing preferable to the Court deciding an issue without benefit of the views of counsel. *See* Trest v. Cain, 522 U.S. 87, 92 (1997) ("We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home."). Other Justices have argued the Court should not use supplemental briefing as a means to rescue issues forfeited by the parties. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 931 (2010) (Stevens, J., dissenting) ("This procedure is unusual and inadvisable for a court."); Patterson v. McLean Credit Union, 485 U.S. 617, 623 (1988) (Stevens, J., dissenting) ("As I have said before, 'the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.'").

32. Izumi Seimitsu Kogyo Kabarshiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 32 (1993).

33. *See* Glover v. United States, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below. As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari"); Singleton v. Wulff, 428 U.S. 106, 120 (1976); Yakus v. United States, 321 U.S. 414, 444 (1944); Hormel v. Helvering, 312 U.S. 552, 558 (1941); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 399 (1996); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940); Gen. Talking Pictures Corp.v. W. Elec. Co., 304 U.S. 175, 177 (1938) ("Our consideration of the case will be limited to the questions specifically brought forward by the petition."); Blair v. Oesterlein Mach. Co., 275 U.S. 220, 225 (1927).

importance of an issue should not distort the principles that control the exercise of our jurisdiction."[34] As then-Judge Scalia conceptualized, "[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."[35]

D. The Court has Strictly Construed Article III of the United States Constitution to Refuse to Decide Issues Properly Preserved and Presented

A fourth limitation on the power of the Court to legislate prevents the Court from deciding an issue, even where the issue has been preserved below and properly presented to the Court in the petition for certiorari and brief on the merits. Article III of the Constitution confines the judicial power to "cases and controversies."[36] The Court has strictly construed Article III to preclude the Court from resolving an issue unless a) the issue is actually presented by the facts of the case, and b) it is necessary for the Court to decide the issue.

The Court deems vigorous advocacy by the litigants regarding application of law to the actual facts of the case indispensable. Accordingly, the Court refuses to decide matters "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 argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."[37] The Court has fiercely adhered

34. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001).

35. Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983). *See also* Quong Wing v. Kirkendall, 223 U.S. 59, 63-64 (1912) (Holmes, J.) ("It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore, without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed.").

36. U.S. CONST. art. III, § 2, cl. 1 provides: "The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizen of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

37. United States v. Fruehauf, 365 U.S. 146, 157 (1961) (emphasis added). The Article III case or controversy language has given rise to the judicial self-limitation doctrines of standing, mootness and ripeness. *See* Daimler Chrysler Corp. v. Cuno, 547

to the constitutional obligation to confine its decisions to issues that must necessarily be resolved and actually presented by the facts of the case. The Court has unreservedly admitted that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[38]

The Supreme Court has exalted the Article III limitation on the judicial power as the justification to deny equitable relief to persons who have suffered deprivations of constitutional rights. The mere fact that a citizen has been victimized by past unconstitutional governmental action does not entitle her to an injunction designed to prevent public officials from persisting in the wrongful conduct.[39] In *Rizzo v. Goode*,[40] a class action on behalf of all minority citizens and all residents of Philadelphia, the district court found plaintiffs had proven an "unacceptably high" number of constitutional violations caused by line police officers, violations likely to recur absent corrective action.[41] Concluding existing departmental procedures were inadequate, the trial judge directed City officials to submit a comprehensive program for dealing effectively with civilian complaints.[42] The court of appeals affirmed, finding equitable relief appropriate to prevent recurrence of police misconduct.

Expressing "serious doubts" whether the facts of the case painted a viable Article III case or controversy, the Supreme Court reversed the issuance of the injunction.[43] The Court reasoned plaintiffs could not establish "continuing, present adverse effects" from the lack of a proper citizen complaint procedure.[44] Plaintiffs had argued police officers would continue to ignore constitutional norms because department disciplinary procedures were impotent. The Court deemed this prospect

U.S. 332, 335 (2006). These doctrines are premised on the supposition that courts risk making erroneous decisions without adverse parties with a concrete stake in the outcome presenting their positions to the Court. *See* Valley Forge Christian Coll. v. Am. United for Separation of Church & State, 454 U.S. 464, 472 (1982) (The Article III requirement that a party seeking relief have suffered actual injury redressable by the court "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a real appreciation of the consequences of judicial action.").

38. Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)).

39. *See* O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

40. Rizzo v. Goode, 423 U.S. 362 (1976).

41. Following twenty-one days of hearings in which 250 witnesses testified, the district court made findings of fact concerning thirty-six separate incidents. The district court ruled that plaintiffs had proven unconstitutional police misconduct in twenty of those incidents. *Id*. at 373.

42. *Id*. at 365.

43. *Id.* at 371-72.

44. *Id.* at 372.

too speculative to empower the courts to order measures designed to prevent constitutional harm.

The Court further held Article III bars federal courts from enjoining unconstitutional police actions even where plaintiff has a live claim for damages arising out of the very conduct giving rise to equitable relief. In *City of Los Angeles v. Lyons*,[45] two City of Los Angeles Police Officers stopped Adolph Lyons for driving while one of his rear taillights was burnt out. With revolvers drawn, the officers ordered Lyons to face his car with hands clasped and placed on his head. After one of the officers completed a pat-down search, Lyons lowered his hands. An officer then slammed Lyons' hands back atop his head. When Lyons protested about pain caused by the ring of keys he was holding, an officer placed Lyons' in a chokehold. Lyons lost consciousness, fell face down to the ground, urinated, defecated, and vomited blood and dirt.[46] In some ways Lyons was fortunate; Los Angeles Police officers had killed at least sixteen persons by applying choke holds.[47] The Department authorized its officers to use holds against citizens even where they posed no threat of violence to the officer.[48]

Lyons filed a Section 1983 action seeking damages, declaratory relief, and an injunction to preclude officers from using choke holds.[49] The district court issued a preliminary injunction barring choke holds unless the citizen posed a threat of death or serious bodily harm. The court of appeals affirmed.[50]

The Supreme Court reversed the injunction.[51] The Court held Lyons did not satisfy the "case or controversy" requirement of Article III because Lyons could not establish he would have another confrontation with the police that would result in application of a choke hold. The purpose of Article III, the Court noted, was to "'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions."[52] The parties certainly would be motivated to vigorously advocate their position as to the constitutionality of choke holds when litigating Lyon's claim for damages. Nonetheless, the Court insisted the conjectural prospect that Lyons would suffer future harm denied him constitutional standing to procure injunctive relief.

45. City of L.A. v. Lyons, 461 U.S. 95 (1983).
46. *Id*. at 114 (Marshal, J., dissenting).
47. *Id*. at 116 (Marshall, J., dissenting).
48. *Id*. at 97.
49. *Id*.
50. *Id*. at 99-100.
51. *Id*. at 100.
52. *Id*. at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

The strength of the Court's insistence that an issue must necessarily be presented by the facts of the case is perhaps best exemplified by the Court's holding in *Ashcroft v. Mattis*.[53] A police officer observed Mattis's son climbing out an office window at a golf course. The son had not used deadly force in the commission of the alleged burglary and the officer did not reasonably believe that the son would use deadly force if not immediately apprehended. Nevertheless, the officer shot and killed Mattis's son when he failed to obey the officer's order to stop. A Missouri statute allowed the use of deadly force to apprehend fleeing persons suspected of felonies, even absent risk that the suspect had used or would use such force. Because he was entitled to rely upon that statute, the courts held the officer who shot Mattis's son immune from liability for damages. However, the lower courts issued a declaratory judgment proclaiming the Missouri statute violated the Constitution.[54]

Although it was the only remedy available for the alleged constitutional violation, the Supreme Court reversed the declaration that the state statute was unconstitutional. The Court ruled a federal judge may issue a declaratory judgment only where there is a dispute that "'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'"[55] The Court held Mattis's father's incentive to fully litigate the constitutionality of the shooting to obtain emotional satisfaction from a determination that his son's death was wrongful[56] was insufficient to satisfy the "case or controversy" requirement. In short, the Court abnegated power to declare unconstitutional a state statute impermissibly authorizing deadly force, even where the person killed has no other remedy. *Mattis* demonstrates the robustness of the Court's understanding that it may not and should not legislate. Instead, the Court's role is to decide only those issues presented by the actual facts of the case, that necessarily must be resolved.

Having detailed the limitations on the branch of government that does not exercise legislative power, the article next examines the intent of the Congress that exerted its prescribed power to provide a remedy to persons deprived of rights guaranteed by the United States Constitution.[57]

53. Ashcroft v. Mattis, 431 U.S. 171 (1977).

54. *Id*. at 172.

55. *Id*. at 172 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937)).

56. Even after his damage claim had been dismissed, Mattis had been before the United States Court of Appeals for the Eighth Circuit twice in quest of a declaration that the statute authorizing the police shooting was unconstitutional. *See id*. at 171-72.

57. U.S. CONST., amend. XIV, § 5.

III. CONGRESS INTENDED TO PROVIDE A BROAD REMEDY TO CITIZENS DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS BY STATE ACTORS

Save for the just compensation clause of the Fifth Amendment,[58] the United States Constitution does not prescribe a remedy for violation of individual rights secured by the charter. In 1871, Congress enacted 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation 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 any action at law, suit in equity, or other proper proceeding for redress.[59]

The language of Section 1983 suggests Congress intended to afford a broad remedy to citizens deprived of their constitutional liberty. The terms of the statute are unqualified, imposing liability on "every person" who, acting under color of state law,[60] "subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution."[61] Consistent with the unequivocal words of the statute, the Supreme Court held plaintiffs must prove only two elements to establish a *prima facie* case under Section 1983: 1) defendant acted under color of state law, and 2) defendant's conduct caused plaintiff to be deprived of a right protected by the Constitution.[62]

The legislative history of Section 1983 confirms Congress intended the statute to generously afford relief to persons injured by officials who

58. "Nor shall private property be taken for public use, without just compensation." U.S. CONST., amend. V.

59. 42 U.S.C. § 1983 (2006).

60. Section 1983 does not extend relief to persons whose rights were invaded by federal, as opposed to state and local, officials. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court sanctioned a cause of action for damages against individual federal officials who violated the Constitution. The court has held liability of federal officials under *Bivens* should parallel the contours of liability of state officials under Section 1983. "In the limited settings where *Bivens* does apply, the implied cause of action is the 'federal analogy to suits brought against state officials under . . . 42 U.S.C. § 1983.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) (quoting Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006)); Harlow v. Fitzgerald, 457 U.S. 800, 807 n.30 (1982); Butz v. Economou, 438 U.S. 478, 504 (1978).

61. 42 U.S.C. § 1983 (2006).

62. *See* Daniels v. Williams, 474 U.S. 327 (1986) (holding Section 1983 does not require plaintiffs to prove culpability beyond that necessary to show a constitutional violation); Parratt v. Taylor, 451 U.S. 527, 535 (1981) ("[T]he initial inquiry must focus on whether the two essential elements to a § 1983 action are present."); Gomez v. Toledo, 446 U.S. 635 (1980) (holding immunity is an affirmative defense to be pleaded by defendants); Monroe v. Pape, 365 U.S. 167 (1961) (holding plaintiffs need not prove defendants acted willfully to prevail in Section 1983 action).

violated the Constitution. Senator Edmunds, manager of the bill in the Senate, stated the Act was "so very simple and really reenacting the Constitution."[63] Representative Bingham announced the purpose of the bill to be "[t]he enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution."[64] Representative Shellenberger instructed that courts should interpret Section 1983 to favor relief to victims of unconstitutional governmental action:

> The Act 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 . . . 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 . . . as are meant to protect and defend and give remedies for their wrongs to all the people.[65]

Notwithstanding the absolute language of Section 1983 and the legislative instruction to liberally construe the statute to provide a remedy, the Supreme Court has extended increasingly expansive immunity to individual public officials sued for damages under Section 1983. At the same time, the Court fully sheltered state governmental entities from monetary liability and severely limited the circumstances under which local governments are liable for harms inflicted by the unconstitutional acts of their employees. As a consequence, the innocent citizen is frequently left without compensation for injuries suffered at the hands of government officials who violate the Constitution. As will next be discussed, the Supreme Court crafted this scheme of risk allocation by consistently ignoring the tenets that limit its power and role.

63. CONG. GLOBE, 42d Cong., 1st Sess., 569 (1971) (cited in Monell v. Dep't of Soc. Servs., 436 U.S. 658, 685 (1978)).

64. Opponents of the bill likewise cited its unbounded application:

> It authorizes any persons who is deprived of any right . . . secured to him by the Constitution . . . to bring an action against the wrongdoer in the Federal Courts, and without any limit whatsoever as to the amount in controversy . . . there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used.

CONG. GLOBE, 42d Cong., 1st Sess. App. 335-36, 216-17 (1871) (remarks of Sen. Thurman) (cited in *Monell*, 436 U.S. at 686 n. 45 and in *Monroe*, 365 U.S. at 179-80).

65. *Id*. at 68 (cited in *Monell*, 436 U.S. at 684).

IV. THE SUPREME COURT *SUA SPONTE* EXPANDED QUALIFIED IMMUNITY OF INDIVIDUAL STATE AND LOCAL OFFICIALS BEYOND THE CIRCUMSTANCES INTENDED BY CONGRESS

The language of Section 1983 makes no mention of immunity. However, the Supreme Court held the Congress that enacted the statute in 1871 intended to incorporate then-existing common law immunities to excuse individual state and local officials from liability for damages caused by their violations of the federal constitution.[66] Certain officials who had blanket immunity at common law for performing the functions of their job—notably legislators, judges and prosecutors—are absolutely immune from damage liability under Section 1983 for these same functions. Officers who at common law could assert a qualified immunity could invoke that same immunity when sued under Section 1983.

As the origin of qualified immunity under Section 1983 is Congress' intent to incorporate the immunity available at common law, one would expect the test for Section 1983 immunity to remain tethered to the common law immunity standard. By the Court's own reckoning, under the common law, an official could avail himself of qualified immunity only if he satisfied both an objective and subjective prong.[67] In *Scheuer v. Rhodes*, the Supreme Court defined the immunity test as follows:

> In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and *all* the circumstances as they reasonably appeared at the time of the actions in which liability is sought to be based. It is the existence of reasonable grounds for the belief in light of *all* the circumstances, coupled with good faith belief, which affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[68]

In a trilogy of cases—*Wood v. Strickland*, *Procunier v. Navarette* and *Harlow v. Fitzgerald*—the Court revamped the test for immunity the Court had held prescribed by Congress. The Court vastly lowered the bar an official must meet to avail himself of immunity, in turn increasing the circumstances under which injured citizens are unable to recover

66. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).

67. As Professor Pfander's contribution to this Symposium details, the Supreme Court may have erred in presuming immunity was routinely available to government officials at common law. *See* James E. Pfander, Iqbal, Bivens *and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387 (2010).

68. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (emphasis added).

damages from officials who violate the strictures of the Constitution. To satisfy the objective prong of the immunity, the state official's belief in the propriety of his conduct no longer need be reasonable in light of all the circumstances; instead, even if a reasonable official would not have believed his conduct appropriate, the official *per se* fulfills the objective tier of immunity whenever the federal constitutional right violated was not "clearly established." The Supreme Court was even more dramatic in its revision of the subjective prong. The Court completely eliminated the requirement that the officials must act in good faith to be immune. Consequently, even malicious or intentional violations of the Constitution are immunized whenever the right invaded was not clearly established. Not only did the Court depart from the common law immunity standard intended by the Congress that enacted Section 1983. In each of the cases in the trilogy, the Court legislated a new immunity standard that a) was not argued or acted on by the lower courts, b) was not advocated by the parties before the Supreme Court, and c) was not necessary to the decision as required by the case or controversy requirement of Article III.

A. Wood v. Strickland

In *Wood v. Strickland*, the Court unilaterally invented the novel concept of "clearly established rights" as a singularly relevant factor in the objective tier of qualified immunity.[69] In *Wood*, three high school students filed an action for damages under Section 1983, alleging they had been suspended from school without the due process required by the Fourteenth Amendment. After the jury failed to reach a verdict, the district court granted the individual school officials' motion for judgment, ruling they were immune because they had acted in good faith and without malice.[70] The court of appeals reversed and remanded for a new trial, holding the district court had erred in applying a subjective test for qualified immunity. Immunity, the court of appeals reasoned, was an objective standard, with immunity forfeited if the officials did not act in good faith under all the circumstances.[71]

The Supreme Court held that to be immune, the official must satisfy both a subjective and an objective test.[72] In its initial exposition of the objective tier of immunity, the Court quoted the test it had set forth in *Scheuer v. Rhodes*, requiring the official seeking immunity to have objectively reasonable grounds for the belief that his actions were

69. Wood v. Strickland, 420 U.S. 308 (1975).
70. *See* Strickland & Crain v. Inlow, 348 F. Supp. 244, 250-54 (W.D. Ark. 1972).
71. *See* Strickland v. Inlow, 485 F. 2d 186, 191 (8th Cir. 1973).
72. *See Wood*, 420 U.S. at 321.

constitutional "in light of *all* the circumstances."[73] The Court's policy analysis was consistent with that definition of the test. The Court posited it would be unfair and undesirable to make school board members pay damages "for mistakes which were not unreasonable in the light of *all* the circumstances"[74] and opined school board officials must be assured they will not be punished for "action taken in the good-faith fulfillment of their responsibilities *and within the bounds of reason under all the circumstances.*"[75] In the final paragraph of its reasoning on immunity, however, the Court for the first time interposed the clarity of the constitutional right as a discrete element of immunity analysis:

> The official himself must be acting sincerely and with a belief that he is doing right, but an act can no more be justified by ignorance or disregard of *settled, indisputable law* . . . than by the presence of actual malice. . . . [A] school board member must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the *basic, unquestioned constitutional rights* of his charges. . . . That is not to say that school board members are 'charged with predicting the future course of constitutional law.' A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's *clearly established constitutional rights* that his action cannot reasonably be characterized as being in good faith.[76]

As the dissent pointed out, the Court offered no authority for departing from what it unambiguously had held in *Scheuer* to be the common law standard for the objective prong intended by Congress when it enacted Section 1983. The dissenters further believed the concept of "settled, indisputable law" or "unquestioned constitutional rights" to be cryptic and indecipherable by constitutional law scholars and school board members alike.[77] In what would prove ironic in light of the Court's further redefinition of the objective tier one year later, the dissent complained the new and unfounded test would *deprive* officials of immunity whenever the right violated was clearly established. The dissenters urged the objective tier continue to be governed by the *Scheuer* test, satisfied only when the official's belief that his actions were lawful is reasonable under all the circumstances.[78]

73. *Id*. at 318 (emphasis added).
74. *Id*. at 319 (emphasis added).
75. *Id*. at 321 (emphasis added).
76. *Id*. at 321-22 (emphasis added).
77. *Id*. at 329.
78. *See id*. at 330.

1. The Lower Court Opinions

Neither the district court nor the court of appeals addressed whether the objective test for qualified immunity should be adjusted to render the state of the law a signature element. Because the district court believed immunity is governed by a purely subjective test of good-faith, it had no occasion to consider whether to earmark the state of the law under the objective prong. The court of appeals similarly did not assess whether to modify the objective test to require courts to discern the clarity of the right in issue. To the contrary, while holding that immunity is defined by an objective rather than subjective standard, the court of appeals reiterated the *Scheuer* test–the officials would be immune only if "in light of *all the circumstances*, [they] act[ed] in good faith."[79] The court of appeals then remanded the case to the district court for a new trial against school board members under the *Scheuer* standard.

2. Arguments of the Parties Before the Supreme Court

Neither defendant school board officials nor plaintiff students asked the Supreme Court to tweak the objective tier to condition immunity on the state of the law. The question presented by the school board officials' brief on immunity was:

> Whether a public school board member is entitled to invoke the doctrine of official or sovereign immunity in a student's civil rights suit under 42 U.S.C. § 1983 so as to avoid individual and personal financial liability except where the acts complained of were done with malice.[80]

The officials' brief argued first that school board members were entitled to absolute immunity from suits by students.[81] Alternatively, the board members argued that if they were entitled only to qualified immunity, the students must prove the school board acted with actual malice to overcome that immunity.[82] At no time did defendants submit the Court should redefine the *Scheuer* test for the objective prong to render the state of the law uniquely relevant to immunity.[83]

79. *Strickland v. Inlow*, 485 F. 2d at 191.

80. Brief for Petitioners at 3, Wood v. Strickland, 420 U.S. 308 (1975) (No. 73-1285).

81. *See id*. at 42.

82. *See id*. at 13 and 44-48.

83. During oral argument, the board members' counsel conceded *Scheuer v. Rhodes* provided the governing standard for qualified immunity. Transcript of Oral Argument, at 11, *Wood*, 420 U.S. 308 (No. 73-1285). Counsel argued the school board members could be immune under the *Scheuer* standard, as the district court's ruling on a motion for a temporary restraining order had found "School Board members had reasonable grounds

The plaintiff students likewise did not ask the Court to modify the objective prong of immunity to isolate the clarity of the law as determinative. Plaintiffs opposed absolute immunity and advocated for an objective test, rather than a subjective "actual malice" test, to govern qualified immunity.[84] Plaintiffs never contended that the state of the law should inform the objective test. Instead, plaintiffs recited the litany of *factual* deficiencies in the procedures leading to their suspensions to demonstrate the school board members did not objectively act in good faith.[85]

3. The Supreme Court Opinion

Modifying the immunity standard was neither necessary to resolve the issues, nor presented by the facts of the case, as required by the Article III case and controversy requirement.[86] The Supreme Court held the school board members did not violate the substantive due process rights of the students by suspending them;[87] therefore there was no need to address immunity on that claim. The Court remanded the case for consideration of whether the officials violated the students' procedural due process rights, an issue neither lower court had addressed. Accordingly, a change to the *Scheuer* immunity standard was neither presented by the facts nor necessary to the Court's decision as required by the case or controversy requirement of Article III.[88]

B. Procunier v. Navarette

The *Wood* dissenters had complained that the Court's interposition of "clearly established rights" as a distinct factor in qualified immunity

to believe that their regulation had been violated." *Id*. At no juncture during argument did defendants' counsel suggest there was an ambiguity in the law regarding due process that should affect immunity analysis.

84. *See* Brief for Respondents at 42-43 *Wood*, 420 U.S. 308 (No. 73-1285).

85. *See id.* at 46 (The school board meeting "was obviously called too hastily, conducted too summarily, coldly, impersonally, superficially, ineptly and brutally. If it were not bad faith, it was certainly an adequate substitute."). At oral argument, plaintiffs' counsel made no arguments concerning, and was asked no questions regarding, immunity. *See* Transcript of Oral Argument at 14-30, *Wood*, 420 U.S. 308 (No. 73-1285).

86. For the same reasons, rewriting immunity was not required to avoid prejudice to the school board officials or to ensure the fairness of the proceedings under the plain error exception to the preservation requirement.

87. *See Wood*, 420 U.S. at 326.

88. The Supreme Court did not suggest any ambiguity in the law pertaining to the procedural due process aspect of the Fourteenth Amendment that would affect analysis of immunity on remand. To the contrary, the Court noted, "Over the past 13 years the Courts of Appeals have without exception held that procedural due process requirements must be satisfied if a student is to be expelled." *Wood*, 420 U.S. at 324 n.15.

analysis automatically denied immunity whenever the right was well settled at the time of the violation. In *Procunier v. Navarette*,[89] the Court turned that understanding of the effect of the state of the law on its head.

The *Procunier* Court held where the right *was* clearly established, the government official nonetheless could satisfy the objective tier of immunity. The official would meet the objective tier if either a) he did not know and should not have known of the right; or b) he did not know and should not have known that his conduct violated the right.[90] In short, albeit violating clearly established constitutional rights, the official could invoke the pre-*Wood* definition of the objective prong of immunity by demonstrating his actions were reasonable under all the circumstances.

On the other hand, where the right violated was *not* clearly established, the official automatically conforms to the objective prong of the immunity defense;[91] the plaintiff is not permitted the additional two bites of the apple afforded the official. Plaintiff cannot negate immunity by proving a) the official knew or should have known of the right, or b) knew or should have known that his conduct violated the right. In sum, even where his conduct is unreasonable under all the circumstances, the officer ineluctably meets the objective test for immunity whenever the right is not clearly established.

As was true of its initial introduction of the state of the law as a signature aspect of immunity, the *Procunier* Court's further departure from the common law immunity standard legislated by Congress (a) was achieved without the views of the lower courts, (b) was resolved without the advocacy and input of counsel for the parties before the Court, and (c) was not presented by the facts or necessary for resolution of the case.

1. The Lower Court Opinions

Navarette, an inmate at Soledad State prison, filed a Section 1983 damages claim against the Director of the California Department of Corrections, the Warden and Assistant Warden of Soledad, and three subordinate officers in charge of mail handling. Navarette alleged, in pertinent part, that defendants had refused to mail letters Navarette penned while incarcerated.[92] Statewide regulations permitted prison officials to bar mailings "that pertain to criminal activity; are lewd, obscene, or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate."[93] The same regulations

89. Procunier v. Navarette, 434 U.S. 555 (1978).
90. *See id.* at 562.
91. *See id.* at 565.
92. Navarette v. Enomoto, 536 F.2d 277, 279 (9th Cir. 1976).
93. *Procunier*, 434 U.S. at 558 n.3.

prohibited officials from interfering with correspondence between the inmate and his attorney.[94] Prison officials refused to send letters from Navarette seeking legal assistance for a federal writ of habeas corpus and for his instant Section 1983 action.[95] Contrary to regulation, the warden took the position that officials could confiscate any inmate mail, including legal correspondence, "'if we don't feel it is right or necessary.'"[96]

The first two counts of Navarette's complaint averred the officials had deliberately refused to mail his letters in violation of both the Free Speech and Due Process protections of the United States Constitution.[97] The third count submitted line officials responsible for mailing letters had invaded Navarette's First Amendment rights by negligently and inadvertently misapplying the mail regulations, and supervisory officials had negligently failed to provide adequate training and supervision to their subordinates.[98]

Without issuing a written opinion, the district court granted summary judgment in favor of the prison officials on all three counts.[99] The court of appeals reversed.[100] The court of appeals held Navarette's allegation that officials had intentionally refused to mail Navarette's correspondence stated a claim for violation of his First Amendment right to free expression.[101] On the matter of qualified immunity, the Court found there was a dispute of material fact as to whether the officials had a reasonable and good faith belief that their conduct was lawful and complied with the prison regulations.[102] The court also noted the question of the officials' subjective good faith is classically an issue of fact incapable of resolution on summary judgment.[103]

The court of appeals further reasoned the qualified immunity defense is not extended globally to all public officials who may not invoke absolute immunity.[104] Rather, as the Supreme Court had previously held, immunity under Section 1983 is derived from Congress' intent to incorporate common law immunities that existed as of 1871

94. *Id*.

95. *See id*. at 565 n.12; Brief for Respondent at 2-3, 7 n.9, *Procunier*, 434 U.S. 555 (No. 76-446).

96. *Procunier*, 434 U.S. at 570.

97. *Id*. at 557-58.

98. *Id*. at 558.

99. *See id.* at 558.

100. Navarette v. Enomoto, 536 F. 2d 277, 282 (9th Cir. 1976).

101. *Id*. at 279.

102. *See id.* at 280.

103. Navarette had submitted affidavits contradicting the officials' conclusory contention that they had acted with the good faith belief they were abiding by prison mail regulations. *See id*.

104. *See id*.

when it enacted the legislation.[105] Hence, prison officials could assert immunity only if there existed a common law tradition of immunity for prison officers and such immunity is supported by public policy.[106] Accordingly, in addition to reversing the grant of summary judgment, the court of appeals instructed the district court to determine whether the prison officials were eligible to assert a qualified immunity defense at trial.

The court of appeals similarly reversed the district court's grant of summary judgment on the negligence count. The court noted the complaint properly pleaded a violation of Navarette's fundamental right to free expression. Moreover, as a matter of statutory intent, Section 1983 does not require additional proof that the official purposefully violated the right. Hence the officials could be liable for their negligent violation of the Constitution. The dispute of fact as to the officials' good faith belief that they had complied with prison regulations equally mandated denial of summary judgment on immunity for the negligence claim.[107] At no point in its treatment of immunity did the court of appeals either analyze whether the constitutional right was clearly established at the time of the violation, or posit the implications for immunity if the right were or were not settled.[108]

2. Arguments of the Parties Before the Supreme Court

On its face, the prison officials' petition for a writ of certiorari did not challenge the court of appeals' determinations that material fact disputes precluded summary judgment on immunity. Rather, the questions presented in the petition relevant to the mail claims were:

> 1. Whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983.
>
> * * *
>
> 3. Whether deliberate refusal to mail certain of a prisoner's correspondence in 1971-1972 prior to *Procunier v. Martinez*, 416 U.S. 396 (1974) and refusal to send certain correspondence by

105. *See id*.

106. *See id*.

107. *See id.* at 282. While not stated explicitly in this portion of its opinion, as with the first two counts, the district court presumably would have to consider whether there was an established background of common law immunity entitling prison officials to assert any immunity under Section 1983.

108. In ruling that Section 1983 afforded a cause of action for negligent violations of constitutional rights, the court of appeals noted in passing that "the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined." *Id.*

> registered mail states a cause of action for violation of his First Amendment right to free expression.[109]

The Court's order granting certiorari was limited to the first question. As later would become evident in *Parratt v. Taylor*[110] and *Daniels v. Williams*,[111] to decide if an allegation of negligence states a cause of action under Section 1983, a court must ascertain a) whether Congress intended to require plaintiffs to prove culpability, beyond a constitutional violation, as a statutory element of the prima facie case, and b) whether the constitutional right in issue is violated only by conduct rising to a standard of culpability more egregious than negligence.

However, in addressing whether Congress intended negligent deprivations of constitutional rights to be redressed under Section 1983, the briefs of both parties drew support for their respective positions by analogizing to the Court's qualified immunity decisions.[112] The parties also debated whether the rights in issue were clearly established at the time the prison officials declined to mail Navarette's letters.[113] Notably, neither party argued whether Navarette or the prison officials could look beyond the settled or unsettled nature of federal constitutional law in advocating whether the state actors' belief in the propriety of their conduct was reasonable under all the circumstances for purposes of immunity.[114] Nor did either party argue the merits of the decidedly pro-

109. *Procunier*, 434 U.S. at 858 n.6.

110. Parratt v. Taylor, 451 U.S. 527 (1981).

111. Daniels v. Williams, 474 U.S. 327 (1986).

112. *See* Brief for Petitioners at 12-13, *Procunier*, 434 U.S. 555 (No. 76-446) (noting that the qualified immunity test in *Pierson v. Ray* and *Wood v. Strickland* indicate that section 1983 was limited to intentional conduct); Brief for Respondent 20-27, *Procunier*, 434 U.S. 555 (No. 76-446); Brief for the American Civil Liberties Union as Amicus Curiae Supporting Respondents at 10, 14-15, *Procunier*, 434 U.S. 555 (No. 760446) (noting that qualified immunity cases reinforce liability for objectively unreasonable constitutional invasions).

113. The prison officials argued a right is not clearly established until it is "first articulated by [the Supreme] Court and then a reasonable period of time for dissemination of this Court's ruling is permitted." Brief for Petitioners at 20, *Procunier*, 434 U.S. 555 (No. 76-446). Navarette submitted that beyond rulings of the Supreme Court, lower federal and state court decisions should be consulted in determining whether the right was clearly established, Brief for Respondent at 53, *Procunier*, 434 U.S. 555 (No. 76-446), and that the relevant opinions should be applicable beyond their particular facts. Brief for Respondent at 55, *Procunier*, 434 U.S. 555 (No. 76-446).

114. Navarette relied solely upon the state of the law to oppose immunity, arguing decisions of the Supreme Court, lower federal courts and state courts "remove[ ] any possibility that defendants herein could reasonably have believed valid any instances of interference with plaintiff's outgoing mail . . . ." Brief for Respondent at 66, *Procunier*, 434 U.S. 555 (No. 76-446). Navarette did not further argue that even if the right was not clearly established based upon decisional law, the officials' asserted failure to comply with regulations governing censorship of inmate mail indicates they reasonably should

defendant test ultimately legislated by the Court—a test that allows government actors to offer evidence of the reasonableness of their belief in the propriety of their actions when the right offended *was* clearly established, but prohibits victims of constitutional wrongs from offering comparable evidence of unreasonableness when the right *was not* settled.

3. The Supreme Court Opinion

Although the question on which certiorari was granted concerned only whether Congress intended Section 1983 to redress negligent, as opposed to intentional, violations of the Constitution, the Court nonetheless chose to address qualified immunity. The majority viewed immunity as a subsidiary issue "fairly comprised" by the question presented, because the briefs of the parties had addressed whether the officials should have known their conduct violated Navarette's constitutional liberties.[115] In any event, the Court offered, its power to decide cases is not constrained by the contours of the question presented.[116]

Having chosen to embrace the immunity issue, the Court did not take up the one aspect of immunity explicitly singled out for consideration on remand by the court of appeals: whether prison officials were in possession of any immunity at common law that could in turn be raised as a defense in a Section 1983 action.[117] Rather than enforce Congress' intent to incorporate into Section 1983 only immunities that prevailed at common law, the Court simply issued what Justice Scalia later would confess to be a "policy prescription."[118]

have known of the right or that their conduct violated the right. The prison officers likewise rested their argument entirely on the unsettled state of the law, and did not submit that they could continue to press for immunity under the objective tier if the right violated was clearly established. Brief for Petitioners at 19-21, *Procunier*, 434 U.S. 555 (No. 76-446).

115. *Procunier*, 434 U.S. at 559.

116. *See id*. at 858 n.6. Chief Justice Burger dissented, finding whether defendants were immune was wholly different than, and not comprised within, the question whether Section 1983 supplies a cause of action for negligent conduct. Chief Justice Burger further noted the case did not fall within "any 'well-recognized exception' to our practice" of considering only the question on which certiorari was granted. *Id*. at 566-67 (Burger, C.J., dissenting). *See also* Transcript of Oral Argument at 24, *Procunier*, 434 U.S. 555 (No. 76-446) ("Well, I thought, Counsel, that the Court, in narrowing the question as it did, was trying to pass on what the Ninth Circuit said . . . that state officers negligently deprived him of those rights state a 1983 cause of action and that is the only issue in this case . . . .").

117. Neither party had addressed this issue in its briefs. Inexplicably, the Court wrongly stated that "[t]he Court of Appeals appeared to agree that petitioners were entitled to the claimed degree of immunity . . . ." *Procunier*, 434 U.S. at 560.

118. *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

Without any assessment of immunity, if any, conferred upon prison officials at common law, the Court dictated that prison officials sued under Section 1983 could assert a qualified immunity defense.

While ignoring the one aspect of immunity actually addressed by the court of appeals, the Court legislated a new standard for immunity that was neither raised below nor advocated by either party before the Court. Without intimating any departure from either *Scheuer v. Rhodes* or *Wood v. Strickland*, the Court issued the single sentence that dramatically re-engineered the test for the objective tier:

> Under the first part of the Wood v. Strickland rule, the immunity defense would be unavailing to [the prison officials] if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, *and* if they knew or should have known that their conduct violated the constitutional norm.[119]

Finding that First Amendment rights of prisoners were not clearly established at the time the officials refused to send Navarette's legal correspondence, the Court held that the officials had irrebuttably satisfied the objective prong of the immunity. Under the Court's test, Navarette was not entitled to defeat immunity by proving that under all the circumstances—including the officials' contravention of statewide regulation barring interference with an inmate's correspondence with legal counsel—the officials should have known that refusing to send his letters to legal assistance organizations would have violated his rights.[120]

Given that the Court had held Navarette's constitutional right was not clearly established, the facts of the case did not present the question of the availability of immunity where the right was settled. While not necessary to the decision, the Court volunteered that if the right had been clearly established, then the officials would have two additional bites at satisfying the objective tier of the immunity.[121] The Court issued its *ipse*

history . . . but simply set forth a policy prescription"). Justice Stevens, dissenting in *Procunier*, bemoaned the Court's failure to investigate the common law treatment of prison officials and intimated that such officials may have been accorded no immunity at common law. Justice Stevens further objected to the majority's failure to limit any immunity to discretionary, as opposed to ministerial, acts. *See Procunier*, 434 U.S. at 568-72 (Stevens, J., dissenting). *See also* Pfander, *supra* note 67.

119. *Procunier*, 434 U.S. at 562 (emphasis added).

120. *See* Davis v. Scherer, 468 U.S. 183, 194 (1984) (holding officials do not lose immunity because their conduct violates state statute or administrative regulation).

121. The Court's election to prescribe two additional means by which officials could satisfy the objective prong of qualified immunity where the right is clearly established was not necessary to prevent injustice on the intentional violation claims the court of appeals had remanded to the district court. Material issues of fact precluded officials from meeting the subjective good-faith requirement. Consequently, the claims of

dixit in stark contrast to the Article III standards it applied to deny relief to victims of unconstitutional conduct.

C. Harlow v. Fitzgerald

The *Procunier* Court's unilateral reformulation of the objective prong immunizes public officials who infringe rights that were not clearly established, even where the officials' conduct was unreasonable under all the circumstances. The only instance in which such officials would be held liable for damages is where they acted with actual malice, and thus fail the subjective tier of the immunity. In *Harlow v. Fitzgerald*, the Court abrogated the requirement that the official act must be done in good faith to be exempted from liability for damages under Section 1983.[122] As with its rewriting of the objective tier of immunity in *Wood* and *Procunier*, the *Harlow* Court's abolition of the subjective tier a) was not passed upon by the lower courts, b) was not advocated by the parties to the Court, and c) was not necessarily presented by the facts of the case.[123]

1. The Lower Court Opinions

Fitzgerald, a civilian cost analyst in the Department of the Air Force, contended he was fired after testifying before a congressional

intentional wrongdoing would proceed to trial regardless of whether the prison officials fulfilled the objective half of the immunity test.

122. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

123. Because *Harlow* was an action against federal, rather than state, actors, the Court was not interpreting Section 1983. However, the Court had ruled in Butz v. Economou, 438 U.S. 478, 504 (1978) that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." While noting the case did not directly present the issue of immunity of state officials under Section 1983, the *Harlow* Court then quoted the portion of its *Butz* opinion prescribing the immunity of state and federal officials should not differ. *Harlow*, 457 U.S. at 818, n.30.

Four days after its *Harlow* opinion, the Court vacated and remanded a decision of the United States Court of Appeals for the Sixth Circuit in a Section 1983 action that had rejected the qualified immunity defense of state parole officers. The Court's order instructed the court of appeals to consider the case in light of *Harlow*, and again quoted the portion of *Butz* dictating the equivalent immunity of state and federal officials. Wolfel v. Sanborn, 458 U.S. 1102 (1982).

In *Davis v. Scherer*, 486 U.S. 183, 194 n.12 (1984), the Court applied the objective-only immunity standard to Section 1983, noting that while *Harlow* was a suit against federal officials, "our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officials under *Bivens* . . . ." Since then, the Court has unvaryingly applied the *Harlow* standard to Section 1983 actions. *See* Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369 (1989).

committee about anticipated cost overruns on an Air Force plane. Fitzgerald sought damages from senior Presidential aides and advisors Harlow and Butterfield, asserting they had conspired to terminate Fitzgerald's employ and to prevent his reinstatement in retaliation for testifying before the committee.[124] After six years of discovery, defendants moved for summary judgment on the grounds of both absolute and qualified immunity.

The district court denied the motion for summary judgment.[125] The court first ruled defendants were not entitled to absolute immunity for actions taken in their capacity as senior aides and advisors to the President.[126] While agreeing that defendants were entitled to assert qualified immunity, the court held fact issues precluded summary judgment on that defense. The court reasoned issues of fact remained as to three immunity related questions: 1) whether defendants had acted within the bounds of their responsibilities, 2) whether any belief defendants held about the legality of their actions was reasonable, and thus satisfied the objective prong of immunity; and 3) whether defendants acted without malicious intent to deprive Fitzgerald of his rights, and consequently met the subjective test of the immunity defense.[127] The district court's opinion did not reflect any argument by defendants that the subjective tier of the immunity be eliminated or modified.

Defendants immediately appealed denial of their motion for summary judgment. Fitzgerald filed a motion to dismiss the appeal, arguing that as the district court's denial was not a final order, it was not appealable. Without issuing an opinion, the court of appeals granted Fitzgerald's motion to dismiss the appeal, and denied motions for rehearing and rehearing *en banc*.[128] Obviously, the court of appeals did not address whether to dissolve the subjective requirement of the qualified immunity test. Harlow and Butterfield then sought review by the Supreme Court.

124. Fitzgerald also sued President Nixon. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), the Court held Nixon was entitled to absolute immunity from damages liability for all acts within the outer perimeter of the President's official responsibility.

125. The district court's March 26, 1980 Order denying defendants' motion for summary judgment is not officially reported, but is reproduced in the Petition for Writ of Certiorari at 38-42, Harlow v Fitzgerald, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945).

126. Petition for Writ of Certiorari at 40, *Harlow*, 457 U.S. 800 (Nos. 79-1738, 80-945).

127. *Id*.

128. *Id*. at 51. Although the court of appeals dismissed the appeal without an opinion, both Petitioners and Respondents posited in their briefs to the Supreme Court that the court of appeals had dismissed the appeal for lack of jurisdiction. Brief for the Petitioners at 26, *Harlow*, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945); Brief for Respondents at 20, *Harlow*, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945).

2. Arguments of the Parties before the Supreme Court

Defendants' petition for writ of certiorari challenged the district court's disposition of both the absolute and qualified immunity defense, as well as the court of appeals' ruling that pretrial denial of immunity was not immediately appealable. As to the qualified immunity defense, the petition posed the following question: "Whether the lower courts, in routinely requiring a trial on the defense of qualified immunity, have thereby vitiated the defense and thwarted this Court's decision in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)."[129]

In *Butz*, the Court had held executive officials were entitled to qualified, rather than absolute, immunity. The *Butz* Court reasoned in pertinent part that qualified immunity would allow "[insubstantial] lawsuits [to] be quickly terminated."[130] In their brief on the merits, defendants argued trial courts had undermined the goal of disposing of groundless claims by finding the subjective good faith of officials to be a fact issue incapable of resolution on a motion for summary judgment. Defendants submitted that "[a]llegations of malice and civil conspiracy, weakly supported by factual inferences drawn from the slightest bits and pieces of evidence, should no longer be allowed to serve as a simple formula for defeating the pre-trial protection of qualified immunity."[131]

Defendants did not urge the Court to abandon the common law requirement that an official act in good faith to be immune. Instead, defendants asked the Court to raise the evidentiary burden plaintiff would have to meet to pose a triable issue of fact as to the defendants' intent under the subjective prong of immunity. Defendants submitted that after discovery, the plaintiff should be required to present sufficient evidence of bad faith to satisfy either a preponderance of the evidence or clear and convincing evidence standard.[132]

129. Petition for Writ of Certiorari at 1, *Harlow*, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945).

130. Butz v. Economou, 438 U.S. 478, 507-08 (1978).

131. Brief for Petitioners at 78, *Harlow*, 457 U.S. 800 (Nos. 79-1738, 80-945).

132. *Id.* at 79. Fitzgerald submitted a unified brief to the Court in response to the separate writ of certiorari submitted by President Nixon as well as the writ submitted by Harlow and Butterfield. Fitzgerald's brief focused largely on the issue of whether Nixon should be absolutely immune. For the most part, Fitzgerald's brief consisted of lengthy arguments involving Nixon, followed by a sentence or two which would tie in the case involving Harlow and Butterfield to the argument just presented regarding Nixon. In fact, Harlow and Butterfield were more often than not mentioned only in footnotes.

During oral argument, counsel for the officials reiterated that they were asking the Court to require plaintiffs to prove malice by a standard stricter than a preponderance of the evidence. Transcript of Oral Argument at *14, Harlow v. Fitzgerald, 457 U.S. 800 (Nos. 79-1738, 80-945), *available at* 1981 U.S. Trans. LEXIS 17. In response to Justice Rehnquist's question as to whether adoption of the heightened burden of proof could permit the granting of summary judgment, counsel replied that the Court could

Fitzgerald opposed elevating the plaintiff's burden of proof on summary judgment to clear and convincing evidence. Fitzgerald argued that to apply a higher evidentiary standard to a pretrial motion for judgment than the preponderance of evidence standard applicable at trial would conflict with the Seventh Amendment right to trial by jury.[133] As neither defendants nor the lower federal courts had mentioned or advocated the position, Fitzgerald's brief did not address the merits of jettisoning the common law and precedential requirement that an officer subjectively act in good faith to be immune from paying damages for his violation of the Constitution.[134]

3. The Supreme Court Opinion

Vacating the subjective tier of immunity was neither presented by the facts nor necessary to resolve the dispute before the Court as required by the Court's Article III standards. The Court could have facilitated disposition of meritless claims before trial by adopting the government officials' urging to require proof of intent by clear and convincing

"significantly reduce the number of cases that would have to go to trial and increase the number in which a motion for summary judgment was granted" if the Court were "to enjoin upon the lower courts close scrutiny of allegations of malice, applying *the two standards* of Wood against Strickland." *Id.* at *20 (emphasis added). Counsel then agreed with the Court's unilateral suggestion that summary judgment would be even easier to obtain were the malice requirement eliminated. *Id.* at *21.

133. Brief for the Respondent at 16, *Harlow*, 457 U.S. 800 (Nos. 79-1738, 80-945). Fitzgerald further submitted that heightening the burden of proof would not aid defendants in the instant case as the evidence of malice was substantial. *Id.*

134. The Court did not pose any questions to counsel for Fitzgerald at oral argument regarding elimination of the subjective prong of immunity. Fitzgerald's counsel did volunteer the following:

> Justice White earlier asked a question about dropping malice as a requirement from the qualified immunity standard. I think that in most cases, particularly cases involving the powers of the Presidency in large scale public acts, it would be very difficult or impossible for a plaintiff to demonstrate malice.

Transcript of Oral Argument at *46-47, *Harlow*, 457 U.S. 800 (Nos. 79-1738, 80-945), *available at* 1981 U.S. Trans. LEXIS 17.

By revoking the subjective prong for Section 1983 actions, the Court contravened the acknowledged intent of Congress to incorporate immunities extant at the time of passage. As the Court's pre-*Harlow* decisions made clear, the common law required an official to act in both objective and subjective good faith to be immune. The Supreme Court has no power to depart from the intent of Congress to further its own policy choices. *See* Malley v. Briggs, 45 U.S. 335, 342 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition."). Nonetheless, as Justice Scalia subsequently conceded, the *Harlow* Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." Anderson v. Creighton, 483 U.S. 635, 645 (1987).

evidence. In fact, in *Celotex Corp. v. Catrett*,[135] the Supreme Court subsequently adopted an approach to summary judgment that permits trial courts to grant summary judgment as to issues of intent without raising the burden of proof beyond the standard governing the trial. As Justice Kennedy later acknowledged, the concerns that induced the *Harlow* Court to eliminate the subjective good faith prerequisite to immunity were allayed by these later developments in the Court's summary judgment jurisprudence:

> *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof .... However, subsequent clarifications to summary judgment law have alleviated that problem, by allowing summary judgment to be entered against a non-moving party "who fails to make a showing sufficient to establish the existence of an element necessary to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, [citation omitted]. Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary judgment stage.[136]

Not only was it unnecessary to vacate the subjective tier to ensure the pretrial disposition of meritless civil liberties suits; eliminating the subjective prong of immunity would not necessarily result in dismissal of Fitzgerald's suit on defendant's motion for summary judgment. The district court had not denied summary judgment solely because of a dispute of fact over defendants' subjective intent. The district court further held there were material disputes of fact as to whether defendants acted within the scope of their responsibilities and as to the reasonableness of defendants' belief in the legality of their actions under the objective aspect of qualified immunity.[137] Accordingly, the Supreme

135. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

136. Wyatt v. Cole, 504 U.S. 158, 171 (Kennedy, J., concurring).

137. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). During oral argument, Justice Stevens suggested the issue of whether the Air Force was reorganized in order to eliminate Fitzgerald's job and get rid of Fitzgerald would remain even if the Court accepted defendants' entreaty to raise the standard of proof for immunity. Transcript of Oral Argument at *22, *Harlow*, 457 U.S. 800 (Nos. 79-1738, 80-945), *available at* 1981 U.S. Trans. LEXIS 17. Abolishing the subjective requisite to immunity also did not remove the issue of defendants' intent from the *Harlow* litigation. The district court held that the genuine issues of material fact as to defendants' good faith also were relevant to the availability of punitive damages. The trial court ruled Fitzgerald may be entitled to punitive damages if he proved the officials' actions were malicious or in reckless disregard of Fitzgerald's rights, and that it had "not been established that such damages

Court could not and did not enter judgment in favor of defendant officials, but remanded the case to the court of appeals.[138]

As a result of the Court's *sua sponte* rewriting of the qualified immunity defense, individual public officials are insulated from paying damages caused by their unconstitutional actions, even when the official acted maliciously, whenever the right violated was not clearly established. Once the official is immunized, the citizen who suffered the deprivation will be left without compensation for her injuries unless the entity is liable for the harm. As will next be discussed, the Court greatly contracted the circumstances under which local governments are responsible for the constitutional torts of its officials, and entirely removed any prospect that damages would be paid by state entities.[139] In both instances, the Court resolved the issue a) without benefit of the view of the lower courts, b) without presentation of the issue by the parties before the Court, and c) in violation of the Court's interpretation of the Article III case or controversy requirement.

V. THE COURT *SUA SPONTE* REJECTED VICARIOUS LIABILITY OF LOCAL GOVERNMENTAL ENTITIES

In *Monell v. Department of Social Services of the City of New York*, the Court ruled that local governmental entities are not vicariously liable under Section 1983 for deprivations of federal constitutional rights caused by their officials' actions.[140] The issue of vicarious liability, however, was not asserted before nor addressed by the lower federal courts. None of the parties argued vicarious liability in the written submissions to the Supreme Court. In fact, during oral argument, plaintiffs' counsel expressly advised the Court he was not seeking to hold the local government liable on a theory of respondeat superior. Finally, the issue of vicarious liability was neither presented by the facts

are unavailable as a matter of law." Petition for Writ of Certiorari at 40, *Harlow*, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945).

138. *Harlow*, 457 U.S. at 820. The subsequent appellate history of *Harlow* is not reported.

139. Citizens injured by unconstitutional conduct by federal officials may not file a *Bivens* action against the federal government. In *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471 (1996), the Supreme Court held the purpose of *Bivens* was to deter individual federal officials from violating the Constitution. The Court reasoned the deterrent would be undermined were the government entity also liable. Furthermore, given the prospect that entity liability would impose substantial financial obligations on the federal government, Congress rather than the Court would have to authorize such liability. Consequently, the citizen entirely bears the risk of loss from deprivations of constitutional rights caused by federal officials whenever that right is not clearly established.

140. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 713-14 (1978).

of the case nor was it necessary for the Court to address respondeat superior liability.

A. The Lower Court Opinions

In *Monell*, female employees of the City of New York Department of Social Services and the City Board of Education filed a Section 1983 class action seeking damages for wages lost as a result of an unconstitutional maternity leave policy. The policy required pregnant employees to take unpaid leaves of absence before stopping work was medically necessary. Plaintiffs sued the City, the Department and the Board, as well as the individual heads of those entities in their official capacities.

The district court dismissed plaintiffs' Section 1983 damages claim.[141] The Court first determined that under applicable precedents, neither New York City, the Board of Education, nor the Department of Social Services were "persons" who were subject to suit within the language of Section 1983.[142] The Court next considered whether plaintiffs could recover damages in the count lodged against individual local officials named as defendants in their official capacities. Because plaintiffs' action against the individual officers asked that damages be paid by the local entities, the Court ruled the suit was a prohibited action against the municipal government.[143] Having determined neither the municipal entities nor the individual officials in their official capacities could be sued under Section 1983, the district court had no occasion to consider whether local governments could be liable for damages on a theory of vicarious liability.

The court of appeals similarly did not entertain the issue of vicarious liability.[144] Like the district court, the court of appeals held all

141. Monell v. Dep't. of Soc. Servs., 394 F. Supp. 853, 854 (S.D.N.Y. 1975). Plaintiffs also sought back pay under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, which prohibits employers from discriminating against employees. Plaintiffs further sought equitable relief under Section 1983, asking the court to direct a change in maternity leave policies. The district court denied the Title VII claims because at the time of the alleged discrimination, governmental units were exempt from suit, and Congress did not intend the amendment to Title VII to apply retroactively. The trial court also denied the Section 1983 claim for equitable relief as moot. Defendants had changed their maternity leave policies and no longer required female employees to report their pregnancies or to take maternity leaves if they were medically able to perform their jobs. *Id*. at 855.

142. *Id*. (citing City of Kenosha v. Bruno, 912 U.S. 507, 513 (1973); Monroe v. Pape, 365 U.S. 167, 188 (1961)).

143. *See id*. at 855-56.

144. The court agreed with the district court's conclusions that plaintiff's Title VII claim for damages was barred because the 1972 amendment subjecting local governments to damage suits for discrimination should not apply retroactively. Monell v.

Section 1983 damage actions against municipalities—whether naming governmental entities or officers in their official capacity as defendants—were barred. The court of appeals rejected plaintiffs' contention that the Board of Education is a body independent of the City of New York. Because the Board performs a vital governmental function and has no control over appropriation of its funds, the Court reasoned, the Board is an arm of the City and is not a suable "person" under Section 1983.[145] The court of appeals further held that since the action against the individual officials sought damages from governmental coffers, it too was a claim against the entity that could not be lodged under Section 1983.[146] Having affirmed that none of the named defendants was amenable to suit, the court of appeals had no cause to mull over vicarious liability.

B. Arguments of the Parties Before the Supreme Court

As Justice Stevens acknowledged in his dissenting opinion in *City of Oklahoma v. Tuttle*,[147] "[t]he commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party." In their written submissions to the Supreme Court, plaintiffs never argued local governmental entities should be held vicariously liable for the constitutional wrongs of their employees. Plaintiffs first argued that unlike cities and counties, school boards are "persons" under Section 1983 liable for their own unconstitutional actions. School boards, plaintiffs argued, are not alter egos of the city or county, but have significant linkages to the state and federal governments as well.[148] Because the mandatory leave policy was admittedly a policy of the school board, plaintiffs never submitted that school boards should be vicariously liable for all actions of their employees.

Plaintiffs' alternate theory of liability against the individual officials similarly did not rest on vicarious liability. Plaintiffs' brief expressly noted they were not asserting a local government is liable for all constitutional wrongs of its employees.[149] Instead, plaintiffs contended courts could direct a local official to expend public funds to remedy a

Dep't of Soc. Serv., 532 F.2d 259, 261-62 (2d Cir. 1976). The court of appeals also agreed plaintiff's Section 1983 action seeking equitable relief was rendered moot by changes in policy enacted after the lawsuit was filed. *Id.* at 261.

145. *Id*. at 263-64.

146. *Id*. at 265-66.

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

148. Brief for the Petitioners at 26-31, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1977) (No. 75-1914).

149. Brief for the Petitioners at 8, 33-34, 53, *3, n.*, *Monell*, 436 U.S. 658 (No. 75-1914).

deprivation of constitutional rights only "under certain narrow circumstances."[150] The court's power to restore funds wrongfully withheld would be restricted to cases where the official who effected the constitutional violation was "the chief executive or policy making body of the city or county, or some other high ranking official authorized to direct the expenditure of funds."[151]

At oral argument, plaintiffs' counsel made clear the action against the individual officials was not a broad-based effort to impose respondeat superior liability. Counsel clarified that if a high-ranking officer had not caused the constitutional wrong or the individual defendant had no authority to direct the expenditure of public funds, the person whose rights were violated could not secure a damage award:

> We are not saying that plaintiffs in *Monroe* could have sued Mayor Daley of Chicago and obtained a judgment because some police officers beat them up. Mayor Daley, in that case, did not wrongfully exercise his official powers . . . . Nor could, under our view, the plaintiff in *Monroe* sue the police officer, because, the—in his official capacity—because the police officer, in that capacity, has no authority to dispense public funds . . . .[152]

In response to the Court's questioning, counsel unequivocally pledged he was not pursuing a theory of vicarious liability:

> Question: In other words, as I understand it, your argument in this phase of the case is not at all dependent upon a respondeat superior theory?
>
> Mr. Chase: No, Your Honor, We believe that -
>
> Question: Not a bit?
>
> Mr. Chase: Not at all.[153]

As plaintiff had abjured reliance on respondeat superior, defendants did not ask the Court to repudiate vicarious liability were the Court to find local governments are suable defendants under Section 1983. Rather, defendants urged the Court to re-affirm its holding in *Monroe* that the 1871 Congress did not intend to include local political subdivisions within the class of "persons" that could be sued under

150. *Id*. at 33.
151. *Id*. at 34.
152. Transcript of Oral Argument Tr. at 11-12, *Monell*, 436 U.S. 658 (1977) (No. 75-1914).
153. *Id*. at 12.

Section 1983.[154] School boards, defendants offered, are indistinguishable from other county and city entities immune from suit under Section 1983.[155] Defendants implored the Court not to subvert that absolute bar by allowing plaintiffs to access public funds through suits against individual officials.[156]

C. The Supreme Court Opinion

After revisiting the legislative history of Section 1983, the Court reversed *Monroe v. Pape*, holding local governmental entities are "persons" that could be sued for damages under Section 1983. The Court ruled local governments would be liable for unconstitutional action that, as in *Monell*, "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."[157]

The facts of the case presented no issue of vicarious liability for actions not sanctioned by the entity itself.[158] The Court observed that "unquestionably" the "official policy" of New York City and its agencies required pregnancy leave before it was medically necessary.[159] The Court expressly noted, "we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be."[160] The Court declined to examine whether municipalities could assert immunity available to its officials because the issue was not addressed by the lower courts, presented as a question in the petition for certiorari, or briefed by the parties.[161] The issue of vicarious liability met the same criteria, and was not presented by the facts of the case. In what Justice Stevens later labeled "judicial legislation of the most blatant

154. Defendants conceded Congress has the power to hold local governments vicariously liable for constitutional wrongs of its employees. Brief for the Respondents at 10-11, *Monell*, 436 U.S. 658 (1977) (No. 75-1914). Defendants further allowed that if Congress had intended to bring local governments within the ambit of Section 1983, "an argument could be made for the imposition of *respondeat superior liability*" upon the entity where the officer would be liable. *Id*. at 33. Defendants, however, urged the Court to adopt a general rule rejecting all local governmental liability for damages under Section 1983. *Id*. at 33-34.

155. Brief for the Respondent at 12-23, *Monell*, 436 U.S. 658 (No. 75-1914).

156. *Id*. at 23-35.

157. *Monell*, 436 U.S. at 690 (1977).

158. The Court's unilateral decision to address and reject respondeat superior was not necessary to avoid a miscarriage of justice to the defendants, as they admitted that the policy of the governmental entities mandated what proved to be an unconstitutional medical leave policy.

159. *Monell*, 436 U.S. at 694.

160. *Monell*, 436 U.S. at 695.

161. *Id*. at 701.

kind,"[162] the Court nonetheless ruled a local government may not be held liable for its officers' constitutional misdeeds on a theory of respondeat superior.

Monell launched the Court on a decades-long quest to define which acts of municipal employees constitute "policy."[163] The Court has generated a web of cases so confusing that four members of the Court suggested the time had come to reexamine the soundness of the rejection of vicarious municipal liability.[164] Equally significantly, by eliminating local government as a defendant in Section 1983 actions for constitutional invasions that do not rise to the level of policy or custom, the Court left victims without compensation whenever the individual employee was immune or judgment-proof.

VI. THE COURT VIOLATED THE TENETS OF JUDICIAL RESTRAINT AND ARTICLE III WHEN IT HELD STATE GOVERNMENTAL ENTITIES ARE NOT SUABLE UNDER SECTION 1983

The *Monell* Court cast aside settled principles of judicial restraint and the Article III case and controversy requirement to reject vicarious liability of local governments under Section 1983. One year later, in *Quern v. Jordan*,[165] the Court *sua sponte* determined states may never be held liable for damages caused by the unconstitutional actions of their employees, even if those acts represent the policy or custom of the state.

To understand the Supreme Court's exemption of States from liability for damages under Section 1983, it is imperative to keep an eye

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

163. In determining acts of local officials that do and do not constitute policy, the Court continued its penchant for issuing decisions on matters not argued by the parties. *See* Bd. of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 423 (1997) (Souter, J., dissenting) ("If, as it appears, today's standard does raise the threshold of municipal liability, it does so quite independently of any issue posed or decided in the trial court.").

164. Bd. of the County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 430 (1997) (Souter, Breyer and Stevens, JJ., dissenting). *Id*. at 437 (Breyer, Stevens and Ginsburg, JJ., dissenting). Ironically, these Justices believed it necessary to receive the arguments of counsel on the matter rather than unilaterally overrule *Monell* and endorse vicarious municipal liability under Section 1983. *Id*. at 436-37 (Breyer, Stevens and Ginsburg, JJ., dissenting).

In City of Oklahoma v. Tuttle, 471 U.S. 808, 835-41 (1985) (Stevens, J., dissenting), Justice Stevens' dissenting opinion lays out the case for respondeat superior liability of local governments. Several commentators have likewise argued in favor of vicarious entity liability. *See* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755 (1992); Barbara Kritchevsky, *Reexamining* Monell*: Basing § 1983 Liability Doctrine on the Statutory Language*, 31 URB. LAW. 437 (1999); David Achtenberg, *Taking History Seriously: § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183 (2005).

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

on the then-existing state of the Supreme Court's rulings on municipal liability. The Supreme Court had adjudged the liability of municipal entities before it addressed the amenability of states to suits for damages under Section 1983. In 1961, the Court in *Monroe v. Pape* held Congress did not intend to include cities as "persons" that could be sued under Section 1983.[166] Thirteen years later, in *Edelman v. Jordan*,[167] the Court for the first time was asked to decide whether Congress intended to authorize suits against states under Section 1983. In a single sentence with no citation to authority, the *Edelman* Court ruled, "[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."[168]

Two years later, the Court supplied the rationale and citation missing from its *Edelman* opinion. In *Fitzpatrick v. Bitzer*,[169] the Court held Congress harbored the power under section five of the Fourteenth Amendment to override the states' Eleventh Amendment immunity. The Court further opined Congress intended to exercise that power when it amended Title VII of the Civil Rights Act of 1974 to authorize suits for money damages against state governments that engage in employment discrimination. The Court distinguished *Edelman.* Unlike the Amendments to Title VII, the Court reasoned, Congress did not intend to authorize suits against states when it enacted Section 1983. The Court then elaborated on its earlier ruling in *Edelman*: "The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape* 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."[170] Thus it became clear the *Edelman* Court had found Congress did not intend states to be suable "persons" under Section 1983 because the Court in *Monroe v. Pape* already had held the legislature did not mean to subject local governments to liability under the same statute.

The Court overruled *Monroe* in *Monell v. Department of Social Services of the City of New York*. The *Monell* Court expressly stated its holding was limited to local governmental entities, which do not share the states' Eleventh Amendment immunity.[171] However, *Monell* upset the lone rationale for the *Edelman* Court's finding that Congress did not intend to subject states to Section 1983 damage actions. After *Monell*,

166. Monroe v. Pape, 365 U.S. 167 (1961).
167. Edelman v. Jordan, 415 U.S. 651 (1974).
168. *Id.* at 675-77.
169. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
170. *Id.* at 452.
171. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 n.54 (1978).

the issue of Congress' intent with respect to the liability of states under Section 1983 became an open question.

Eight months after issuing its *Monell* decision, the Court in *Quern v. Jordan*[172] held Congress did not intend to abrogate the states' Eleventh Amendment immunity. The *Quern* Court wholly sheltered states from paying damages for constitutional deprivations of their officials even though a) the issue had not been raised before or addressed by the lower federal courts; b) both parties agreed the issue was not before the Supreme Court; and c) the issue was neither presented by the facts of the case nor was it necessary for the Court to address the question.

A. The Lower Court Opinions

Quern v. Jordan arose out of the same lawsuit that had spawned the Court's opinion in *Edelman*. Individuals seeking benefits under the State of Illinois' Aid to the Aged, Blind and Disabled program claimed state officials had delayed determining their eligibility in violation of federal regulations and the Fourteenth Amendment. Among other things, plaintiffs asked the court to order retroactive payment of funds they would have received had the Department acted in the prescribed time frame. The *Edelman* Court ruled a federal court would offend the Eleventh Amendment were it to order the state to pay past benefits from its treasury. On remand, plaintiffs asked the district court to order state officials to send notices to members of the class "explaining their possible entitlement to retroactive benefits and the appropriate state administrative and appeals procedures to be followed in applying for those benefits."[173] Defendant officials resisted, arguing the proposed order violated the Eleventh Amendment since providing notice of state remedies eventually could lead to monetary recovery from state coffers.

The lower federal court proceedings preceded the Supreme Court's *Monell* opinion that unsettled *Edelman*. Therefore, it is not surprising that neither the district court nor the court of appeals addressed whether Congress intended to abrogate the state's Eleventh Amendment immunity when it enacted Section 1983. Instead, the courts debated whether ordering state officials to issue the notice was prospective relief that does not amount to an action against the state within the meaning of the Eleventh Amendment, or retroactive relief that runs afoul of the Amendment.[174]

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

173. Jordan v. Trainor, 405 F. Supp. 802, 805 (N.D. Ill. 1975).

174. In *Ex Parte Young*, 209 U.S. 123 (1908), the Court held a citizen who suffered a deprivation of federal constitutional rights may file a federal court suit against a state official, in his official capacity, as long as the relief sought was prospective. In what

The district court held because the notice sought by plaintiffs did not order payment of retroactive benefits, the order "falls outside the arena proscribed by the Supreme Court's *Edelman* opinion."[175] The court of appeals reversed, finding the practical consequence of the letter of notification equivalent to an order directing payment of retroactive benefits by the state that is barred by the Supreme Court's ruling in *Edelman*.[176] Following a rehearing *en banc*, the court of appeals reversed the panel decision. The *en banc* court held merely sending notice of the right to seek a state administrative determination of entitlement to past payments does not constitute retroactive relief against the state within the meaning of the Eleventh Amendment.[177]

As *Monell* had not yet been decided, the lower courts obviously were not presented with the question of whether to reconsider the issue of Congress' intent as to state liability under Section 1983. Accordingly, neither the district court, the three judge panel of the court of appeals, nor the court of appeals sitting en banc addressed whether Congress intended to trump the Eleventh Amendment when it passed Section 1983.

B. Arguments of the Parties Before the Supreme Court

The Supreme Court issued its *Monell* decision after the defendant state welfare officials filed their petition for writ of certiorari and opening brief on the merits.[178] Consequently neither the cert petition nor the initial brief addressed whether *Monell* undermined the Court's opinion in *Edelman*. To the contrary, the officials' initial brief argued the court of appeals' *en banc* decision violated the law of the case

became known as the *Ex Parte Young* "fiction," the Court reasoned that by acting unconstitutionally, the state official was "stripped of his official . . . character and is subject in his person to the consequences of his individual conduct." *Id.* at 160. Despite being construed as individual action for Eleventh Amendment purposes, the state official is deemed to be acting under color of law for purposes of Section 1983. The fiction that the individual official is not the State is pierced, however, where the complaint seeks damages from the treasury of the State.

175. *Jordan*, 405 F. Supp. at 805.

176. Jordan v. Trainor, 551 F. 2d 152, 156 (7th Cir. 1977).

177. Jordan v. Trainor, 563 F. 2d 873, 874 (7th Cir. 1977). The *en banc* court agreed with the panel that the language in that notice, "you were denied public assistance to which you were entitled in the amount of $ . . .," did in effect require the retroactive payment of state funds. However, a "mere explanatory notice" advising applicants they are entitled to use available state administrative procedures to have the state determine eligibility for past benefits would not constitute a federal court order that applicants were entitled to retroactive benefits.

178. The defendants filed their Petition for Writ of Certiorari on December 12, 1977 and their brief on the merits on June 3, 1978. The Court issued its decision in *Monell* on June 6, 1978. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

established by the Supreme Court's *Edelman* decision.[179] Because the notice sent to applicants for benefits would result in payment of funds from the state treasury as reparation for past wrongdoing, defendants submitted, the Eleventh Amendment bars a federal court from ordering such notice.[180]

The successive brief of the plaintiffs and the defendant officials' reply brief, were filed after the Court overruled *Monroe* in *Monell.* However, both parties agreed the Court need not address whether Congress intended to permit suits against states for damages under Section 1983.[181] Plaintiffs' brief argued that the federal court's order requiring state officials to send notice of plaintiffs' right to appeal the denial of benefits through available state administrative mechanism did not even present an Eleventh Amendment issue. Plaintiffs repeatedly acknowledged principles of sovereign immunity embodied in the Eleventh Amendment are designed to protect the states' financial integrity and bar federal courts from ordering states to pay money damages for constitutional violations.[182] Plaintiffs submitted that the notice ordered by the lower courts does not award damages from the state treasury, but leaves the state to determine its own monetary liability.[183] Rather than suggest *Monell* opened the door to state liability under Section 1983, plaintiffs used the just-issued *Monell* opinion to support its view that the decree enforced federal rights "without unreasonably intruding upon state sovereignty."[184] By vesting the ultimate decision whether to award back benefits in the state's own administrative agency, plaintiffs averred, the lower courts acted consistent with the principles of federalism inherent in Section 1983.[185]

Both parties expressly advised the Court it need not decide whether Congress intended to permit suits for damages against states under Section 1983. Because the district court did not award money damages and issued its equitable decree only against individual state officials rather than against a state entity, plaintiffs' brief specified, "it is

179. Brief for the Petitioner at 14, Quern v. Jordan, 440 U.S. 332 (1979) (No. 77-841).

180. Brief for the Petitioner at 33-34, *Quern*, 440 U.S. 332 (No. 77-841).

181. The State of Indiana filed a brief as amicus curiae in support of the defendant officials. Indiana's amicus brief did not address Section 1983 on whether the State is a "person" under that statute. Instead, the State argued the notice approved by the court of appeals is retroactive relief barred by the Eleventh Amendment. Brief for State of Indiana as Amici Curiae Supporting Petitioners at 9-10, *Quern*, 440 U.S. 332 (1979) (No. 77-841).

182. Brief for the Respondents at 23-47, 54-55, 62, *Quern*, 440 U.S. 332 (1979) (No. 77-841).

183. *Id*. at 10.

184. *Id*. at 47.

185. *Id*. at 47-64.

unnecessary in this case to confront directly the far-reaching question of whether Congress intended in § 1983 to provide for relief directly against States, as it did against municipalities."[186] While noting *Monell* did not answer whether states are liable for damages, the state officials' reply brief agreed that "the *en banc* decision of the Seventh Circuit does not rest upon the conclusion that the term persons for purposes of § 1983 includes sovereign states, as opposed to state officials, within its ambit. That issue is not the issue before this Court on Petitioner's Writ for Certiorari."[187]

C. The Supreme Court Opinion

The Supreme Court agreed with plaintiffs that ordering state officials to notify welfare recipients of available state administrative remedies, while reserving to state agencies the ultimate decision whether to award past benefits, did not conflict with the Eleventh Amendment. Despite finding the district court's order did not clash with the Eleventh Amendment, the Court opted first to resolve the very issue both parties expressly declared was not before the Court.[188] The Court held Congress did not intend to exert its power to override the states' Eleventh Amendment immunity with the passage of Section 1983.[189] Thus states may not be sued or held liable under Section 1983 for damages for the constitutional deprivations of their officials.

As with its three-fold expansion of the qualified immunity defense and rejection of vicarious municipal liability, the *Quern* Court's exclusion of states from the ambit of Section 1983 not only was bereft of the views of the lower federal courts and the submissions of counsel; there was no Article III case or controversy as to that issue. Because the notice to the applicants was not retroactive relief against the state for Eleventh Amendment purposes, the facts did not present the question whether Congress intended to permit federal courts to issue orders that would conflict with that amendment. Furthermore, the court of appeals' *en banc* opinion approving the notice would stand regardless of how the Court resolved whether Congress intended to allow federal court actions against states when it enacted Section 1983. Justice Brennan vigorously

186. *Id*. at 55 n.37.

187. Reply Brief for the State Petitioner at 14, *Quern*, 440 U.S. 332 (1979) (No. 77-841).

188. The majority alleged plaintiffs had raised the issue whether *Monell* undermined the vitality of the Court's *Edelman* holding in footnote 37 of the plaintiff's brief. *Quern*, 440 U.S. at 338. As noted earlier, in that very footnote plaintiffs expressly stated it was unnecessary for the Court to confront that question. Brief for Respondents at 55 n.37, *Quern*, 440 U.S. 332 (1979) (No. 77-841). *See supra* note 169 and accompanying text.

189. *Quern*, 440 U.S. at 341.

criticized the Court's election to tackle the issue of the 1871 Congress' intent to trump the Eleventh Amendment: "It is deeply disturbing, however, 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."[190]

The Court's redrafting of qualified immunity, repudiation of respondeat superior liability of local governmental entities, and exoneration of states from Section 1983 damage actions increasingly leaves victims of unconstitutional government action without compensation for their injuries. Whenever the right was not clearly established, citizens harmed by deprivations of constitutional liberties by federal or state officials will recover no damages, even if the official intended the injury; where the wrongdoer is an officer of the local government, the victim will receive compensation only in the narrow circumstances when the official's action represents municipal policy or custom.[191]

VII. IQBAL ADDED A PREREQUISITE TO SUPERVISORY LIABILITY THAT WAS NEITHER RAISED BELOW NOR PRESENTED TO THE COURT BY THE PARTIES

Iqbal weakened one of the few remaining arrows in the remedial quiver of the citizen whose fundamental constitutional rights have been infringed. The *Iqbal* Court erected an additional—and perhaps even insurmountable—obstacle to imposing liability on an official for misfeasance in supervising the employee who physically deprived the citizen of his constitutional liberty. The supervisor is no longer liable solely because his personal involvement was a cause of the subordinate's unconstitutional conduct. Instead, plaintiff may recover damages from the supervisor only by proving the supervisor's own actions violate the

190. Quern v. Jordan, 438 U.S. at 350 (Brennan, J., concurring).

191. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); McMillian v. Monroe County, 520 U.S. 781 (1997) (single act of official constitutes policy only where, under state law, that official was person responsible for establishing final policy); City of Canton v. Harris, 489 U.S. 378 (1989) (failure to train amounts to policy only where need for more or different training is so obvious, and inadequacy so likely to result in violation of constitutional rights, that policymakers can reasonably be deemed to have been deliberately indifferent); Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997) (local government liable for wrongful hiring of employee who inflicted constitutional violation only where plaintiff proves entity was deliberately indifferent to risk that the officer was highly likely to inflict that particular injury). The *Iqbal* opinion is likely to open the question whether, as in actions against supervisory officers, plaintiff must prove an even higher standard of culpability to hold local governments liable for the unconstitutional conduct of their employees. *See* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after* Iqbal, 14 LEWIS AND CLARK L. REV. 279, 308 (2010).

Constitution. As with its line of decisions expanding individual immunity and diminishing entity liability, the Court promulgated a standard of supervisory liability a) that the officers did not proffer before the lower courts or advocate before the Supreme Court, and b) which was not necessary to resolve the dispute.

A. The Lower Court Opinions

1. The District Court

Plaintiff Javard Iqbal, a Muslim from Pakistan, was arrested for offenses unrelated to terrorism shortly after the September 11 attacks.[192] Iqbal was classified as a person "of high interest" to the government's investigation of terrorism. As a result, Iqbal was transferred from the general population to the far more restrictive confinement of the Administrative Maximum Special Housing Unit ("ADMAX-SHU") of the Metropolitan Detention Center. Federal Bureau of Prison regulations require periodic individual reviews to determine whether continued detention in the ADMAX-SHU is merited.[193] Iqbal was never afforded these individualized periodic reviews. Instead, an alleged policy adopted in the aftermath of the September 11 attacks required detainees of high interest to be held in ADMAX-SHU until the FBI cleared them of linkage to terrorist activity.

While in ADMAX-SHU, Iqbal and his co-plaintiff Elmaghraby alleged they were subject to the following conditions of confinement:

> [T]hey were (1) kept in solitary confinement; (2) prohibited from leaving their cells for more than one hour each day with few exceptions; (3) verbally and physically abused; (4) routinely subject to humiliating and unnecessary strip searched; (5) denied access to basic medical care; (6) denied access to legal counsel; (7) denied adequate exercise and nutrition; (8) housed in small cells where the lights were left on almost 24 hours a day; (9) deliberately subjected to air conditioning during the winter months and heat during the summer months; (10) deprived of adequate bedding or personal hygiene items; and (11) they were deprived of adequate food, as a result of which Iqbal lost over 40 pounds (and suffers from persistent digestive problems) and Elmaghraby lost 20 pounds.[194]

192. Iqbal was arrested for fraud in relation to identification documents and conspiracy to defraud the United States in violation of 18 U.S.C. §§ 371 and 1028. Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434 at * 3 n. 1 (E.D.N.Y. 2005).

193. *See* 28 C.F.R. § 541.22(c).

194. *Elmaghraby*, 2005 U.S. Dist. LEXIS 21434 at *13.

Iqbal sued not only the officials with whom he had direct contact at the Detention Center, but also the Warden of the Center, Federal Bureau of Prison Officials, FBI officials, FBI Director Mueller and Attorney General Ashcroft. Plaintiff alleged all defendants were personally involved in either creating or implementing the "hold and clear" policy that deviated from the administrative requirement that individual reviews be conducted to justify continued confinement in ADMAX-SHU. Iqbal further averred defendants were aware of the conditions of confinement in ADMAX-SHU and subjected Iqbal to those harsh conditions because of Iqbal's religious beliefs and race.

Since Ashcroft and Mueller were the two petitioners before the Supreme Court, this section will focus only on the district court's analysis of their motion to dismiss on the ground that there were insufficient allegations of supervisory liability.[195] Iqbal claimed Ashcroft and Mueller were liable for three constitutional violations. First, Iqbal averred his right to due process under the Fifth Amendment was violated by the policy of assigning him to ADMAX-SHU without an opportunity to challenge the continued administrative detention. Second, Iqbal asserted that defendants infringed the First Amendment by subjecting Iqbal to the harsher conditions of confinement because of his religious beliefs. Finally, Iqbal claimed confinement in ADMAX-SHU was based on his race in violation of the equal protection clause of the Fifth Amendment.

Iqbal did not seek to hold Ashcroft and Mueller liable on a theory of respondeat superior. Iqbal claimed that it was Ashcroft and Mueller who approved the "hold until cleared" policy.[196] Iqbal further alleged that while fully aware all detainees "of high interest" were housed in the most restrictive conditions possible until cleared by the FBI, Ashcroft and Mueller failed to promulgate deadlines for the clearance process.[197]

The district court did not deny Ashcroft and Mueller's motion to dismiss by finding they were vicariously liable for actions of subordinates. To the contrary, the court ruled "[a] government official may not be held liable for a constitutional tort under a theory of *respondeat superior*; instead a plaintiff must establish that the official

195. Ashcroft and Mueller also argued a) the district court lacked personal jurisdiction; b) they were entitled to qualified immunity; and c) a *Bivens* action should not be available because of "special factors," in particular (i) the origin of the claims in the events following September 11 and, (ii) immigration statutes provide a comprehensive remedial scheme for persons like Iqbal challenging detention pending renewal.

196. Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS at *11 (citing Complaint ¶ 69).

197. *Id.* at *11-12.

was personally involved in the alleged violations."[198] The district court ruled the complaint sufficiently alleged Ashcroft and Mueller were involved in the "creation and/or implementation of the hold and clear policy" that violated the Constitution.[199] Indeed, Iqbal pleaded Ashcroft was the "principal architect of the challenged policies."[200] Iqbal's averment, the district court noted, was supported by an April 2003 report of the Office of Inspector General. The report "suggests the involvement of Ashcroft [and] the FBI Defendants . . . in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities."[201] The court further observed Iqbal had alleged Ashcroft and Mueller were actually aware of the unusually restrictive conditions of confinement in ADMAX-SHU resulting from the policy they had created.

There is no indication Ashcroft or Mueller argued the culpability pre-requisite to supervisory liability eventually adopted by the United States Supreme Court. Ashcroft and Mueller posited the Complaint lacked sufficient nonconclusory, factual allegations of their personal involvement.[202] However, the district court's opinion gives no indication defendants argued that even if personally involved in the creation of the policy resulting in subordinate officials' physically depriving Iqbal of his constitutional rights, Ashcroft and Mueller could not be held liable unless their own conduct was sufficiently culpable to constitute an independent violation of the Constitution.

2. The Court of Appeals

As was true of the district court proceedings, neither Iqbal nor the court of appeals sought to impose liability on Ashcroft and Iqbal on a theory of vicarious liability. Quite the opposite, the Court of Appeals for the Second Circuit reasoned, "'[O]ur task is to consider whether, as a matter of law, the factual allegations and all reasonable inferences therefrom are insufficient to establish the required showing of personal

198. *Id.* at *37. *See also id.* at *46 ("As in §1983 actions, there is no *respondeat superior* liability in a *Bivens* action.").

199. *Id*. at *65.

200. *Id*. at *66, n.20. While finding sufficient allegation of personal involvement of Ashcroft and Mueller, the district court dismissed these claims against Bureau of Prison Officials. The court reasoned that, while enforcing the policies, the BOP Officials were not involved in the allegedly unconstitutional classification of all arrested Arab Muslim men as of "high interest" to the investigation of the September 11 attacks. *Id.* at *94. The district court also dismissed claims of unconstitutional searches against former Director of the Bureau Programs Kathleen Hawk Sawyer on the ground that the complaint did not allege her involvement in the searches. *Id.* at *86.

201. *Id.* at *66, n. 20.

202. *Id.* at *38.

involvement.'"[203] The court identified five available means of satisfying that requirement:

> The personal involvement of a supervisor may be established by showing that he (a) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated.[204]

Ashcroft and Mueller contended that Iqbal had failed to allege their personal involvement in the deprivation of procedural due process violation because the decision to continue to detain Iqbal in ADMAX-SHU was made by subordinate FBI officials.[205] The court of appeals rejected that argument. The court pointed to Iqbal's allegations that Ashcroft and Mueller "condoned the policy under which the Plaintiff was held in harsh conditions of confinement until 'cleared' by the FBI."[206] Because due process mandates additional procedural safeguards to prolong Iqbal's confinement in the ADMAX-SHU, the court concluded defendants' approval of the hold until cleared policy established the plausibility of their personal involvement for purposes of surviving a motion to dismiss.[207]

The court of appeals similarly found Iqbal had lodged sufficient allegations to establish the personal involvement of Ashcroft and Mueller in the deprivation of Iqbal's right to be free of religious and racial discrimination. Iqbal had asserted "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11 attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post September 11th investigation."[208] The fact that it was lower-level FBI officials who determined Iqbal was of high interest

203. Iqbal v. Hasty, 490 F.3d 143, 153 (2d Cir. 2007) (quoting Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 255 (2d Cir. 2001)).

204. Iqbal v. Hasty, 490 F.2d at 152.

205. *Id.* at 165.

206. *Id.*

207. *Id.* at 166. "Even as to Ashcroft and Mueller, it is plausible to believe that senior officials of the Justice Department would be aware of policies concerning the detention of those arrested by the federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies." *Id*. at 167. The court of appeals found the right to procedural due process was not clearly established and dismissed that claim on the ground of qualified immunity. *Id.* at 167-68.

208. *Elmaghraby*, 2005 U.S. Dist. LEXIS at *95 (quoting Complaint ¶ 52).

solely because of his race, ethnic background and religion did not obviate the supervisors' accountability for actions of those subordinates. Iqbal alleged Ashcroft and Mueller had condoned and agreed to this discrimination. The court of appeals reasoned this allegation was plausible, without pleading further facts, "because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11."[209]

The court of appeals' opinion offered no hint that Ashcroft and Mueller submitted that Iqbal should be required to prove they independently disregarded constitutional norms. Defendants had argued the allegations that subordinate FBI officials classified Iqbal of high interest because of race, ethnic background and religion were too conclusory to state a claim.[210] Nowhere did the court of appeals indicate Ashcroft and Mueller asserted that Iqbal was required to plead they shared the discriminatory animus of those subordinate FBI defendants. Rather, the court concluded liability could be imposed if Ashcroft and Mueller were found to have condoned or agreed to the discrimination of those under their command.[211]

B. Arguments of the Parties Before the Supreme Court

Ashcroft and Mueller presented two questions to the Supreme Court. The first question challenged the level of specificity required to plead a cause of action, the issue that has spawned so much commentary post-*Iqbal*.[212] The second question addressed the appropriate substantive standard for liability of supervisors. More particularly, Ashcroft and Mueller contended they could not be held liable for unconstitutional actions of subordinates of which they had constructive, but not actual notice.[213]

209. Iqbal v. Hasty, 490 F.3d at 175-76.

210. *Id.* at 175.

211. *Id.* at 175.

212. The first Question Presented was "Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, or condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purposely committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*." Petition for a Writ of Certiorari at 1, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015).

213. The second Question Presented was "Whether a cabinet-level officer or high ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Petition for a Writ of Certiorari at 1, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015).

Ashcroft and Mueller did not maintain they could be held liable only if their own actions were unconstitutional. Indeed, they conceded high-level officials could be sued not only for their direct involvement in deprivations of constitutional rights, but also for "their deliberate indifference in the face of information that the rights of others are being violated."[214] Ashcroft and Muller quarreled with the court of appeals' alleged imposition of liability for wrongdoing of which the Attorney General and FBI Director did not actually know. Supervisory liability in the absence of actual knowledge of malfeasance, they submitted, would be ineffective in deterring official wrongdoing.[215] Ashcroft and Mueller further claimed the Court had rejected supervisory liability under Section 1983 on a theory of constructive notice.[216] Finally, they cited the Court's precedents on the liability of municipalities under Section 1983, which generally require deliberate indifference to the risk that employees would infringe constitutional rights.[217] Under these precedents, constructive knowledge of wrongdoing would not give rise to liability. Instead, Ashcroft and Mueller averred, "[t]he proper standard for supervisory liability would preclude liability unless petitioners had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being of 'high interest' *and they were deliberately indifferent to that discrimination*."[218]

Iqbal made clear that he was not asking the Court to endorse vicarious liability of supervisory officials. To the contrary, *Iqbal* agreed "it is undisputed that supervisory *Bivens* liability cannot be established

214. Initial Brief of Appellants at 14, 44, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015).

215. *Id*. at 45-46.

216. *Id*. at 48-49. *See also* Transcript of Oral Argument at 8, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015) ("In [*Rizzo v. Goode*], the Court held a plaintiff under Section 1983 has to establish . . . an affirmative link between the acts of the subordinates and the higher level officials and we think that that substantive rule in Section 1983 at a minimum carries over to the *Bivens* context.").

217. Initial Brief of Appellants at 49-50, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015).

218. *Id*. at 50 (emphasis added). Ashcroft and Mueller tendered that same legal standard in their Reply Brief. Reply Brief at 22, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015). *See also* Petition for Writ of Certiorari at 14, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015) ("[T]he mere fact of supervisory authority is not an adequate basis for holding petitioners liable for alleged wrongdoing committed by others, absent facts showing that they had actual knowledge of a substantial risk of wrongdoing and that their failure to take action was the proximate cause of respondent's alleged injuries."). *See also* Petition for Writ of Certiorari 25-29, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015) (advocating supervisors may be liable only when they are deliberately indifferent, which requires actual, as opposed to constructive, knowledge of wrongdoing by subordinates).

solely on a theory of *respondeat superior*."[219] Instead, Iqbal asserted he had adequately pleaded two independent bases for liability resting on the personal involvement of Ashcroft and Mueller.[220] First, Iqbal advanced that Ashcroft and Mueller could be held liable for creating the policy that impermissibly classified detainees based upon race, religion and national origin. Alternatively, Ashcroft and Mueller were suable for their "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees."[221]

Iqbal stressed that the second theory of liability did not rest upon defendants' constructive, as opposed to actual, notice of subordinate wrongdoing. Iqbal asserted all parties agreed a supervisor is liable for his "knowing acquiescence to subordinates' unconstitutional conduct."[222] Iqbal argued the Second Circuit had not approved any theory of liability based upon constructive knowledge.[223] Rather, the court of appeals had found the Complaint alleged Mueller and Ashcroft "knew of, condoned and agreed to subject respondent to harsh conditions of confinement solely because of his membership in a protected class."[224]

C. The Supreme Court's Opinion

The Supreme Court reframed the issue to a choice between a theory of liability that Iqbal never advocated and a theory of defense never proffered by Ashcroft or Mueller. In a portion of its opinion spanning at most three paragraphs, the Court reasoned that in order to avoid *respondeat superior* liability, plaintiff must prove the supervisor acted with sufficient culpability to constitute his own violation of the Constitution.[225] As Iqbal asserted a deprivation of rights under the Equal Protection Clause, Ashcroft and Mueller could be liable only if they acted with the purpose to discriminate. The Court then held Iqbal's

219. Brief of Respondent at 46, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015). *See also* Transcript of Oral Argument at 18, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015) ("[T]here might be a respondeat superior theory [in a tort action against the president of Coca Cola] for liability, that we don't have access to in the *Bivens* arena, which we concede.").

220. *Id*. at 45. *See also* Transcript of Oral Argument at 14, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015) ("Your Honor, we have two different theories . . . . One is knowledge of and approval of, and the other is direction.").

221. Brief of Respondents at 45-46, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015).

222. *Id*. at 46. *See also id*. at 38 ("[P]etitioners concede that an allegation that petitioners knew and acquiesced in discriminatory conduct . . . would state a claim.").

223. *Id*. at 12. Iqbal made clear that he was not relying on a theory of gross negligence, and the Second Circuit did not apply that standard of culpability. *Id*. at 12-13.

224. *Id*. at 7.

225. *Ashcroft v. Iqbal*, 129 S. Ct. at 1948.

Complaint did not contain sufficient factual allegations to plausibly demonstrate Ashcroft and Mueller acted with the requisite discriminatory state of mind.

As Justice Souter observed in dissent, the Court *sua sponte* adopted a test for supervisory liability never briefed or argued by the parties.[226] All parties had agreed supervisors could be held liable for deliberate indifference to unconstitutional conduct of subordinates of which the officials were aware. The disagreement was whether Iqbal was resting upon, or could succeed upon, a theory of liability that held supervisors liable where they had constructive, but not actual, knowledge of subordinate misconduct.

Even Professor Sheldon Nahmod, the leading academic supporter of the outcome the Court reached in *Iqbal*,[227] was critical of the Court's acting unilaterally to require plaintiffs to prove the supervisor independently violated the Constitution:

> Whatever one thinks should be the proper standard for supervisory liability, it is surprising from a process perspective that the Court announced that it was adopting the constitutional approach to supervisory liability under the circumstances of no briefing and no argument. This is particularly troubling because the circuits for the most part have adopted the causation approach. At the very least, the Court should have explained itself much more than it did.[228]

Justice Souter's denunciation of the process by which the Court arrived at its new standard of supervisory liability applies equally to the court's *sua sponte* refashioning of the qualified immunity standard, insulation of state entities from accountability, and rejection of vicarious liability of local governments:

> Ashcroft and Mueller have, as noted, made the critical concession that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability.
>
> ****

226. *Id*. at 1957 (Souter, J., dissenting).

227. *See* Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982); SHELDON N. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 3.97 - 3.98 (4th ed. 2009).

228. Nahmod, *supra* note 225, at 292-93. Professor Kinports's companion piece in this Symposium effectively spells out the substantive critique of the *Iqbal* Court's insistence that victims of deprivations of constitutional rights must prove the supervisor violated the constitutional norm to prevail—arguments that were never presented to the Court. Kit Kinports, Iqbal *and Supervisory Immunity*, 114 PENN ST. L. REV. 1291 (2010).

> [B]ecause of that concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. This Court recently remarked on the danger of "bad decision making" when the briefing on a question is "woefully inadequate," yet today the majority answers a question with no briefing at all. The attendant risk of error is palpable.
>
> Finally, the Court's approach is most unfair to Iqbal. He was entitled to rely on Ashcroft and Mueller's concession. . . . By overriding that concession, the court denies Iqbal a fair chance to be heard on the question.[229]

VIII. CONCLUSION

The Supreme Court has consistently slighted constitutional and prudential constraints on its decision-making to shelter government and its officials from accountability for constitutional wrongs. The Court's readiness to adopt doctrines favoring government that were neither preserved below, lodged before the Court, nor presented by the facts stands in stark relief to the Court's strict application of Article III case and controversy requirements to deny equitable relief to persons complaining of constitutional violations. The Court's selective disregard and invocation of the four restraints on its role and power suggest the Court is pursuing an agenda at odds with the intent of the legislature that enacted Section 1983 to provide a broad remedy to citizens deprived of their constitutional rights.[230]

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229. *Ashcroft*, 129 S. Ct. at 1957 (Souter, J., dissenting). Justice Souter also noted that in light of the Court's finding that allegations of Ashcroft and Mueller's knowledge of subordinates misconduct were conclusory and thus could not sustain factual plausibility, it was unnecessary for the Court to impose a new standard of liability to resolve the case. *Id*. at 1958. Of course, the Court also could have disposed of the case by accepting the position actually advocated by Ashcroft and Mueller.

230. An inkling of the Court's ambition might be found in the following passage from Justice Scalia's dissenting opinion in Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting):

> As I have observed earlier, our treatment of qualified immunity under *§ 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. See *Burns v. Reed, 500 U.S. 478, 498, n. 1, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991)* (Scalia, J., concurring in judgment in part and dissenting in part). 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, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961),* which converted an 1871 statute covering constitutional violations committed "*under color of* any statute, ordinance, regulation,

On a practical level, persons who stand to be aggrieved by the Court's Section 1983 remedial jurisprudence have three options. First, a citizen deprived of his constitutional rights who will be denied compensation under the existing complex of Supreme Court decisions could ask the Court to overrule those decisions. However, the force of stare decisis is greatest in decisions construing legislation, such as the Court's interpretations of Section 1983.[231] Furthermore, the current Supreme Court is not likely to be a hospitable audience to arguments seeking to liberalize federal court remedies to victims of governmental wrongdoing, particularly where the defendants are state and local actors.[232]

> custom, or usage of any State," Rev. Stat. § 1979, *42 U.S.C. § 1983* (emphasis added), into a statute covering constitutional violations committed *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. See *Monroe, U.S. at 183; id., at 224-225* (FRANKFURTER, J., dissenting). As described in detail by the concurring opinion of Judge Silberman in this case, see *320 U.S. App. D.C. 150, 93 F.3d 813, 829 (1996)*, *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 from degenerating into a general tort law. (The present suit, involving the constitutional violation of misdirecting a package, is a good enough example.) Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.

See also Stefanie Lindquist, Joseph L. Smith and Frank Cross, *The Rhetoric of Restraint and the Ideology of Activism*, 24 CONST. COMMENT. 103, 124 (2007) (concluding from empirical analysis of decisions by individual Justices that "[c]onservative justices, like liberals, are ideological in their decision-making but temper their ideologies with respect and deference for certain institutions. Conservatives show deference to state decisions and those of the executive branch, while not extending this deference to actions of the national legislature."); Jeffrey Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN ST. L. REV. 1247 (2010) (identifying forces external to precedents that gave rise to *Iqbal* Court's sheltering of federal officials from judicial scrutiny).

231. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (noting "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."). The Court has on at least one occasion found its earlier interpretation of Section 1983 so at odds with the intent of Congress to provide a remedy to merit overruling the decision, rather than leave it to Congress to correct the error. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (overruling the holding of *Monroe v. Pape* that local governments are not persons under Section 1983). Of course, in that same case the Court legislated the rejection of vicarious liability that serves to deny redress to victims of constitutional wrongdoing.

232. Beyond its decision in *Iqbal*, in the same Term the Roberts Court further diminished the utility of Section 1983 by overturning the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001). In *Saucier*, the Court had mandated that courts ruling on claims of qualified immunity first determine whether, on the applicable record, the conduct averred by plaintiff violated the Constitution. If plaintiff satisfied the first step, the court next would decide whether that right was clearly established. In Pearson v. Callahan, 129 S. Ct. 808 (2009), the Court held the *Saucier* framework was no longer

A second option is to ask Congress to override the Supreme Court's *sua sponte* constructions of Section 1983. Members of both the House and Senate have proposed amendments to Fed. R. Civ. P. 8(a)(2) intended to overrule *Iqbal* and to restore the liberal pleading standard of *Conley v. Gibson*.[233] Congress inarguably has the power to enact legislation that re-allocates the risk of loss from deprivations of constitutional rights to ensure compensation to the citizen. In an era of record deficits, however, the prospect that the federal legislature voluntarily would subject state and local governments to additional fiscal obligations is slim to none.

A third option for citizens harmed by government misconduct requires neither overturning nor legislatively overriding existing doctrine. For the past twenty-five years, plaintiffs denied protection by the Supreme Court's narrow construction of rights provided by the United States Constitution have secured their civil liberty by turning to the guarantees of state constitutions. The same theoretical, structural and

mandatory. Instead, courts have discretion as to which of the two prongs of the analysis to examine first.

Under the new approach adopted by *Callahan*, courts may dispose of Section 1983 damage actions on the ground that the right violated was not clearly established without first deciding whether the government conduct was unconstitutional. By postponing to future cases the determination whether a right was violated, the courts extend the window in which government officials have successive "free bites" at depriving citizens of constitutional liberty before such rights become clearly established. *See* John C. Jeffries, *Reversing the Order of Battle in Constitutional Torts*, SUP. CT. REV. 4 (forthcoming 2010) (Virginia Public Law and Legal Theory Research Paper No. 2010-04), *available at* http://ssrn.com/a bstract=1547237 (arguing that for constitutional rights that cannot be vindicated other than through civil damage actions, *Pearson* may "inhibit the development of constitutional doctrine."); Goutam U. Jois, Pearson, Iqbal *and Procedural Activism* 27-28, *available at* http://ssrn.com/abstract=1472485 (2008) (noting *Iqbal* and *Pearson* harm civil rights plaintiffs by penalizing both pleadings that are too general and complaints that are too fact specific). *See also* Gene R. Nichol, *The Roberts Court and Access to Justice*, *available at* http://ssrn.com/abstract=1551584 (arguing Article III standing decisions "aid the powerful and hinder the powerless"); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L.J. 191 (2010); Spencer, *supra* note 4, at 200 (arguing *Iqbal* "reflects . . . an attitude of hostility and skepticism towards supplicants with alleged grievances against the government"); Jois, *supra*, at 5-6 (arguing *Iqbal* represents conservative judicial activism to diminish access to civil rights remedies); Victor C. Romero, *Interrogating* Iqbal*: Intent, Inertia, and a (lack of) Imagination*, 114 PENN ST. L. REV. 1419 (2010) (arguing *Iqbal* "signals the Court's reluctance to intervene in matters (even tangentially) related to national security even if the government's allocation of burdens and benefits perpetuates societal racial and gender privileges"); Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1489 (2010) (contending *Iqbal* perpetuates lack of accountability for selective discrimination against foreign nationals based on race, religion, ethnicity and political ideology).

233. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009) (sponsored by Rep. Jerrold Nadler (D.-N.Y.)); Notice Pleading Restoration Act of 2009, S. 504, 111th Cong. 2009 (introduced by Sen. Arlen Specter (D.-Pa.)).

practical reasons that entitle a state court to interpret the state constitution to afford more generous rights to its citizenry empower those courts to escape the shadow of the Court's remedies jurisprudence. Actions for violation of the state constitution are not founded in Section 1983. Hence, the Court's interpretation of the remedial scheme prescribed by Section 1983 is not binding on state courts discerning remedies available under state constitutions, or state statutes enforcing those constitutions.[234]

Understanding the Supreme Court's disregard of the acknowledged limits on its power and role provides an additional argument in favor of state court departure from the Supreme Court's risk allocation when seeking remedies for violation of the state constitution. The weight of stare decisis attached to a decision is diminished where the court acts on an issue without the advice of the lower courts and counsel.[235] Advocates seeking compensation for harms caused by violation of state constitutions are well advised to recount how the obstacles to relief under Section 1983 are founded in the Supreme Court's issuance of edicts on grounds that were neither litigated below nor argued to the Court by the parties.

234. Plaintiffs' counsel could join a Section 1983 action for violation of the federal constitution in the state court action. *See* Haywood v. Drown, 129 S. Ct. 2108 (2009) (states may not divest their courts of general jurisdiction from entertaining Section 1983 actions). The state's procedural rules may afford a more generous standard of notice pleading. Plaintiffs also might consider utilizing presuit discovery available under state rules of procedure. *See* Dodson, *supra* note 4.

235. *See Monell*, 436 U.S. at 647 (Powell, J., concurring) ("[W]e owe somewhat less deference to a decision that was rendered without benefit of full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to a holding may be accorded less weight in subsequent cases.").