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Sovereign Immunity -- Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities

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ing implied that some states achieved political stability by other means, the Court should have inquired into the nature of these alternatives. By not requiring the State to utilize less drastic means, the Court went a step further in increasing the latitude of the legislature's authority.

The significance of the *Storer* decision lies in its implications for future franchise cases. It suggests that, when election laws that do not directly and blatantly infringe the rights of voters are challenged, the Court will lower the justification hurdle that the state must surmount. As a result, it is likely that the Court will approve electoral restrictions that accomplish indirectly what it was previously declared could not be done directly. The *Storer* decision indicates particularly that when candidacy restrictions are involved, the Court will apply a more lenient standard of evaluation. Such an approach by the Court seems unwise, for little has been gained if a soldier in Texas[68] or an indigent in Virginia[69] is allowed into the voting booth only to discover that those candidates representing his point of view have been excluded from the ballot. James Madison recognized this critical relationship between rights of candidates and those of voters when he said, "A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect."[70]

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Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities

In developing satisfactory judicial approaches to the section 1983 remedies of the Civil Rights Act,[1] federal courts have encountered con-

its high degree of interparty raiding, and yet it places no requirement of prior disaffiliation on independent candidates. Under N.C. GEN. STAT. § 163-122 (Supp. 1973), a potential independent candidate must file an affidavit stating that he "*does not* affiliate with any political party" (emphasis added). There is no further requirement that he must not have affiliated with a party at any time in the past.

68. *See* Carrington v. Rash, 380 U.S. 89 (1965).

69. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

70. 5 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 404 (1845).

1. 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

flicting policy considerations. Effective redress for injured parties against officials "acting under color of" state law has been curtailed by various governmental immunities designed to protect officials and to promote efficient, decisive government action.[2] Federal courts have also guarded against overburdening the federal judicial structure and against unnecessarily preempting traditional state torts.[3] These considerations have prompted three significant judicial limitations on section 1983 actions:[4] (1) a narrow interpretation of the word "person" in the act;[5] (2) a strict construction of the eleventh amendment's sovereign immunity implications, which has severely limited suits against the state;[6] and (3) the development of various personal immunities.

Although section 1983 actions against governments have thus been restricted, the United States Supreme Court in *Scheuer v. Rhodes*[7] unanimously[8] reaffirmed the section's vitality in damage actions against individuals who have allegedly abused governmental executive powers. In suits brought on behalf of three students killed in 1970 at Kent State University, the Court held that neither the eleventh amendment nor an absolute executive immunity sheltered state officials with discretionary[9] responsibilities from personal liability for unconstitutional actions. Although some major issues remain unsettled,[10] *Scheuer* signals progress in reconciling section 1983 damage remedies with the policies of governmental immunity.

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to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. *See* text accompanying note 30 *infra.*

3. *See* notes 50-56 and accompanying text *infra.*

4. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1, 4-5 (1974).

5. *See* Note, *Federal Jurisdiction—Municipal Immunity under the Civil Rights Act—Closing the Loopholes,* 52 N.C.L. REV. 1289 (1974).

6. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1, 8-13 (1972) traces the interpretative expansion of the eleventh amendment from its primary purpose, that of protecting states from the debt claims of citizens of other states, into a broad doctrine of sovereign immunity.

7. 94 S. Ct. 1683 (1974).

8. The decision was 8-0, with Mr. Justice Douglas not participating.

9. Courts have traditionally attempted to distinguish between "ministerial" (or "non-discretionary") duties and "quasi-judicial" (discretionary) duties. An early case defined a ministerial duty as one in respect "to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498 (1866). On the other hand, a discretionary duty is one in which an official has "a power and duty to make a choice among valid alternatives." Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 HARV. L. REV. 209, 218 (1963).

10. *See* text accompanying note 47 *infra.*

The tragedy in question occurred on May 4, 1970, when Ohio National Guardsmen fired into a group of students at Kent State University, killing four and injuring nine. Section 1983 actions were filed on behalf of three deceased students,[11] joining as defendants in their individual capacities Ohio Governor Rhodes,[12] the guard adjutant and assistant adjutant generals, various other guard personnel and the Kent State University president. Allegedly, the defendants willfully caused an unnecessary guard deployment and ordered illegal actions resulting in the student deaths.[13]

Before answers were filed,[14] the district court dismissed the actions[15] because they were against the state and therefore barred by the eleventh amendment. The Sixth Circuit Court of Appeals affirmed,[16] finding alternatively that an unqualified executive immunity protected the defendants. The Supreme Court, however, reversed the dismissals as "inappropriate" and held that the claimants were "entitled to offer evidence to support [their] claims."[17]

In considering the lower courts' sovereign immunity arguments, the Supreme Court reaffirmed earlier decisions that the eleventh amendment precluded claims against the state as the named defendant or the defendant in fact.[18] Relying on *Ex parte Young*,[19] the Court

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11. A special counsel to the attorney general of Ohio stated that twenty-two civil suits had been commenced claiming more than ninety-nine million dollars in damages. Howarth, *Sovereign Immunity—An Argument Pro*, 22 CLEV. ST. L. REV. 48 (1973). Many suits encountered difficulties. One was dismissed on the ground that the state could not be sued in tort. Krause v. Rhodes, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), *rev'd*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 409 U.S. 1052 (1973). In another, the Court held that a suit for injunctive relief against premature deployment of the guard by government officials and for a declaration that a state statute was unconstitutional was not justiciable under the circumstances. Gilligan v. Morgan, 413 U.S. 1 (1973).

12. Governor Rhodes was sued for initially calling out the guard and for allegedly inciting unconstitutional activity later. Brief for Petitioners at 11-12, 59-60, Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

13. 94 S. Ct. at 1686.

14. Two proclamations by the governor were attached to the motion to dismiss, one ordering the guard to protect against truck strike violence and the other recounting conditions on the Kent State campus. *Id.*

15. Krause v. Rhodes, Civil No. C 70-544 (N.D. Ohio, June 2, 1971); Miller v. Rhodes, Civil No. C 70-816 (N.D. Ohio, June 2, 1971); Scheuer v. Rhodes, Civil No. C 70-859 (N.D. Ohio, June 2, 1971).

16. Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972) (2-1 decision).

17. 94 S. Ct. at 1686.

18. *Id.* at 1687, *citing* Edelman v. Jordan, 94 S. Ct. 1347 (1974).

19. 209 U.S. 123 (1908). This case, which permitted suit for injunctive relief against the attorney general of Minnesota to prohibit enforcement of an allegedly unconstitutional statute, attempted to reconcile the eleventh amendment prohibition of suits against the state with the fourteenth amendment prohibition of constitutional in-

nevertheless concluded that "the Eleventh Amendment provides no shield for a state official" confronted by a section 1983 claim. The Court reasoned that

> when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct."[20]

Although both *Young* and *Scheuer* concerned state officers with considerable discretionary powers, the two cases arguably can be distinguished because *Young* was a federal action seeking an injunction rather than monetary damages. Nevertheless, *Scheuer* concluded that, as long as recovery is not sought from public funds, executive officials whose discretionary conduct[21] violates section 1983 rights can be sued for damages in their individual capacities.[22]

In similarly rejecting the court of appeal's theory of executive immunity,[23] the Supreme Court indicated that immunities were judicial value judgments. Executive immunity, for example, represented " 'an impression of a policy designed to aid in the effective functioning of government.' "[24] Unlike absolute legislative[25] and judicial[26] immunities, however, unqualified executive immunities are not firmly en-

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fringements occurring "under color of" state law. This case was the precedent for actions against school boards in the important desegregation cases of the 1950's.

20. 94 S. Ct. at 1687, *quoting Ex parte* Young, 209 U.S. 123, 159-60 (1908).

21. The three cases cited to support the Court's conclusion involved public officials with relatively little discretionary power. In Myers v. Anderson, 238 U.S. 368 (1915), an election official violated section 1983 by enforcing a "grandfather clause" in Maryland that effectively denied a black the right to vote. Damage actions in voting cases have been previously justified by the special nature of the constitutional deprivation. *See* McCormack, *supra* note 4, at 60-64. The other two cases, Monroe v. Pape, 365 U.S. 167 (1961), and Moor v. County of Alameda, 411 U.S. 693 (1973), concerned alleged brutality by law enforcement officials.

22. Although courts might recognize an absolute sovereign immunity for states under the eleventh amendment depriving federal courts of subject-matter jurisdiction, there is no jurisdictional bar to section 1983 actions against state executive officials in their individual capacities. The qualified immunity enjoyed by executive officials is an affirmative defense or privilege, more accurately relating to the claim's merits than to a court's jurisdiction. *See* Engdahl, *supra* note 6, at 41.

23. "It can hardly be argued at this late date that under no circumstances can the officers of state government be subject to liability under [section 1983]." Scheuer v. Rhodes, 94 S. Ct. 1683, 1690 (1974).

24. Barr v. Matteo, 360 U.S. 564, 572-73 (1959), *quoted in* Scheuer v. Rhodes, 94 S. Ct. 1683, 1689 (1974). *Barr* involved a libel action rather than a section 1983 infringement.

25. 94 S. Ct. at 1690, *citing* Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

26. 94 S. Ct. at 1690, *citing* Pierson v. Ray, 386 U.S. 547, 554 (1967).

trenched in law and judicial history.[27] Since Congress did not intend for section 1983 to abolish all common law immunities[28] or to be completely circumscribed by absolute immunities,[29] the Court initiated a search for a middle ground. Citing previous immunity justifications such as possible injustice to officials who are required to make discretionary decisions and harm to efficient, effective government,[30] the Court noted that the concept of immunity presupposes that "it is better [for an official] to risk some error and possible injury from such error than not to decide or act at all."[31]

Despite such considerations, the Court concluded that judicial review of discretionary executive conduct allegedly violating constitutional rights was imperative. Otherwise, for example, a governor's determination of the "fact" of an insurrection to justify his actions would make "the fiat of a state governor, and not the Constitution of the United States"[32] the supreme law of the land. To prevent section 1983 from being "drained of meaning,"[33] the Court proposed a qualified immunity for executive-branch personnel. The immunity would be

> dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared. . . . It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith

27. 94 S. Ct. at 1691. The Court noted that unlike executive actions, judicial errors may be reviewed and corrected on appeal. *Id.* at 1690. Judge Celebrezze examined the status of executive immunities in greater detail in Krause v. Rhodes, 471 F.2d 430, 454 (6th Cir. 1972) (dissenting opinion).

28. 94 S. Ct. at 1690.

29. *Id.* at 1692.

30. *Id.* at 1688.

31. *Id.* at 1689. In Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), Judge Learned Hand held that the United States Attorney General and other federal officials enjoyed absolute immunities when sued by the plaintiff allegedly for falsely arresting him as an enemy alien. Hand reasoned that it was "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.* Although *Scheuer* appears to have approved Hand's logic, the *Gregoire* result has probably been overruled, at least concerning section 1983 actions, by *Scheuer* and Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), *on remand from* 403 U.S. 388 (1971). Because Bivens held that federal officials were subject to suit under section 1983, one commentator suggested, even before *Scheuer*, that *Bivens* might have overruled *Gregoire*. Engdahl, *supra* note 6, at 54. This implies that Hand's logic in *Gregoire*, while still compelling, may no longer represent overriding considerations.

32. Sterling v. Constantin, 287 U.S. 378, 397-98 (1932), *quoted in* Scheuer v. Rhodes, 94 S. Ct. 1683, 1692 (1974). In *Sterling* the Governor of Texas justified seizure of certain oil wells because of an insurrection. Rejecting the argument that the Governor's determination was unreviewable, the Court examined the facts involved, determined that the Governor's actions were indefensible, and granted the plaintiff's request for a restraining order.

33. 94 S. Ct. at 1692.

> belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[34]

The lower courts were admonished not to presume either an official's good faith or the existence of reasonable justification for the actions taken.[35] Although distinguishing between duties involving little discretion and those in which the range of possible decisions is "virtually infinite,"[36] the Court rejected any categorical distinction between ministerial and discretionary functions as a basis for the immunity.[37] Concentrating instead on the nature of the particular duties allegedly abused, the Court incorporated the subjective "good faith" and objective "reasonableness" standards of *Pierson v. Ray*[38] into a qualified immunity for discretionary actions. Thus, the extent of the immunity would vary with the scope of discretion dictated by the circumstances of the case.[39]

The Court's proposed standards reflect the complicated considerations inherent in damage actions involving official abuse of discretionary powers. As an official's range of viable options increases, it becomes more difficult to formulate clear-cut grounds for liability.[40] In determining whether an official acted within the scope of his permissible discretion, lower courts have agreed with the Supreme Court that

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34. *Id.*

35. *Id.* at 1693.

36. *Id.* at 1691.

37. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 297-301 (1937) criticizes such distinctions as tests in determining administrative liability.

38. 386 U.S. 547, 557 (1967).

39. Judge Celebrezze's two-tier analytical framework would be adaptable to the Court's formation—if the actions were "within the range of discretionary measures which were justified by the exigencies of the situation," defenses of good faith or honest belief became relevant; if outside that range, the defenses were not allowed. Krause v. Rhodes, 471 F.2d 430, 463 (6th Cir. 1972) (dissenting opinion). The initial determination is whether the action was within the permissible scope of discretion. In one case, for example, involving libel rather than a section 1983 violation, immunity was granted for statements made during the school board's investigation of a superintendent, but comments to newspaper reporters were ultra vires and therefore not protected. Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

40. The Fifth Circuit Court of Appeals recently had to consider grounds for liability for executive officials with differing levels of responsibility in Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). The court found a superintendent of a prison farm personally liable when a trusty guard that he appointed shot an inmate. The ground for liability was the superintendent's failure adequately to train and supervise the guard, who was twenty-three years old, had only a fourth-grade education, and had been previously convicted of assault with intent to kill. *Id.* at 821-22. Despite their awareness of the superintendent's policies, however, members of the farm's board of supervisors were deemed not liable for a "good faith, reasonable choice among valid policy alternatives, even if an unwise one. . . ." *Id.* at 831.

certain governmental responsibilities entail broad discretion.[41] Governor Rhodes' initial deployment of the guard may well have been a reasonable choice among valid alternatives unless, however, he were aware of the guard's purported unusual propensity for violence.[42] He might also be liable if he later incited the use of unnecessary force at Kent State.[43] It would be more difficult to find the Kent State president's conduct actionable merely because of his passive acquiescence in the governor's apparent authority.[44]

Despite greater fairness to section 1983 claimants and increased official accountability for unconstitutional acts, the conflict between these important considerations and the policy justifications for immunity remains unresolved. Fear of personal liability still results in indecision, and defending claims is highly burdensome.[45] On the other hand, broad immunities can bar plaintiffs from any effective avenue of redress.[46]

Scheuer's attempt to reconcile these competing policy considerations also raises some uncertainties[47] and problems. First, analysis of the immunity solely in terms of the reasonableness of the defendant's actions arguably ignores the seriousness of the alleged offense.[48] This

41. *Id.* at 831.

42. The Ohio National Guard in 1970, according to one charge made after the Kent State tragedy, was particularly prone to violence because of the nature of their training and use of loaded weapons. Gilligan v. Morgan, 413 U.S. 1, 4 (1973). *Roberts*, for example, suggested that the board of supervisors members might have been personally liable on charges of cruel and unusual punishment under section 1983 if they had been aware of certain disciplinary practices at the camp. Roberts v. Williams, 456 F.2d 819, 832 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). Although Governor Rhodes' knowledge of the guard's propensity for violence would not be actionable, that knowledge might suggest the unreasonableness of dispatching the guard to Kent State.

43. *See* note 12 *supra*.

44. Personal liability for educators is an increasing concern. One commentator believes that members of a board of regents in general are not "proper parties" to a damage action. McCormack, *supra* note 4, at 16.

45. *See* text accompanying note 30 *supra*.

46. A governor, for example, may be immune for reasonably choosing between valid policy alternatives and soldiers immune in carrying out their duties in a reasonable manner. Thus no recovery would be possible even if a plaintiff unquestionably was deprived of constitutional rights by the combination of actions.

47. One such uncertainty concerns the applicability of the *Scheuer* qualified immunity standards to equitable remedies. Unlike damage actions, equity suits under section 1983 generally involve the performance or nonperformance of official duties without the attendant threat of extensive personal liability to officials. Considerations of indecisive action or injustice to officials that justify executive immunities in damage actions are much less relevant in equity suits. Justification for a qualified immunity might exist, however, because of the potentially disruptive effect of equity suits on government and the general reluctance of courts to review fully the constitutionality of every decision of executive branch officials.

48. One commentator would assess executive immunity claims in terms of the

particular shortcoming, however, may be more apparent than real; the Court's assessment of the reasonableness of an official's conduct would certainly take into account the likelihood that such conduct would induce unnecessary violence.[49]

In addition, *Scheuer* may encourage suits by claimants with minor, or even feckless, grievances.[50] Therefore, a narrower definition of the claims permitted under section 1983 possibly should accompany the lowering of the immunity barrier.[51] Recognizing the fundamental change in federal-state relations resulting from section 1983,[52] Congress carefully limited recoveries to "rights, privileges, and immunities" secured by the Constitution.[53] Since the act was designed to supplement rather than to supplant traditional state remedies,[54] the rapid expansion of the scope of actions permitted under the section has elicited criticism.[55] Greater care in restricting these actions would protect both the federal courts and government officials from relatively minor claims that should not be considered "constitutional torts."[56]

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character and severity of the plaintiff's injury, the existence of alternative remedies, the court's capacity to evaluate the propriety of the official's acts and the effect of liability on effective administration. Jaffe, *supra* note 9, at 219.

49. One aspect of determining reasonableness should be the foreseeability of types of injuries that a certain action might produce, with actions risking unreasonable injuries being outside the scope of permissible discretion. Resort to military action, for example, "has traditionally been viewed with suspicion and skepticism." Scheuer v. Rhodes, 94 S. Ct. 1683, 1691 (1974).

50. In Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964), for example, the plaintiff named forty-four different defendants representing almost every level of government service. The complaint was dismissed on traditional immunity grounds.

51. One list of wrongs actionable under section 1983 included violations of speech, assembly, religion, privacy; racial discrimination in labor, education, housing, public accommodations, and voting; economic discrimination, the right to bear arms, freedom from unreasonable searches and seizures, the right to vote and to participate in political processes; due process in criminal investigating, indictment, trials and appeal; and equality in legislative and congressional apportionment. Comment, *Civil Actions for Damages under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015, 1021 (1967).

52. The "legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights." Mitchum v. Foster, 407 U.S. 225, 242 (1972), holding that section 1983 provided an authorized exception to the anti-injunction statute.

53. Monroe v. Pape, 365 U.S. 167, 183 (1961).

54. *See* McCormack, *supra* note 4, at 7.

55. Although immunities are one means of limiting redress, the policy considerations supporting immunities differ from those justifying restrictions on section 1983 actions. The goals of the latter are avoidance of unnecessary preemption of traditional state torts and the protection of the federal courts from a flood of relatively minor claims. Qualified immunities, on the other hand, exempt tortfeasors from personal liability whenever certain conditions are met, regardless of the seriousness of the violation and the availability of redress from other sources.

56. *Compare* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 324, 327 (1965), *with* McCormack, *supra* note 4, at 7-10. Shapo, suggesting the dangers of preempting state laws, would limit actionable in-

Another means of guarding against undue harassment of officials would be to redefine the traditional role of qualified immunities. The Supreme Court's emphasis on reasonableness[57] to justify executive conduct is analagous to the "reasonable man" standard in torts. Thus, a "reasonable official" standard might be adopted, with the scope of permissible discretion inherent in the office becoming an important consideration in determining the reasonableness of the conduct. In addition, rather than a defendant asserting and proving an affirmative defense, the section 1983 plaintiff might be required to overcome a presumption of reasonableness of the official's conduct.[58]

Even though unnecessary harassment of executive officials can be minimized,[59] the detente between executive immunities and section 1983 actions remains fragile. As long as governments summarily deny responsibility for wrongful actions of their employees,[60] the *Scheuer* approach may nevertheless be the best available. Since reliance on the individual offender for redress in these situations is inadequate, government responsibility is imperative as the only feasible means of reconciling the conflicting policy considerations between executive immunities and section 1983 actions.[61] If governments would acknowledge the common-law assurance of state indemnity for damages incurred by a public official's exercise of good faith judgment,[62] restraints on decisive action would clearly be reduced. A government's shielding

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juries to "outrageous" situations. Stressing that the federal remedy is supplementary to state remedies, McCormack criticizes Shapo's definition of constitutional torts as being too dependent on emotion and, instead, would emphasize the form of the remedy and a plaintiff's reasonable belief that the officer was pursuing a governmental objective.

57. Scheuer v. Rhodes, 94 S. Ct. 1683, 1692 (1974).

58. Caution should be taken, however, not to make the plaintiff's burden too onerous. Summary judgment can be another valid means of protecting defendants from frivolous claims, but the Court appears concerned that section 1983 claimants not be dismissed prematurely. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

59. Other means of protecting government officials are also available. Governments could agree to reimburse officials for defense expenses if the officials were ultimately exonerated or if they could demonstrate good faith. The greater use of administrative boards and procedures, though possibly of little help in emergency situations, would protect plaintiffs' rights and provide a convenient forum for presentation of the reasons for an official's actions. *See* Jennings, *supra* note 37, at 306-14, for a thorough analysis of administrative processes that could be established.

60. McCormack, *supra* note 4, at 29, concluded that "vicarious liability would be an effective deterrent, and therefore it is unfortunate that the Court dismissed it out of hand" in Monroe v. Pape, 365 U.S. 167 (1961).

61. There is little reason now for states not to acknowledge financial responsibility for their employees' actions. "Given the availability of insurance and the ability of states to raise revenues, there is no reason to protect the state from the legitimate claims of its constituents." Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548, 558 (1972).

62. Jaffe, *supra* note 9, at 216.

of both the individual official and itself from suit may also deny a due process right to redress under section 1983.[63] As a corollary, not only should at least one defendant be amenable to suit but, in the interests of justice, he should also be financially responsible.

Although Chief Justice Burger has recommended a viable format for congressional action in this area,[64] legislatures have been unwilling to take the needed steps.[65] Although the Court might understandably prefer that legislative action break the sovereign immunity barrier,[66] Congress arguably has already expressed its intent in enacting section 1983. Since judicial value judgments created the initial expansion of state immunities, the Court should possibly re-examine those judgments and affix "respondeat superior" responsibility to governments for unconstitutional employee actions.[67] *Scheuer*, however, may have accomplished this more subtly. With officials subject to personal liability, governments may find that to attract and keep qualified executive personnel, they will have to protect those officials from expensive damage actions either through assurances of indemnity or by consenting to suit.[68]

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63. Verkuil, *supra* note 61, at 597.

64. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421-23 (1971) (dissenting opinion). In launching an attack on the exclusionary rule, the Chief Justice suggested the creation of an effective means of redress for citizens whose rights are violated by unlawful fourth amendment conduct by government officials. These suggestions for a remedy against the government itself appear adaptable to section 1983 violations:

> (a) a waiver of sovereign immunity as to illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute. . . .

Id. at 422-23.

65. Governments have generally refused to acknowledge liability for employee actions. *See* Engdahl, *supra* note 6, at 18, 55-56. Engdahl concluded that even the right to indemnity would provide little solace when the state refused to be sued for indemnity. He suggested that the replacement of older nineteenth century immunity standards, which were quite harsh on executive officials, would be unqualifiedly beneficial if effective alternative means for redress were available for aggrieved plaintiffs.

66. Previous eleventh amendment interpretations, the long existence of the immunities, and the considerable financial burden that might be felt by governments would certainly help explain the Court's reluctance.

67. The Court has not refrained from imposing financial burdens on governments when constitutional rights were at stake. In Griffin v. Board of Educ., 377 U.S. 218 (1964), for example, the Court demanded that public schools be kept open even if local taxes had to be raised.

68. State and federal governments will be affected because the *Scheuer* standards have already been held applicable to federal executive officials. States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (1974).

The Supreme Court has taken important steps toward assuring that section 1983 claims against executive officials will have a full hearing in federal courts. Initiating a reevaluation of governmental immunity justifications, the Court has also proposed a workable qualified immunity standard for alleged abuses of discretionary power. The Court's concern for the plight of citizens deprived of constitutional rights under color of state law hopefully will reveal the inadequacy of relying solely on individual officials for compensation. The Court has recognized the necessity for individual accountability in section 1983 actions. The next step, whether taken by the legislature or the judiciary, is to assure that the accountability is extended to the government. Employer responsibility for the actions of its employees, especially when the employer has clothed those actions in the legitimacy of state law, cannot justifiably end where government employment begins.

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