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The Meaning of under Color of Law

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THE MEANING OF “UNDER COLOR OF” LAW†

*Steven L. Winter**

INTRODUCTION	324
I. THE PROBLEM AT THE HEART OF SECTION 1983	334
II. THE HISTORICAL MEANING OF “UNDER COLOR OF” LAW	341
A. <i>Sheriffs, Sureties, and the “Colour of Their Office”</i> ..	342
1. <i>English Antecedents</i>	342
2. <i>American Applications</i>	346
B. <i>The Federalism Dimension</i>	352
C. <i>Under Color of Frankfurter’s Law</i>	362
1. <i>The Political-Doctrinal Context</i>	362
2. <i>Monroe and the Moment of Truth</i>	376
III. METAPHOR AND THE MEANING OF SECTION 1983	384
A. <i>Why Metaphor?</i>	384
B. <i>What Can Be Done by “Color”?</i>	389
C. <i>“Amphibians” and the Rule of Law</i>	396
D. <i>Interpreting Section 1983</i>	404
IV. PENTIMENTO	407

Old paint on canvas, as it ages, sometimes becomes transparent. When that happens it is possible, in some pictures, to see the original lines: a tree will show through a woman’s dress, a child will make way for a dog, a large boat is no longer on an open sea. That is called pentimento because the painter “repented,” changed his mind. Perhaps it would be as well to say that the old conception,

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* Professor, University of Miami School of Law. B.A. 1974, Yeshiva University; J.D. 1977, Columbia. — Ed. I am grateful to Tony Amsterdam, Bruce Ackerman, Akhil Amar, Jan Deutsch, Pat Gudridge, Mark Johnson, George Lakoff, Burke Marshall, Henry Monaghan, Jeremy Paul, Pierre Schlag, Napoleon Williams, Lynn Winter, and the participants in the legal theory workshops at the Universities of Colorado and Cincinnati for helpful comments and suggestions, to Terry Tracht and Mark Richardson for their research assistance, and to Charles for not quite destroying everything. Special thanks to Paul Kahn for the loan of his office and to the staff of the Yale Law Library for support services above and beyond the call.

For Tony: inspired teacher, dedicated colleague, devoted friend.

replaced by a later choice, is a way of seeing and then seeing again[:]. . . to see what was there . . . once, what is there . . . now.

— Lillian Hellman, *Pentimento*¹

INTRODUCTION

Section 1983 provides redress for constitutional violations committed “under color of” state law.² In *Monroe v. Pape*,³ the Court interpreted this phrase to include deprivations of constitutional rights caused by state officers acting either without authority or, what is much the same, in violation of state law. In so holding, the Court followed its earlier decision in *United States v. Classic*,⁴ which had interpreted the “under color of” state law language of section 2 of the 1866 act, the criminal civil rights provision.⁵ In both cases, the Court understood the statutory phrase to refer to “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”⁶

In dissent, Justice Frankfurter asserted that “[u]nder color’ of law meant by authority of law in the nineteenth century.”⁷ More recently, Eric Zagrans has reviewed the legislative history of section 1983 and concluded “[without] doubt that section 1983 was meant to create liability only for acts done with state authority.”⁸ On his reading, section 1983 was only intended to abrogate unconstitutional state laws.

1. LILLIAN HELLMAN, *PENTIMENTO* 1 (1973).

2. 42 U.S.C. § 1983 (1988). Originally the first section of the Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, it currently provides:

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

3. 365 U.S. 167, 183-87 (1961), *overruled by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (overruling *Monroe* only “insofar as it holds that local governments are wholly immune from suit under § 1983”).

4. 313 U.S. 299, 325-29 (1941).

5. 18 U.S.C. § 242 (1988). Originally the second section of the first civil rights act, Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27, this statute was the model for § 1983. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (statement of Rep. Shellabarger).

6. *Classic*, 313 U.S. at 326, *quoted in Monroe*, 365 U.S. at 184.

7. *Monroe*, 365 U.S. at 244 (Frankfurter, J., dissenting).

8. Eric H. Zagrans, “Under Color of” What Law: *A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 559 (1985). Under current doctrine, official authorization by rule, policy, or custom is a necessary element of a § 1983 case only if the plaintiffs are attempting to establish municipal liability under *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). For reasons I shall explore below, the Court has experienced some difficulty defining the parameters of *Monell*’s “policy or custom” requirement. *See infra* text accompanying notes 415-45.

“As a matter of statutory construction,” Zagrans proclaimed, “*Monroe* is flatly wrong.”⁹

Nothing could be further from the truth. The Frankfurter-Zagrans misinterpretation of section 1983 is not only wrong, but wildly ahistorical. Indeed, Frankfurter’s assertion concerning the nineteenth-century meaning of the phrase *under color of law* is unsupported by citation to any authority.¹⁰ Even so, Frankfurter at least appreciated that there was a historical understanding of the phrase and that this understanding is relevant to the question of statutory interpretation. In contrast, Zagrans’ analysis of the legislative history proceeded in a historical vacuum: it is as if the phrase originated in the Reconstruction civil rights statutes, as if its legal significance were solely a matter of the intention of the Congress that so employed it.¹¹

In fact, however, the phrase *Colour of his Office* appears as early as the thirteenth century, in an English statute providing “[t]hat no Escheator, Sheriff, nor other Bailiff of the King, by Colour of his Office, without special Warrant, or Commandment, or Authority certain pertaining to his Office, disseise any Man of his Freehold, nor of any Thing belonging to his Freehold.”¹² In his annotation of the statute, Sir Edward Coke explained the statutory phrase *Per colour de son office*:

9. Zagrans, *supra* note 8, at 502.

10. *Monroe*, 365 U.S. at 244 (Frankfurter, J., dissenting).

11. This assumption also is implicit in the majority opinion in *Monroe*, which exhaustively canvassed the same legislative debates that Zagrans and Frankfurter considered dispositive. *Monroe*, 365 U.S. at 172-85. Without more, however, the legislative histories of § 1983 and its predecessor statute are remarkably unilluminating. PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 940 (2d ed. 1989) (“[T]he legislative history is often less clear than it is made out to be. In *Monroe* and *Monell*, for example, despite a seemingly thorough search, neither side was able to produce the ‘smoking gun’ that clearly demonstrated legislative intent one way or the other — not for the meaning of ‘under color of’ law and not for the scope of the word ‘person.’”); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 *STAN. L. REV.* 51, 55 (1989) (“Both the Court’s and Zagrans’ reading of the legislative history are plausible, but for that very reason, both are open to dispute.”); *cf. Monroe*, 365 U.S. at 193 (Harlan, J., concurring) (“Those aspects of Congress’ purpose which are quite clear . . . seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority . . .”).

Justice O’Connor indulges a similar ahistorical assumption in *Mesa v. California*, 489 U.S. 121 (1989), when she says that “[t]he critical phrase ‘under color of office’ first appeared in the [removal] Act of July 13, 1866.” 489 U.S. at 134. *Mesa* is discussed *infra* notes 134-35, 158 and accompanying text.

12. 3 *Edw. 1*, ch. 24 (1275) (Eng.), reprinted in 1 *STATUTES AT LARGE* 92-93 (Danby Pickering ed., 1762). This statute predates by almost a hundred years any of the entries in *The Oxford English Dictionary* for legal uses of the term *colour* and by 15 years the earliest example given for a nonlegal use. 3 *THE OXFORD ENGLISH DICTIONARY* 499-500 (2d ed. 1989) (definitions 2.a., 11.c. & d.) [hereinafter OED]. For another early legal use of the phrase, see 23 *Hen. 6*, c. 10 (1444), (Eng.) reprinted in 3 *STATUTES AT LARGE* 269, 271-72 (Danby Pickering ed., 1762) (regulating the availability of bail and the form of bonds accepted by sheriffs and jailers); see *infra* text accompanying notes 76-99.

Colore officii is ever taken in *malam partem*, as *virtute officii* is taken in *bonam*: and therefore this implyeth a seisure unduly made against law.

And he may do it *colore officii* in two manner of wayes: either when he hath no warrant at all, or when he hath a warrant, and doth not pursue it.¹³

Through the first half of the nineteenth century, *colore officii* was a common law term of art referring to the illegal or unauthorized actions of governmental officials.¹⁴ Chief Justice Marshall used the expression in this fashion in *Marbury v. Madison*.¹⁵ Moreover, between 1815 and 1868, Congress employed the phrase *under color of office* or a variant in each of the several statutes authorizing removal to federal court of state court suits against federal officers.¹⁶ When the Recon-

13. 1 SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 206 (facsimile ed. 1799) (1642); see *infra* text accompanying notes 393-94.

14. See, e.g., *City of Lowell v. Parker*, 51 Mass. (10 Met.) 309, 313-14 (1845) (Shaw, C.J.) ("He was an officer, had authority to attach goods . . . on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods . . . He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."); see also *infra* text accompanying notes 111-27.

15. 5 U.S. (1 Cranch) 137, 170 (1803) ("If one of the heads of departments commits any illegal act, under color of his office, . . . it cannot be pretended that his office alone exempts him from being sued . . ."). Marshall used the phrase in the same sense in a subsequent opinion that, coincidentally, also construed the Supreme Court's jurisdiction narrowly. See *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) ("This is an indictment against the defendant, for taking fees, under colour of his office, as a justice of the peace in the district of Columbia."). The indictment, quoted in the headnote, leaves no doubt about the connotation of the phrase. It charged that the defendant "by colour of his said office, unlawfully and unjustly did demand, extort, receive and take . . . the sum of twelve cents, and a half cent, . . . for and as his fee. . . ." 7 U.S. (3 Cranch) at 159. The case arose when More continued to charge fees after Congress had passed a statute abolishing the fees of justices of the peace in the District of Columbia. The circuit court, in an opinion by Cranch that was joined by Marshall, held that the act abolishing the fees violated the Article III guarantee that the compensation of federal judges shall not be diminished during their tenure. 7 U.S. (3 Cranch) at 160-62. When the government appealed to the Supreme Court, Marshall held that, under the governing statute concerning the District of Columbia, the Court had no appellate jurisdiction over criminal cases arising in the District. 7 U.S. (3 Cranch) at 173-74.

16. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198 (providing for removal of state prosecutions "for any thing done by virtue of this act or under colour thereof"); Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633 ("any act done under the revenue laws of the United States, or under colour thereof"); Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755-56 ("by virtue or under color of any authority derived from or exercised by or under the President . . . or any act of Congress"). Some of these statutes were amended or extended by subsequent Congresses; the "under color of" formula appears in those later provisions as well. Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231, 233 ("for any thing done by virtue of this act or under colour thereof"); Act of Mar. 3, 1817, ch. 109, § 2, 3 Stat. 396 ("by virtue of said act, or under colour thereof"); Act of May 11, 1866, ch. 80, § 4, 14 Stat. 46 (in cases of state court resistance to removal "all parties, judges, officers, and other persons, thenceforth proceeding thereunder, or by color thereof, shall be liable in damages"); Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171 ("on account of any act done under color of his office"); Act of July 28, 1866, ch. 298, § 8, 14 Stat. 328, 329 (providing for removal in cases involving "any acts done . . . under authority or color of" the Captured and Abandoned Property Act); see also Act of July 27, 1868, ch. 276, § 1, 15 Stat. 243 ("while acting by virtue or under color of his office or employment").

The very first congressional use of the phrase *under color of* appears in the All Writs Act, now codified as 28 U.S.C. § 1651 (1988), which was part of the Judiciary Act of 1789. Act of

struction Congresses incorporated the phrase in the Civil Rights Acts of 1866 and 1871, *under color of* was a well known legal expression with a long and distinguished pedigree. Not surprisingly, the meaning of the phrase had shifted subtly as it was deployed in different doctrinal contexts that reflected different policy concerns.¹⁷ Still, the central idea conveyed by the phrase had remained remarkably constant for six centuries: *Under color of law* referred to official action *without* authority of law, in the nineteenth as in the thirteenth century.

In his *Monroe* dissent, Frankfurter also invoked a plain meaning argument. He claimed that "the prior decisions . . . have given 'under color of [law]' a content that ignores the meaning fairly comported by the words of the text."¹⁸ Belied by the historical evidence, this claim is also debunked by what we know from cognitive linguistics about the semantics of metaphor. The expression *under color of* employs two conventional conceptual metaphors that are still live aspects of our contemporary conceptual system. Consider the following metaphors and the familiar expressions they enable:

HAVING CONTROL OR FORCE IS UP; BEING SUBJECT TO CONTROL OR FORCE IS DOWN

I have control *over* her. I am *on top of* the situation. He's in a *superior* position. He's at the *height* of his power. . . . He is *under* my control.¹⁹

UNDERSTANDING IS SEEING; IDEAS ARE LIGHT-SOURCES; DISCOURSE IS A LIGHT-MEDIUM

I *see* what you're saying. . . . That's an *insightful* idea. That was a *brilliant* remark. The argument is *clear*. It was a *murky* discus-

Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81. In granting federal courts the power to issue writs of habeas corpus, Congress provided that the writ could only extend to prisoners "in custody, under or by colour of the authority of the United States." *Id.* at 82.

17. See *infra* text accompanying notes 124-27 and 163-81. As a preliminary matter, we can identify five different contexts in which the *under color of office* conception might be employed to effectuate (or mediate between) different policy concerns: (1) to immunize the conduct of an officer, as in the case of the Captured and Abandoned Property Act (see *infra* text accompanying notes 169-71); (2) to absolve a governmental employer from liability for the actions of its agents, as in *Thayer v. City of Boston*, 36 Mass. (19 Pick.) 511 (1837) (see *infra* text accompanying notes 104-07); (3) to establish liability for official misconduct, as in §§ 1983 and 242 where it is an element of a claim or offense, respectively; (4) to regulate the efficacy of an officer's action with respect to unsuspecting third parties, as in *Cocke v. Halsey*, 41 U.S. 71 (1842) (see *infra* note 354); or (5) to demarcate intergovernmental boundaries, as in the removal statutes (see *infra* text accompanying notes 128-66).

18. *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J. dissenting). This argument was added late in the drafting of the opinion, first appearing in a draft of Frankfurter's dissent dated January 3, 1961. THE FELIX FRANKFURTER PAPERS, PART II: UNITED STATES SUPREME COURT CASE FILES OF OPINIONS AND MEMORANDA OCTOBER TERMS 1953-1960, microfilm series, Reel 67, Frame Nos. 00785, 00795, 00805 (Library of Congress, Box 144, Folders 6-16) [hereinafter FRANKFURTER PAPERS: PART II].

19. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 15 (1980). Another example of the CONTROL IS UP metaphor is a conventional phrase such as "she has the *upper* hand."

sion. . . . The discussion was *opaque*.²⁰

The legal metaphor *under color of state law* connotes action by an officer that appears in a false light: it has the appearance of lawful authority, but that appearance is deceptive.²¹ As Justice Douglas observed in *Screws v. United States*: "If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt words to express the idea."²² Rather, the obvious import of *under color of law* is that the phrase refers to official action that *seems* to be lawful and authorized, but turns out not to be.²³

In later sections, I elaborate the historical and linguistic evidence demonstrating that *Monroe* was rightly decided. But, one might ask, why so much effort to defend a precedent that — apart from the attack of an isolated commentator and the ruminations of a single Justice dissenting from a denial of certiorari²⁴ — has remained undisturbed for thirty years? And why go beyond traditional legal and historical arguments to invoke support from so unconventional a source as cognitive linguistics?

The short answer to the first question is that the importance of *Monroe* extends far beyond the narrow question of statutory construction.²⁵ Rather, *Monroe* represents a particularly lucid but embattled response to a surprisingly intractable conceptual problem: Who or what is "the State"? This conceptual difficulty arises in a broad array of doctrinal contexts both related and unrelated to section 1983.²⁶ In

20. *Id.* at 48. Another example of the IDEAS ARE LIGHT-SOURCES metaphor is a conventional phrase such as "his judgment was *colored* by his emotions."

21. There is a second, perhaps more important metaphoric conception that is at work in this legal metaphor in which *under color of state law* connotes action in the guise of state authority. See *infra* text accompanying notes 360-95.

22. 325 U.S. 91, 111 (1945) (plurality opinion).

23. Cf. 325 U.S. at 111 ("It is clear that under 'color' of law means under 'pretense' of law."). Although *pretense* is a reasonably close analogue, it does not quite capture the sense of the metaphor. See *infra* text accompanying notes 381-90.

24. *City of Columbus v. Leonard*, 443 U.S. 905, 911 (1979) (Rehnquist, J., dissenting from denial of certiorari).

25. Cf. *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting) ("The issue in the present case concerns directly a basic problem of American federalism. . . . In this aspect, it has significance approximating constitutional dimension.").

26. Cf. LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND?: A CONCEPTUAL ANALYSIS WITH PRACTICAL IMPLICATIONS (1988):

Although the answer to this question — and to many related questions . . . — has not been settled with authority, the need for an answer would seem to be a desperate one. Whole areas of litigation, especially in the federal courts, continue to beg for theoretical rationale and resolution mainly because questions like this one have not been answered with authority. In particular, the large and amorphous domains of "state action," actions "under color of law," and "federal judicial abstention" suffer by virtue of failure to achieve a definitive answer to these sorts of questions.

Id. at 1-2.

many of these contexts — such as the scope of the Federal Officer Removal Act,²⁷ the extent of municipal liability for constitutional violations,²⁸ or the reach of the Due Process Clause²⁹ — the Court has embraced a theoretical alternative that is inconsistent or in radical conflict with *Monroe*.³⁰ It is tempting to explain these incompatible decisions as the instrumental manipulations of a Court that is hostile to *Monroe* but unwilling to overrule it.³¹ Notwithstanding its cogency,

27. 28 U.S.C. § 1442(a)(3) (1988); see *Mesa v. California*, 489 U.S. 121 (1989) (conflating “under color of his office” with “in performance of his duties”); *infra* text accompanying notes 158, 331.

28. See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (only those with the authority to make final policy act for a city for purposes of municipal liability under § 1983); see *infra* text accompanying notes 415-28.

29. See *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that no state deprivation of property occurs if state tort law provides an after-the-fact remedy); *Parratt v. Taylor*, 451 U.S. 527 (1981) (same), *overruled by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (overruling *Parratt* “to the extent that it states that mere lack of due care by a state official may ‘deprive’ an individual of life, liberty, or property under the Fourteenth Amendment”).

30. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 379 (1989) (“Although Justice Frankfurter’s position never has attracted majority support on the Court, in decisions concerning other aspects of § 1983 liability the Court has relied upon the distinction between official policy and unauthorized acts of government officers.”); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 982 (1986) (“*Parratt* is ultimately grounded in a theory of ‘state action’ that cannot be reconciled with the more general constitutional understandings contained in *Home Telephone* and *Monroe*.”); Edward B. Foley, Note, *Unauthorized Conduct of State Officials under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrines*, 85 COLUM. L. REV. 837 (1985) (exploring the conflict between the recent cases and *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913)); cf. Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U. PA. L. REV. 755, 803-04 (1992) (“In striking counterpoint to Justice Harlan’s observation in *Monroe* that Congress apparently contemplated fuller relief under § 1983 than states might afford for the same misconduct, the Court held in *Parratt* and *Hudson* that a state remedy made available after the deprivation in such a case satisfies the obligation to provide ‘process.’”) (footnote omitted); Zagrans, *supra* note 8, at 520-21 (*Hudson* and *Parratt* “achieve[] through another route — the redefinition of a nature of a protected right rather than the construction of the ‘under color of’ law element — a severe limitation on the availability of section 1983 relief and a counter to the flood of cases loosed by *Monroe*.”); see also Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2-3, 23-27 (1985) (warning that § 1983 is on the verge of withering away as a viable mechanism for the enforcement of constitutional rights). In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Court limited *Parratt*’s reach to cases concerning procedural due process. In doing so, however, *Zinermon* explicitly raised the same conceptual problem concerning the identity of the State, 494 U.S. at 138, which it treated in an ambiguous manner consistent with neither *Parratt* nor *Monroe*. See *infra* text accompanying notes 430-31.

31. On this view, the Court’s reshaping of the doctrine is driven by concern over the excessive “costs” of the exercise of federal jurisdiction over § 1983 claims. See, e.g., Henry P. Monaghan, *The Burger Court and “Our Federalism”*, 43 LAW & CONTEMP. PROBS., Summer 1980, at 39, 48 (“[W]hat we see is a form of what psychologists call displacement — the desire to close the doors of the federal trial courts to certain kinds of substantive and procedural claims, an essentially jurisdictional concept, has been resolved by narrowing the scope of substantive constitutional guarantees.”) (footnote omitted). For judicial expressions of the concern over the costs of § 1983 litigation, see *Pulliam v. Allen*, 466 U.S. 522, 555-56 & n.16 (1984) (Powell, J., dissenting); *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), *overruled by Stone v. Powell*, 428 U.S. 465 (1976); *Monroe v. Pape*, 365 U.S. 167, 242 (1961) (Frankfurter, J., dissenting). Examples of academic work inspired by these policy assumptions concerning federalism and federal court workloads include Paul Bator, *The State*

however, this purely instrumentalist account is incomplete in a crucial respect. As I have suggested in previous examinations of doctrinal development in constitutional law, "the underlying concepts frame and constrain the instrumentalist choices."³² Thus, the purely instrumentalist account obscures something very important about the theoretical stakes at issue in *Monroe*. Exactly the same conceptual problem — who or what is "the State"? — reasserts itself in other doctrinal contexts notorious for their difficulty: questions of state action,³³ governmental immunity,³⁴ and municipal liability,³⁵ to name just a few, all turn on the theory by which one determines whether the agent's acts are considered those of the State.

The conceptual difficulty of the problem of who or what is "the State" is what justifies the unconventional methodological turn. The

Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605 (1981); Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6, 26 (1980); Zagrans, *supra* note 8, at 502.

Less charitably, the Court may be motivated by outright hostility toward the claims of the typical § 1983 plaintiff. There is good reason to suspect so. The available empirical evidence belies much of what masquerades as the prevailing wisdom about the "flood" of § 1983 litigation and the "burden" it creates for federal court dockets. Compare Blackmun, *supra* note 30, at 2 ("Critics rehearse statistics as to the number of § 1983 actions filed each year, with emphasis on those filed by state prisoners. . . .") with Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643 (1987) ("[C]ivil rights litigation — including the core section 1983 cases — is not exploding.") and William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 637 (1979) (noting that the impact of prisoner suits "is not nearly as great as the number might indicate" because "a large portion of the cases are screened out and summarily dismissed before they get under way"). See also *id.* at 618 (in 1976, 68% of prisoner complaints nationally were dismissed before responsive pleadings; only 4.2% of prisoner suits went to trial). On the lack of empirical support for the notion that Americans are overly litigious, see generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

32. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988).

33. Compare *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 288 (1913) ("[W]here a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there was a want of power.") with *Barney v. City of New York*, 193 U.S. 430, 437 (1904) (the complained-of action of the Rapid Transit Board "was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York"). The state action issue is discussed *infra* text accompanying note 386.

34. Compare *Ex parte Young*, 209 U.S. 123, 159 (1908) ("[T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.") with *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984) ("[T]he general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought."). The Eleventh Amendment issue is discussed *infra* text accompanying notes 370-78, 390-92.

35. Compare *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978) (holding municipality liable for unconstitutional actions pursuant to governmental "policy or custom") with *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.7 (1985) (plurality opinion) ("We express no opinion on whether a policy that itself is not unconstitutional . . . can ever meet the 'policy' requirement of *Monell*."). The *Monell* issue is discussed *infra* text accompanying notes 415-45.

most salient aspect of the common law approach adopted by the drafters of section 1983 is the reliance on a metaphor — *under color of law* — to mediate the application of legal restrictions on the exercise of state power. In contrast, conventional approaches to legal theory are suspicious of metaphor.³⁶ Within mainstream jurisprudence, metaphor is generally understood as merely colorful discourse that may make law vivid at the expense of clarity and comprehensibility.³⁷ Conventional legal reasoning attempts instead to reduce a complex legal problem to a principle, a set of propositional rules, or some other necessary and sufficient criteria.³⁸ In theory, these definitional criteria allow professionals to delineate legal categories with greater precision and then to draw appropriate distinctions.

But the problem of who or what is “the State” has proved remarkably recalcitrant to ordinary legal analysis.³⁹ The trouble with the standard reductive analysis is twofold. First, the very attempt to delineate objective criteria inevitably discounts much of what is significant about the social meaning of “the State,” the Constitution, and the ideal of “a government of laws and not of men.”⁴⁰ Thus, the approach advocated by Frankfurter and Zagrans (and implicit in many of the recent Court’s decisions) is to identify “the State” with only those who act pursuant to the specific authorization of positive law. But this po-

36. An almost canonical citation is Cardozo’s dictum in *Berkey v. Third Ave. Ry. Co.*, 94, 155 N.E. 58, 61 (1930): “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” Traditionally, this suspicion of metaphor has been shared by those critical of mainstream jurisprudence. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (“When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices . . . , then [one] . . . is apt to forget the social forces which mold the law . . .”).

37. See, e.g., David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205 (1991) (book review):

Metaphor has its uses in legal scholarship. . . . It creates memorable images that enable us to conjure up complex ideas, or even entire systems of thought, with a single word or phrase. Metaphor helps make the ordinary memorable, and permits levels of subtlety that otherwise would be difficult to communicate. . . .

⋮⋮⋮

⋮⋮⋮ [But metaphor] is a mixed blessing. It is useful because it is evocative, but it may evoke different ideas in different readers. It liberates the author from some of the rigidity of exposition, but also from the demands of precision and clarity. The subtlety that makes metaphor the poet’s boon can be the lawyer’s bane

Id. at 1214-15.

38. See Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1107-10 (1989).

39. Frankfurter admitted as much in his concurring opinion in *Snowden v. Hughes*, 321 U.S. 1, 16 (1944): “[T]he question naturally arises what functionaries, acting under what circumstances, are to be deemed the state. . . . The problem is beset with inherent difficulties and not unnaturally has had a fluctuating history in the decisions of the Court.”

40. MASS. CONST. pt. 1, art. XXX; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). On the origins of the phrase, see Frank M. Michelman, *The Supreme Court 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 4 n.2 (1986).

sition — which I will refer to as “the reductive approach” — obliterates much of what is supposed to be accomplished by the commitment to governmental accountability that distinguishes our concept of constitutionalism.⁴¹ Second, the search for reliable objectified criteria either proves too much or too little.⁴² If “state action” is identified with state permission, then every actor — public and private, official and unofficial — is always acting as “the State.”⁴³ Conversely, if “state action” is reduced to direct authorization by positive law, then strictly speaking no putatively illegal act could be attributed to a state until its highest court had upheld it against legal challenge.⁴⁴

Here, then, is a case where the standard legal tools lead to confusion rather than clarity. In contrast, a legal metaphor may provide the best, most effective way to express the conceptual complexities with which the law must grapple. In previous work, I have argued that metaphor is a basic dimension of human rationality and, therefore, an

41. In a simplistic sense, the reductive view appears to fit well with the rule-of-law ideal. A governmental officer who fails to comply with the rules specifying her official conduct is no longer viewed as acting for the state and is treated instead as any other wrongdoer. See, e.g., *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (When enforcing an unconstitutional law, a state officer is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”). But, as I explain in the next section, the reductive approach quickly proves incoherent because there is no government apart from the men (and women) who instantiate it. This incoherence becomes manifest under either of two circumstances: (1) when the court is asked to enforce restraints on actions that are peculiarly governmental — for example, the Eleventh Amendment problem, see, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-07 (1984) (describing the reductive approach of *Ex parte Young* as a necessary “fiction” and characterizing the dissent’s ultra vires theory of *Young* as “out of touch with reality”); HOWARD P. FINK & MARK V. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 127 (2d ed. 1987) (“[T]he *Young-Home Telephone* pair retains the air of mysticism that surrounds most legal fictions.”); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1490 n.257 (1987) (“Under this fiction, government can by definition ‘do no wrong’; thus, if a wrong has occurred, ‘government’ did not do it — even if government policy allowed or even prescribed the individual wrongdoing.”); or (2) when the system invokes third-party constraints that are defined in terms of official action — the problem common to the surety cases, see *infra* text accompanying notes 111-27, the removal cases, see *infra* text accompanying notes 128-80, and cases under § 1983. See *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 284 (1913) (rejecting an early version of the reductive argument because “the enforcement of the doctrine would hence render impossible the performance of the duty with which the Federal courts are charged under the Constitution. . . . [P]aralysis would inevitably ensue. . . .”).

42. Cf. ALEXANDER & HORTON, *supra* note 26, at 89-90 (concluding that only the “Legalist model,” in which the Constitution speaks only to government officials who can meaningfully be said to be “lawmakers,” and the “Naturalist model,” in which the Constitution speaks to everyone, are “fully principled”).

43. See, e.g., Beermann, *supra* note 11, at 101 (“For the radical, almost all action involves state power, and private abuse of contractual rights is as much under color of law as police brutality.”). The classic statement of this argument is Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923); see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1748-51 (1976).

44. *Home Telephone*, 227 U.S. at 283 (“Under this hypothesis . . . it could not be assumed that the State had authorized its officers to do acts in violation of the state constitution until the court of last resort of the State had determined that such acts were authorized.”). This, in effect, is the position taken by the Court in its recent decisions. See Monaghan, *supra* note 30, at 982.

inescapable aspect of legal thought.⁴⁵ I have argued as well that the failure to recognize the metaphorical quality of standard legal reasoning can have distorting, even pernicious effects on legal decisionmaking.⁴⁶ Here, I take the affirmative tack and attempt to demonstrate the significance of metaphor in law. The “cash value,” so to speak, of the unconventional methodological turn lies in metaphor’s ability better to express significant aspects of our social reality, aspects that more conventional, reductive approaches to legal reasoning otherwise devalue or eliminate.⁴⁷

The argument proceeds as follows. In Part I, I examine why the conceptual problem of who or what is “the State” is so intractable. In Part II, I present the historical evidence that establishes beyond doubt the pedigree and meaning of the phrase *under color of law*. I explain why Frankfurter would have indulged in such an obvious historical error to take the position he did. I suggest that, as was the case with the invention of modern standing doctrine,⁴⁸ Frankfurter was here engaged in a stealthy, anachronistic campaign against the jurisprudence of the *Lochner* era — attempting to create doctrinal constraints on the federal courts’ power to invalidate necessary social legislation.

In Part III, I examine the more complex metaphorical aspects of the meaning of the legal metaphor *under color of law*. I explore the conceptual bases of the metaphor, considering both the historical changes and the continuities in the socio-linguistic practices that underpin its meaning. The purpose of this linguistic analysis is threefold: first, to explain *how* the metaphor expresses the meaning that it does; second, to clarify *why* the meaning of the metaphor as it was incorpo-

45. See, e.g., Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 748-49, 753-64 (1992); Winter, *supra* note 38, at 1105, 1142-48, 1162-71, 1199-224.

46. See Winter, *supra* note 45, at 764-69 (discussing the Court’s treatment of the Fifth Amendment privilege against self-incrimination in *Braswell v. United States*, 487 U.S. 99 (1988)); Winter, *supra* note 32, at 1386-88 (“The metaphor of ‘standing’ is a myth that has become ‘the literal truth’ and shaped — or misshaped — our thinking about adjudication.”).

47. See Winter, *supra* note 38, at 1197 (“Conventional legal reasoning . . . abstracts and simplifies a complex experience; its very partiality falsifies what it tries to capture. For example, Fiss’ view of the first amendment as torn between the autonomy and public debate principles is a typical objectivist dissection of a single experiential gestalt better captured by the *market* metaphor.” (discussing Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785-87 (1986) (footnotes omitted))).

48. Winter, *supra* note 32, at 1441-57. When I first claimed that standing doctrine was invented by Justices Brandeis and Frankfurter, I was unsure whether my documentation would be sufficient to overcome the conventional perception of standing as a fundamental requirement of justiciability under Article III. Indeed, when I described my project to one of my former teachers, he responded: “Have they repealed the ‘case or controversy’ clause?” Consequently, I was surprised by the speed with which my revisionist claim was first credited as true and then consigned to the general stock of conventional wisdom. Compare Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436-38 (1988) with GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 86, 96 (2d ed. 1991 & Supp. 1992).

rated in section 1983 is conventional to our culture, rather than arbitrary and contingent solely on the intention of the drafters; and third, to explore *what* the metaphor adds to our understanding of the conceptual problem at the heart of section 1983. The section closes with an analysis of what the historical and linguistic material implies for the interpretation of the statute.

My intention in this article is not to argue for the drafters' intent, but rather to employ a more faithful historical understanding of *under color of law* as "a way of seeing and then seeing again."⁴⁹ Thus, in Part IV, I consider some of the broader ramifications of the *color of law* conception. I examine how this metaphoric conception changes our view of apparently unrelated doctrinal issues concerning the scope and coverage of section 1983. In this renewed vision, we can relocate the social dimension of the meaning of state power in a tradition committed to self-governance and, therefore, to governmental accountability — to see what was there once, to see what can be there now.

I. THE PROBLEM AT THE HEART OF SECTION 1983

A useful way to introduce the conceptual problem is to examine the formulations offered by the reductivists. In *Screws v. United States*,⁵⁰ the dissent suggested that the question of who or what is "the State" could be resolved by simple common sense. "It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State."⁵¹ For the *Screws* dissent, the referent of the term *State* is self-evident: the state is a political entity, the government, the official authority. It speaks in a clear, identifiable voice; hence, it has an "authentic command." The implicit personification of the state is so conventional that it goes virtually unnoticed.⁵²

49. HELLMAN, *supra* note 1, at 3.

50. 325 U.S. 91 (1945).

51. 325 U.S. at 147-48 (Roberts, Frankfurter & Jackson, JJ., dissenting). This particular formulation is actually a paraphrase of a Frankfurter opinion paraphrasing a Holmes opinion. See *infra* text accompanying notes 191-93, 230-33.

52. See DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 160 (1987) ("Whatever figurative words the political scientists chose, the State captured a straining for wholeness so sharp one could virtually taste it in the word itself. The State by definition was a unity, a moral 'person,' whose will radiated outward into what men called law."); cf. Winter, *supra* note 38, at 1207-17 (explaining the related concept "Law" as a similar product of the cognitive processes of reification and personification). This personification, however, must take a specific form to function as "Law." As Robert Cover points out, it must be

an "other" from whom we "disengage" but whom we continue to perceive as "faithful" to us and thus deserving of obedience. "The metaphor of separation" that Cover invokes is not

But Frankfurter knew the problem to be more complex. One year earlier, concurring in *Snowden v. Hughes*,⁵³ he explained that, "[s]ince the state . . . can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suit in the federal courts on the basis of illegal state action."⁵⁴ Frankfurter points out that the state cannot be isolated from its functionaries because it is only through them that the state can act at all.⁵⁵ This dependency makes the state a contingent reality, but it also complicates matters tremendously. The deep-seated difficulty is signalled by the peculiar formulation of the passage. As Frankfurter puts it, the question is who or what is "to be deemed the state." To "deem" is to form an opinion, judge, think, or believe.⁵⁶ Don't we know? We do not, of course, and that is the problem at the heart of section 1983.

The first clause of the Frankfurter quotation implies that the state is, at least in one sense, the amalgamation of the actions of a large number of actual human beings.⁵⁷ But this more pragmatist description still fails to capture the full meaning of "the State." The state as an entity is an entirely conceptual construct; in the language made

just a generalized metaphor of personification, but rather a specific invocation of the childhood experience of separation from parent. The process of law-creation is a projection of childhood experience. LAW is the projected parent, the internalized superego. In Brandeis' quite Freudian metaphor, the "Government is the potent, the omnipresent teacher." When it is no longer faithful, when "Government becomes a lawbreaker" and not the embodiment of LAW, "it breeds contempt for law; it invites everyman to become a law unto himself; it invites anarchy."

Id. at 1208-09 (footnotes omitted) (quoting Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 45 (1983), and *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). I shall return to the implications of this personification in Part IV.

53. 321 U.S. 1, 13 (1944) (Frankfurter, J., concurring).

54. 321 U.S. at 16. Frankfurter's description of the issue can be divided into three subquestions: (1) Who acts for the state? (2) When? (3) How do the concerns about federalism and the scope of federal court jurisdiction affect these determinations?

55. *Cf.* *Tennessee v. Davis*, 100 U.S. 257, 263 (1880) (The federal government "can act only through its officers and agents, and they must act within the States."); Lewis & Blumoff, *supra* note 30, at 794 ("At the theoretical level, any liability imposed upon government is necessarily vicarious because governments cannot operate except through human agency.")

56. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 589 (1986).

57. Only through such representation in performed roles can the institution manifest itself in actual experience. The institution, with its assemblage of "programmed" actions, is like the unwritten libretto of a drama. The realization of the drama depends upon the reiterated performance of its prescribed roles by living actors. . . . Neither drama nor institution exist empirically apart from this recurrent realization.

PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 70 (1966); see also Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 992-95 (1991) ("A role is not a unitary, static, or invariable 'thing' but a dynamic pattern of conduct.")

familiar by critical legal studies, the state is a reification.⁵⁸ But it is a reification of a very particular kind, because this reification is indispensable to the phenomenological experience of the state. Without the concept "State" there would only be groups of similarly clad thugs impinging on our autonomy or protecting us (at a price, no doubt) from other such groups. In this sense, the state is an imaginative social product over and above its personnel and its other material manifestations. "The State" exists only because we conceptualize it *as such*.⁵⁹

58. In Peter Gabel's colorful phrase, the state is a "hallucinatory projection." Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563, 1589 (1984); cf. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (rev. ed. 1991) ("[T]he nation . . . is an imagined political community. . . . It is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.").

In Gabel's view, the state is a falsehood that takes the place of "authentic connection" and real community, a conspiracy of the group "to represent itself to itself as politically constituted." Gabel, *supra*, at 1572-74; cf. RODGERS, *supra* note 52:

The political scientists taught a social class and generation to imagine something else, an abstract holder of sovereignty called the State, shimmering behind the conflict-ridden screen of everyday life. Not until that was done did their glistening edifice of words suddenly collapse and leave Americans talking nakedly, for the first time, about interests.

Id. at 146-47. Anderson, in contrast, understands the "nation" as a cultural artifact; he situates the birth of nationalism in a matrix of social, cultural, historical and technological developments that made it possible for people unknown to one another to identify themselves as a nationality and project that sense of collective identity onto the modern nation-state. ANDERSON, *supra*, at 4 ("[T]he creation of these artefacts toward the end of the eighteenth century was the spontaneous distillation of a complex 'crossing' of discrete historical forces . . .") (footnote omitted). Thus, Anderson rejects arguments like Gabel's that imply that the state is "fictive" simply because it is imaginative:

[T]he drawback to this formulation, however, is that . . . [it] assimilates "invention" to "fabrication" and "falsity," rather than to "imagining" and "creation". In this way [it] implies that "true" communities exist which can be advantageously juxtaposed to nations. In fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined. Communities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined.

Id. at 6. The question of the "falsity" or "reality" of the state is discussed *infra* text accompanying notes 67-75.

59. This claim may perhaps be counterintuitive to the average American who has never experienced a radical change from one regime to another. Consider, in contrast, the effect of the Nazi occupation of France during World War II and the formation of a collaborationist government at Vichy:

[It] meant that suddenly each citizen was thrust into a situation where he had to "argue within himself over the social pact and reconstitute a state by his choice." Where before there had been habitual allegiance, now there was necessarily a deliberate decision for or against the Vichy regime. The Occupation brought to the foreground a truth usually ignored: the state rests upon nothing other than the collective effect of choices made by individuals. To live through the limit situation of war was to witness "the contingent bases [*fondements*] of legality."

KERRY H. WHITESIDE, *MERLEAU-PONTY AND THE FOUNDATION OF AN EXISTENTIAL POLITICS* 185-86 (1988) (citations omitted) (quoting MAURICE MERLEAU-PONTY, *HUMANISM AND TERROR: AN ESSAY ON THE COMMUNIST PROBLEM* 36-37 (John O'Neill trans., 1969)).

The closest analogue in American legal history is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), where the Court was asked to decide which of two sets of competing claimants represented the lawful government of Rhode Island. The case, a trespass action, arose when an officer

To clarify this point, consider the contrast with other categorical constructs like "weather" or "famine." These concepts organize as a single "entity" a diversity of phenomena that can be experienced directly independent of their conceptualization. In an experientially grounded case like "weather," for example, our experience of the elements remains largely the same with or without the concept of a systematic atmospheric and environmental process.⁶⁰ Thus, even if we had no overarching category like "weather," there would still be sunny and stormy days, balmy evenings and crisp, clear nights.

It is not that the "weather" construct adds nothing: an understanding of weather as a system of related events makes possible a somewhat greater predictive capacity. So too, a concept like "State" will render more predictable the actions of government officials who understand themselves as having certain social functions delineated by certain social codes. But, in the latter case, the predictive power of the concept is contingent on the reflexivity of its social meaning — that is, on the assimilation of that meaning both by the observer and by the actor under observation.⁶¹ Unlike our experience of a stormy day, our experience of the uses of power varies radically depending upon whether it is mediated by the conceptualization "State." As Frankfurter acknowledged in *Monroe*:

It might also be true merely because [they] are the police — because they are clothed with an appearance of official authority which is in itself a

under the charter government broke into the home of an adherent of the competing faction to effect a warrantless arrest. 48 U.S. (7 How.) at 2. Given my analysis, it is not surprising that the Court decided that it could not determine the case in a reductivist fashion by reference to positivist criteria and concluded instead that the case presented a *political* question. 48 U.S. (7 How.) at 46-47.

60. I do not claim that there are no socially constructed elements to concepts like "weather." One can easily imagine cultures in which the weather is personified and given volition or in which it is attributed to the design of the gods. My point is only that, in cases such as "weather," there are experientially grounded referents whose reality is not contingent upon cultural understandings. The difference is one of degree and not kind.

To sharpen the contrast, consider a case that is closer to "the State" than to "weather." It is certainly true that a concept like "disease" has physical referents in bodily states. In that sense, it has a phenomenological reality separate from its conceptualization. On the other hand, disease also has a significant psychological or cultural component that may affect one's understanding and experience of illness in significant ways: "A liver crisis will reassure a French patient while it would alarm an American one; the diagnosis of 'a virus' would probably have opposite effects on each." LYNN PAYER, *MEDICINE AND CULTURE: VARIETIES OF TREATMENT IN THE UNITED STATES, ENGLAND, WEST GERMANY AND FRANCE* 27 (1988). Indeed, whether a particular set of clinical symptoms is understood as a "disease" may well depend on the country in which the sufferer happens to find herself. *Id.* at 24-25.

61. In this sense, all social roles are like MacIntyre's notion of character in that "a knowledge of the [role] provides an interpretation of the actions of those individuals who have assumed the [role]. It does so precisely because those individuals have used the very same knowledge to guide and to structure their behavior."

Winter, *supra* note 57, at 990-91 (quoting ALASDAIR MACINTYRE, *AFTER VIRTUE* 27 (2d ed. 1984)).

factor of significance in dealings between individuals. Certainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government.⁶²

The entirely abstract, socially constructed nature of the concept "State" makes it difficult to discern when it is a governmental entity that has acted. A government, as Frankfurter observed, can act only through its agents. But the people who act for that entity are "amphibians,"⁶³ for they are capable of acting in either of two roles at any given moment. Contrary to the most elemental laws of Newtonian physics, each of the actual humans that comprise the projected entity called "the State" exists simultaneously in two distinct "mental spaces,"⁶⁴ one labeled *public official* and the other labeled *private citizen*.⁶⁵ This dual capacity creates a serious problem of role ambiguity. The problem is compounded, however, by the fact that the very identity of "the State" is dependent on the unstable character of its agents: There is no "State" separate from the amphibious and ambiguous public/private actor and the reification he or she temporarily embodies. This doubled ambiguity makes it impossible to determine in any "objective" or "logical" way when the state has caused an injury or when a mere private actor — who only incidentally has a secondary identity as a state agent or employee — is the "real" cause.⁶⁶ Because of the twofold opacity of the concept "State," we are (in

62. *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting); see also 365 U.S. at 193 (Harlan, J., concurring) (Congress may "have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern."). Frankfurter went on to concede that Congress would have the power to legislate against "[t]he pretense of authority alone," 365 U.S. at 238, but erroneously maintained that Congress had not done so in § 1983. 365 U.S. at 239. Zagrans echoes Frankfurter precisely. See Zagrans, *supra* note 8, at 501-02.

63. *Cf. Culombe v. Connecticut*, 367 U.S. 568, 605 (1961) (opinion of Frankfurter, J.) (describing the concept of voluntariness as "an amphibian" because it connotes both a mental state and a legal conclusion).

64. On the function of "mental spaces" in cognitive processes, see GILLES FAUCONNIER, *MENTAL SPACES: ASPECTS OF MEANING CONSTRUCTION IN NATURAL LANGUAGE* 1, 16-22 (1985) (mental spaces are "domains that we set up as we talk or listen, and that we structure with elements, roles, strategies, and relations"); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 281-82 (1987) ("A mental space is a medium for conceptualization and thought.").

65. *Cf. FED. R. CIV. P. 25(b)* (distinguishing suits brought against a governmental officer in his or her "official capacity").

66. In current doctrine, the questions of causation and legal responsibility are dominated by a model that is reductive in yet another way: the State is personified and treated as an individual. *Cf. supra* text accompanying notes 50-52. Professor Whitman, describing this reduction in terms of "the language of common-law tort," correctly argues that we need a richer conception of governmental responsibility if we are meaningfully to reach "harms created by structures and contexts rather than by individuals." Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225-26 (1986).

Frankfurter's words) always left "deeming" this or that to be the state for one purpose or another.

At this point, the legal realist in all of us is likely to conclude that "the State" is just another formalism unsuited to competent legal analysis. Instead of trying to deduce legal conclusions from a concept, the legal realist might say, we should recognize that "the State" is little more than a group of similarly clad thugs dressed up in a legal fiction.⁶⁷ On this view, we need first to come to grips with the fact that "the State" is an empty construct. Only then will we be in a position rationally to determine how best to cope with the problem at hand.

There are two problems with this antiformalist approach, however. First, it works (if at all) only for the theoretically sophisticated. For most everyone else — and especially for judges — such a destabilization of an established cultural notion is likely to provoke either anxiety or defensive disbelief.⁶⁸ The likely consequence is not more enlightened legal analysis, but increased pressure for some objectifiable criteria.⁶⁹ The danger, then, is that the antiformalist critique may produce what it least intends — the reductive legal analysis in which the State is represented only by the actions of its officers when they act pursuant to an authority expressed in positive law. The inevitable effect is a landscape increasingly barren of accountable state actors.⁷⁰

Second, and more important, the antiformalist approach to the

67. Cf. Cohen, *supra* note 36, at 821 ("Legal concepts . . . are supernatural entities which do not have a verifiable existence except to the eyes of faith. . . . *Jurisprudence*, then, . . . is a special branch of the science of transcendental nonsense.").

68. Cf. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985):

The more the process of derealization continues, the more desperately will each side work to recertify and verbally reaffirm the legitimacy and reality of its own cultural constructs. Although at a distance human beings take pride in being the single species that relentlessly recreates the world, generates fictions, and builds culture, to arrive at the recognition that one has been unselfconsciously dwelling in the midst of one's own creation by witnessing the derealization of the made thing is a terrifying and self-repudiating process.

Id. at 128 (describing the process of reciprocal deligitimation of opponents' beliefs that is the prelude to war).

69. Compare *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986) (plurality opinion) (attempting to distinguish between a case in which a decisionmaking body delegates all discretion to hire and fire to a subordinate official and one in which it delegates "its power to establish final employment policy") with *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 (1988) (plurality opinion) ("[W]e can be confident that state law . . . will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.").

70. See Kenneth M. Casebeer, *Toward a Critical Jurisprudence — A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 412-17 (1983) (discussing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976)); see also Kenneth M. Casebeer, *Running on Empty: Justice Brennan's Plea, The Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989, 1002-03 (1989) (discussing the "ideology of the empty state," in which the state is viewed as "empty of all but the decisions of its agents").

concept "State" misses the sense in which the State is very "real" as a social fact.⁷¹ A socially constructed concept like the State is not a fiction merely because of its constructed character.⁷² To the contrary, the State becomes "real" precisely to the extent that people internalize and act on the cultural meaning that it represents.⁷³ Neither a mere fiction nor an objectifiable legal code, the State is a social institution in the same sense that Karl Llewellyn described the Constitution as an institution:

An institution is in first instance a set of ways of living and doing. It is not, *in first instance*, a matter of words or rules. The existence of an institution lies first of all and last of all in the fact that people do behave in certain patterns *a*, *b* and *c*, and do not behave in other conceivable patterns *d* to *w*. . . .

A national constitution is a somewhat peculiar institution in that it involves in one phase or another the ways of a huge number of people — well-nigh the whole population. If, like ours, it is a firmly established constitution, it involves ways of behavior deeply set and settled in the make-up of these people — and it involves not patterns of doing (or of inhibition) merely, but also accompanying patterns of thinking and of emotion⁷⁴

Thus, to understand the concept "State" as an imaginative social product is to see — and respect — the social dimension of meaning and its constructive role in shaping human behavior and experience.⁷⁵ In this alternative understanding, the actions of the State are recog-

71. Cf. Winter, *supra* note 38, at 1228 ("[T]he State is real enough in its ability to marshal the organized forces of violence, as [Robert] Cover so movingly points out.").

72. [This] choice of the term "fiction" represents a failure of pragmatist conviction. To recognize that everything is socially constructed is not to believe in a "fiction." Our constructions are no less real (and no more fictive) because they are our constructions. For the pragmatist, constructions may be useful or not; they may be harmful or not; they will enable some things and exclude others. For the pragmatist, however, they can never be "false" in any but this relative sense.

Winter, *supra* note 45, at 762-63 (footnotes omitted).

73. Cf. Hector-Neri Castañeda, *Fiction and Reality: Their Fundamental Connections*, 8 *POETICS* 31 (1979):

The fictional, as Anatole France said, can be most influential. His hero Putois is a fictional character within the main fiction of the story. It was invented by a (first-order fictional) character in order to refuse a boring dinner invitation: she had to await the gardener Putois. Then everybody in the story acquired the habit of blaming unexplainable events, or events not to be explained, on Putois. The situation developed in such a way that Putois was just an invisible member of the community, even more real than other members of it. Yet some people knew that he was a fiction. In the experience of those persons Putois, although fictional, played a very important role.

Id. at 45.

74. Karl N. Llewellyn, *The Constitution as an Institution*, 34 *COLUM. L. REV.* 1, 17-18 (1934) (footnotes omitted). For an attempt to apply these insights to contemporary constitutional law, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 *CAL. L. REV.* 1441 (1990).

75. See LAKOFF, *supra* note 64:

Cultural categories are real and they are made real by human action. Governments are real. They exist. But they exist only because human beings conceived of them and have acted

nized by their social significance and not interpreted by some reductive, literal code of "official" behavior.

The conceptual problem that frames the section 1983 question is a little like the difference between seeing the glass as half empty and seeing it as half full. Because the idea of the State is conceptualized as a container only half-filled by its functionaries and other physical manifestations, it is always vulnerable to a reductive analysis. But, because the tangible or material components of the State do not exhaust the "reality" of its social significance, a reductive analysis can never effectively suppress the constructive, social dimension of its meaning. This conflict between the reductive and the constructive meanings of "the State" is the problem at the heart of section 1983.

II. THE HISTORICAL MEANING OF "UNDER COLOR OF" LAW

Today, the difficulties caused by the conceptual opacity of "the State" arise most frequently in the context of constitutional litigation under section 1983. But the underlying conceptual problem was familiar to the common law. It arose in the context of wrongful acts by sheriffs or other officers where courts had to determine whether the agent's acts were private or official. Here, the reductive analysis proved entirely unsuitable. In its stead, the *colore officii* concept played a central role in the maintenance of appropriate legal controls over governmental agents.

In the sections that follow, I present historical evidence that clearly establishes the meaning of the phrase *under color of law*. In the first, I review some of the earliest uses of the expression in English law of the fifteenth and sixteenth centuries. I then show how American courts employed this metaphoric conception during the first half of the nineteenth century to solve some of the doctrinal problems created by the conceptual ambiguity of "the State." In the second section, I examine the adoption by Congress of the *color of office* expression in each of the removal statutes of the same period. I discuss both how the exigencies of the federal system exacerbated the conceptual opacity of "the State" and the way in which the *color of office* notion helped mediate the problem. In the final section, I consider why Frankfurter — perhaps the first serious student of the history of the federal courts — would have misinterpreted the statutory phrase in the face of so ample a historical record.

according to that conceptualization. In short, the imaginative products of the human mind play an enormous role in the creation of reality.
Id. at 208; cf. Winter, *supra* note 38, at 1231 (explaining that the meaning of rights is an imaginative, social construction that is real "for us").

A. *Sheriffs, Sureties, and the "Colour of their Office"*

1. *English Antecedents*

During the final years of the reign of Henry VIII, a yeoman by the name of Thomas Maningham fell in arrears with his fishmonger, Thomas Palley, in the amount of two hundred marks sterling. On May 18, 1545, Palley sued out a writ in execution of the debt, which Maningham had previously confessed in court. The writ directed the Sheriff of the county of Bedford, Lewis Dive, to seize all of Maningham's property and to imprison Maningham until he had fully satisfied his debt to Palley. Dive executed the writ, seizing the property and arresting Maningham. Maningham's brother John, however, obtained bail for him. John Maningham endorsed and gave to Dive a surety bond in the amount of £40 that agreed to indemnify and "keep, without damage, the said sheriff against our lord the King, and one Thomas Palley."⁷⁶

Subsequently, when Thomas Maningham failed to appear in court, Dive sued John Maningham on the bond. Maningham's defense was that the bond was void under a statute of Henry VI.⁷⁷ In response, Dive argued that Maningham's bond was not covered by the statute and, therefore, that it was enforceable as a debt at common law.⁷⁸ The court ruled that the statute applied, held the bond void, and rendered judgment for the defendant John Maningham.⁷⁹

The statute in question, enacted in 1444, was designed to curb extortion and other abuses of the bail bond process by local sheriffs.⁸⁰

76. *Dive v. Maningham*, 1 Plowden Rep. 60, 61-62, 75 Eng. Rep. 96, 97-99 (Common Bench 1551) (first reported in 1578).

77. 23 Hen. 6, ch. 10 (1444) (Eng.), reprinted in 3 STATUTES AT LARGE 269, 271-72 (Danby Pickering ed., 1762).

78. *Dive*, 1 Plowden at 63, 75 Eng. Rep. at 100-01.

79. *Dive*, 1 Plowden at 67-69, 75 Eng. Rep. at 106-10. *Dive* is better known for its holding on a separate question of pleading and for its application of the distinction between contracts that are void and those that are merely voidable. See 8 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 65-66 (1922).

80. The statute was one of several enacted in 1444 with similar purposes. See also 23 Hen. 6, ch. 7 (1444) (Eng.), reprinted in 3 STATUTES AT LARGE 265 (Danby Pickering ed., 1762) (prohibiting specific abuses by the Sheriff of Northumberland); 23 Hen. 6, ch. 8 (1444) (Eng.), reprinted in 3 STATUTES AT LARGE 266 (limiting the terms of all sheriffs to one year because of "many and divers oppressions to the King's liege people."). It opens with the King's disavowal of "the great perjury, extortion, and oppression" committed by his sheriffs and their deputies. 23 Hen. 6, ch. 10 (1444) (Eng.), reprinted in *id.* at 269-70. As the *Dive* court explained:

[A]t the common law before this statute, where a man was condemned in any sum, and in execution for it, the sheriffs or other officers would let him at large upon condition to save them harmless; as if he had been condemned for £100, the sheriff or other officer would take an obligation of £300, and suffer him to go at large, and then the party plaintiff had no other remedy but only to sue the sheriff or other officer upon the escape . . . And sometimes the sheriff or other officer would for such favour gain a piece of land, sometimes he would compound with the prisoner by this means to get his son and heir married to his own daugh-

The statute carefully regulated the process of admitting prisoners to bail, delineated the categories of prisoners who were eligible for bail, and excepted from bail those who, like Thomas Maningham, were arrested upon execution for debt.⁸¹ The statute also specified the form required for bail bonds.⁸² Finally, it provided that "if any of the said sheriffs . . . take any obligation in other form by colour of their offices, that it shall be void."⁸³

Dive's argument was that the clause specifying the form of bail bonds "for any cause aforesaid"⁸⁴ referred only to bonds in those cases eligible for bail under the statute and not for cases, like Maningham's, where the prisoner was not eligible for bail.⁸⁵ Thus, the fulcrum of Dive's argument was the admission that Maningham's release was unlawful, for it was this illegality that arguably exempted the bond from the provision rendering void any nonconforming obligation. On this logic, the bond was like any other contract otherwise enforceable at common law.⁸⁶

In rejecting Dive's construction of the statute, the court made two arguments. First, it reasoned that the statute had to be interpreted in light of the mischief it sought to remedy. Accordingly, it held that the clauses that prescribed the form of all bonds and made all nonconforming bonds void were intended to apply as well to bonds entered into for nonbailable offenses.⁸⁷ Second, and more important for our

ter, and he never was without great reward for such favour. And so sheriffs and other officers by such crafts and devices were enriched

Dive, 1 Plowden at 67, 75 Eng. Rep. at 107. In response, the statute prohibited sheriffs and their officers from taking "under colour of their office" any "thing . . . to their use, profit, or avail, of any person by them . . . to be arrested or attached, nor of none other for them, for the omitting of any arrest or attachment" or for "mainprise, letting to bail, or shewing any ease or favour to any such person so arrested." 3 STATUTES AT LARGE at 270.

81. *Id.* at 271.

82. *Id.* The statute required that bail shall be only "upon reasonable sureties of sufficient persons" and that

no sheriff . . . shall take or cause to be taken, or make, any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person . . . but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill or warrant, and in such places as the said writs, bills, or warrants shall require.

Id. at 271-72.

83. *Id.* at 272.

84. *See supra* note 82.

85. *Dive*, 1 Plowden at 67, 75 Eng. Rep. at 107.

86. Dive argued quite shamelessly that

Thomas Maningham was in upon execution, and was one of those contained in the exception, and the letting him go at large is an escape, and so is out of the intent of the statute, and is merely at the common law, in which case the obligation stands at common law, and so is good.

Dive, 1 Plowden at 63, 75 Eng. Rep. at 100-01.

87. *Dive*, 1 Plowden at 67, 75 Eng. Rep. at 107-08 ("[S]o that if the sheriffs or other officers

purposes, the court held that the statutory phrase "by color of their offices" specifically referred to illegal actions like Dive's release of Maningham.

[I]f the obligation is not void for this cause, it seems to me that (if it is taken in other form than the statute limits) these words, viz. *colore officii*, will make it void, for it is to be considered that Thomas Maningham . . . was in execution under the custody of the plaintiff, not as Lewis Dive, but as sheriff, for the writ to take Thomas Maningham was directed to him as sheriff, and so as officer he had the custody of him, then when he took the obligation, he took it as officer, but he took it unduly, for he was not bailable, but yet he took it as sheriff, ergo he took it *colore officii sui*; for this word *colore officii sui* is always taken . . . *in malam partem*, and signifies an act badly done under countenance of an office, and it bears a dissembling visage of duty, and is properly called *extortion*. . . . Wherefore here inasmuch as the obligation was made for the deliverance of Thomas Maningham, who was in the custody of the plaintiff, as officer, it cannot be denied but that he took the obligation for his deliverance *colore officii*, although it was not *virtute officii sui*.⁸⁸

Two things are noteworthy about this passage. The first and most straightforward is doctrinal. The passage leaves no doubt that the statutory phrase "by colour of their offices" refers to unauthorized, indeed, grossly illegal conduct. But the more fascinating aspect of the passage is the way the court anguished over the question of role ambiguity. The court's conspicuous difficulty is all the more remarkable because the issue before it seems so simple and straightforward. After all, hadn't the sheriff done precisely what the statute prohibited?

What appears to have troubled the *Dive* court is that the clause rendering the obligation void seems addressed to sheriffs in their official capacity.⁸⁹ Indeed, this interpretation best explains Dive's argument that the debt stood outside the statute: In effect, Dive claimed that the obligation was not taken in his official capacity and, therefore, was a contract between two private parties no different from any other obligation at common law.⁹⁰ The *Dive* court countered by pointing to the official character of the act that gave rise to the obligation, "for it is to be considered that Thomas Maningham . . . was in execution

will let prisoners at large, they must do it at their peril, for by this statute their safe conduct, that is to say, the obligations to save them harmless, is cut off and destroyed.").

88. *Dive*, 1 Plowden at 67-68, 75 Eng. Rep. at 108.

89. See 3 STATUTES AT LARGE at 272 ("[I]f any of the said sheriffs . . . take any obligation in other form by colour of their offices, that it shall be void . . .").

90. See *Dive*, 1 Plowden at 63, 75 Eng. Rep. at 101 (argument of counsel):

And as to these words which are contained in the statute, viz. *vel colore officii sui*, they are referred to the said first branch of the statute, that is to say, concerning obligations taken of those who are in by writ, bill, or warrant, and have a day to appear, &c. But to refer it to those, who are not bailable, could never be the intention of the statute

under the custody of the plaintiff, not as Lewis Dive, but as *sheriff*.”⁹¹ Nevertheless, the *Dive* court was obviously troubled by the argument and by the apparent contradiction that arises from the formalism of the reductive approach.⁹² “[B]ut he took it unduly, for he was not bailable, *but yet he took it as sheriff . . .*”⁹³

Of course, this is a contradiction only if one holds to a formalist understanding in which categories like *private citizen* and *public official* must be mutually exclusive. In contrast, the *Dive* court invoked the concept of *colore officii* to explain how an officer can act in a plainly unauthorized manner and still act officially: “he took it unduly, . . . but yet he took it as sheriff, *ergo* he took it *colore officii sui*.”⁹⁴ Thus, it concluded that Dive acted in his official capacity even though those actions were outside his rightful authority — i.e., “that he took the obligation for his deliverance *colore officii*, although it was not *virtute officii sui*.”⁹⁵

By dealing with the problem of role ambiguity in this way, the *Dive* court avoided the absurd implications of a reductive, categorical approach that would insist upon separating Dive’s actions into those taken in his official and personal capacities. Thus, the *Dive* court did not search for some formal or objective criteria by which to define Dive’s “proper” identity. Instead, it used metaphor to express the potential two-faced quality of an act “badly done under countenance of an office, and [bearing] a dissembling visage of duty.”⁹⁶ Moreover, it understood the legal metaphor *colore officii sui* — by color of his office — specifically to address the amphibious way in which an officer can act in two capacities at once. Or, as Maningham’s counsel argued: “[*C*]olore officii implies that the thing is under pretence of office, but not duly, and the office is no more than a cloak to deceit, and the thing is grounded upon vice, and the office is as a shadow thereto.”⁹⁷

Indeed, in explaining the meaning of *colore officii*, the *Dive* court

91. *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108 (emphasis added).

92. Indeed, the authentic sovereign — the King — had explicitly disavowed the conduct in advance. 3 STATUTES AT LARGE at 269-70. Cf. *Screws v. United States*, 325 U.S. 91, 147-48 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting) (quoted *supra* text accompanying notes 50-51).

93. *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108 (emphasis added).

94. *Dive*, 1 Plowden at 67-68, 75 Eng. Rep. at 108. Zagrans, in contrast, insists on separating the officer from his or her role and, as a consequence, gets it exactly backwards: “‘Under color of’ has a specific meaning, and the conduct of public officials must be considered separately from the offices they hold in light of that meaning.” Zagrans, *supra* note 8, at 562.

95. *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108.

96. *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108.

97. *Dive*, 1 Plowden at 64, 75 Eng. Rep. at 102.

considered it centrally important that the misconduct of an official differs qualitatively from a mere private wrong.

As if an officer will take more for his fees than he ought, this is done *colore officii sui*, but yet it is not part of his office, and it is called extortion, . . . which is no other than robbery, but it is more odious than robbery, for robbery is apparent, and always hath the countenance of vice, but extortion, being equally as great a vice as robbery, carries the mask of virtue, and is more difficult to be tried or discerned, and consequently more odious than robbery.⁹⁸

As we have seen, Frankfurter too understood and acknowledged this qualitative difference.⁹⁹ The stark difference between Frankfurter and the *Dive* court, however, is that Frankfurter denied precisely what the *Dive* court understood: that the legal metaphor *under color of office* expresses the “two-faced” quality of official misconduct (a point to which I shall return in Part III) and is the way the law historically has conveyed the special gravity of the offense that stems from the wrongdoer’s abuse of his or her official status.

2. American Applications

The problem of role ambiguity was familiar to American courts of the nineteenth century, but it arose in other contexts. One such question concerned whether and when officers’ actions should be attributed to the governmental entity that employed them. The view that is conventional today — much influenced by the Eleventh Amendment cases — is that the common law adopted a binary, categorical approach.¹⁰⁰ On this view, only legal, authorized actions were ascribed

98. *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108.

99. See *supra* text accompanying note 62.

100. *Young* distinguishes between the state and its officers in much the same way as the common law always has distinguished between a principal and its agent. For example, a corporate officer who is performing acts that the corporation cannot legally authorize is said to be acting “ultra vires” or beyond the powers conferred by the corporation. Such an officer cannot claim the authority of the corporation. Similarly, in *Young* the Court concluded that an officer acting illegally is stripped of state authority and therefore the Eleventh Amendment does not bar suits against officers.

CHEMERINSKY, *supra* note 30, § 7.5, at 346-47 (footnotes omitted); see also FINK & TUSHNET, *supra* note 41:

The private law approach asked whether the act complained of . . . would be actionable under traditional common-law rules. . . . If the act was a wrong at common law, then the eleventh amendment did not bar the suit. As the Court in *Young* said, a suit was then against the named defendant “personally as a wrong-doer and not against the State.”

Id. at 127.

The division of the legal world into the binary categories of *public* and *private* appears to be a phenomenon of the late nineteenth century. See generally Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH IN LAW AND SOCIOLOGY 3, 8 (1980) (classical legal thought was “deeply preoccupied with an opposition between freedom . . . and restraint,” an opposition that it mediated “[b]y the sharp delineation of boundaries”). Early nineteenth-century legal thought, on the other hand, recognized more variegated categories with intermediate classes between the

to the government. Illegal acts were deemed *ultra vires*; the offending officer was treated as a private actor liable at common law as a tortfeasor.¹⁰¹ Thus, in *Barney v. City of New York*,¹⁰² the Supreme Court observed:

There are many cases in this court involving the application of the Eleventh Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii*. . . . Mr. Justice Lamar defined the two classes to be, those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority.¹⁰³

In most legal contexts, however, nineteenth-century American courts rejected this fully reductive, private law approach as unworkable.

In *Thayer v. City of Boston*,¹⁰⁴ for example, the city had argued for a fully reductive analysis in which it would be responsible only for the lawful, authorized acts of its officers. In that event, however, there could be no liability because, by definition, the actions were lawful. If, on the other hand, its officers acted in an unlawful manner, the city maintained that the officers had acted outside the scope of their authority. In that event, the individual "officers are personally responsible for such unlawful and unauthorized acts."¹⁰⁵ Thus, from the government's perspective, the fully reductive analysis would ensure a "heads I win, tails you lose" situation. Conversely, from the perspective of a claimant seeking to hold the government accountable to law, the reductive approach would create a Catch-22 in which it would be conceptually impossible for a government ever to be responsible for the wrongdoing of its officers.

poles of what only later became binary oppositions. See Winter, *supra* note 32, at 1409-17 (describing the early nineteenth-century "public rights model" of adjudication).

101. See *Ex parte Young*, 209 U.S. 123 (1908):

[T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of the State in its sovereign or governmental capacity. It is simply an illegal act on the part of a state official. . . . [T]he officer in proceeding under such [unconstitutional] enactment 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.

209 U.S. at 159-60.

102. 193 U.S. 430 (1904). *Barney* was itself a Fourteenth Amendment case.

103. 193 U.S. at 439-40 (discussing *Pennoyer v. McConaughy*, 140 U.S. 1, 9-10 (1891)). Even in these decisions, the term *colore officii* obviously refers to unauthorized actions. I shall return to this point below. See *infra* note 127, text accompanying notes 314-16.

104. 36 Mass. (19 Pick.) 511 (1837). The Supreme Court relied on *Thayer* in its decision rejecting a qualified immunity defense in cases of municipal liability under *Monell*. *Owen v. City of Independence*, 445 U.S. 622, 641-43, 654-55 (1980). Chief Justice Rehnquist has characterized *Thayer* as a "famous case." *Oklahoma City v. Tuttle*, 471 U.S. 808, 819 n.5 (1985) (plurality opinion).

105. *Thayer*, 36 Mass. at 515.

Chief Justice Shaw repudiated this argument, recognizing both its unfairness and its arid formalism.¹⁰⁶ Unlike the *Barney* Court, Shaw did not simply equate unlawful action with acts *colore officii*. True, he acknowledged that,

[a]s a general rule, the [municipal] corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bon fide* in pursuance of a general authority to act for the city, on the subject to which they relate¹⁰⁷

But close inspection of this passage reveals that, notwithstanding the apparent similarity to *Barney's* doctrinal summary, Shaw did not treat either side of the common law distinction in the completely reductive manner of the Eleventh Amendment cases. Rather, for Shaw, unlawful acts could nevertheless be "official" ("unlawful acts of its officers, though done *colore officii*"). Authority, moreover, was seen as a matter of general empowerment within a given sphere of action (acts "done *bon fide* in pursuance of a general authority to act for the city, on the subject to which they relate").

It is too simplistic, Shaw explained, to use an after-the-fact determination of the legality of the officers' actions as the defining criteria for deciding whether they had acted in their "official" or "personal" capacities.

There is large class of cases . . . in which it cannot be known at the time the act is done, whether it is lawful or not. . . . [I]f it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage¹⁰⁸

Shaw appreciated that the reductive view, which equates authority with lawfulness, fails to accommodate the complex social reality of the patterns of action that constitute "the State."¹⁰⁹ Since authority can-

106. *Thayer*, 36 Mass. at 515 ("[T]his argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results.").

107. 36 Mass. at 516-17.

108. 36 Mass. at 515.

109. In addition, Shaw's argument was strikingly modern in its consideration of policy: It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed And it may be added, that it would be injurious to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers and subordinate persons, might well refuse to act under the directions of its government in all

not be a matter of lawfulness *vel non*, it must be understood as a question of social meaning — that is, as a question of fact for the jury to determine.¹¹⁰ For Shaw, “reason and justice obviously require” municipal responsibility precisely because the social meaning that is an inevitable aspect of a role like that of public officer means that official authority is never reducible to authorization by positive law.

The reductive analysis created difficulties in other contexts where the characterization of an officer’s acts as private or official had important legal consequences. The issue arose with some frequency in suits alleging that, in executing a writ of attachment, the sheriff had in fact seized goods belonging to the wrong person. Because sheriffs were likely to be people of limited means, a party injured by the sheriff’s unlawful act would seek recovery against the sureties on the officer’s bond faithfully to perform the duties of his office.¹¹¹ If the sheriff’s act were treated as the unlawful act of a private actor, the injured party could not recover against the sureties because, as some courts reasoned, “[t]here being no authority, there is no office, nothing official.”¹¹²

But a fully reductive, categorical approach to the concept of authority would defeat the purpose of requiring sheriffs to post such bonds because it would lead to a conceptual Catch-22 like that advocated by the city in *Thayer*. “[T]he argument, if sound, would preclude a recovery in any case against the sureties. If an authority could

cases, where the act should be merely complained of, and resisted, by any individual as unlawful, . . . and conformably to the principle relied on, no obligation of indemnity could avail them.

36 Mass. at 516. Compare Justice Brennan’s statement almost a century and a half later:

[T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

. . . The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole.

Owen v. City of Independence, 445 U.S. 622, 657 (1980).

110. Compare *Thayer*, 36 Mass. at 516 (the question for the jury is whether the injurious act “was authorized by the city, by any previous delegation, general or special”) with *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986) (plurality opinion) (suggesting that there would be no liability under *Monell* where a city merely delegates discretion to hire and fire to a subordinate official).

111. Indeed, the modest means of most sheriffs was one reason for the state statutory requirements that sheriffs obtain such surety bonds. See *Carmack v. Commonwealth ex rel. Boggs*, 5 Binn. 184, 189 (Pa. 1812) (Tilgham, C.J.).

112. *Ex parte Reed*, 4 Hill 572, 574 (N.Y. Sup. Ct. 1843), overruled by *People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173 (1850) (discussed *infra* notes 113, 119-25 and accompanying text); see also *United States v. Cranston*, 25 F. Cas. 692 (C.C.D.C. 1828) (No. 14,889) (holding sureties not liable for debt collected by constable when he acted without legal process); *Governor ex rel. Simmons v. Hancock*, 2 Ala. 728 (1841) (holding sureties not liable for false representations made by sheriff to induce suitor to sell her claim to him).

be shown, their defence would be complete; if there was none, the act would be extra official, and not within the scope of their undertaking."¹¹³ Accordingly, even reductive courts recognized that the bond would be forfeited and the sureties liable in cases of nonfeasance or misfeasance.¹¹⁴ They drew the line, however, at cases of malfeasance — refusing to hold the sureties liable because “[a] trespass is certainly not a faithful performance of the office, or any performance at all.”¹¹⁵

Other courts agreed with Chief Justice Shaw that wrongs committed under a claim of authority were *colore officii* and retained their governmental character even though they could not be attributed to the government itself:

[A] seizure of the goods of A, under color of process against B, is *official misconduct* in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*.¹¹⁶

Or, as another court put it: “He does this in his character of sheriff, *colore officii*, and not as a naked trespasser without color of authority. . . .”¹¹⁷ Accordingly, the majority rule — later adopted by the Supreme Court for federal officers¹¹⁸ — gave the injured party recourse against the sureties even in cases of malfeasance such as a wrongful attachment.¹¹⁹

The purely reductive, private law approach to the problem of official misconduct would have made little sense to American courts of the early nineteenth century. Consistent with their recognition of the social meaning of “the State,” they understood the question of official misconduct as a matter of *public* concern and not a mere private

113. *Schuyler*, 4 N.Y. at 180.

114. *Reed*, 4 Hill at 572-73.

115. 4 Hill at 575. The court continued: “Where is the limit of the argument, if it be extended to any kind of acts with which his office and process have no connection?” 4 Hill at 575.

116. *Ohio ex rel. Story v. Jennings*, 4 Ohio St. 418, 423 (1854); see also *City of Lowell v. Parker*, 51 Mass. (10 Met.) 309, 314 (1845) (Shaw, C.J.) (Sheriff “took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty.”).

117. *Sangster v. Commonwealth*, 58 Va. (17 Gratt.) 124, 130 (1866).

118. *Lammon v. Feusier*, 111 U.S. 17, 20 (1884) (“[T]he taking of goods, upon a writ of attachment, . . . [is] an official act, and therefore, if wrongful, a breach of the bond given by the marshal for the faithful performance of the duties of his office.”).

119. 111 U.S. at 20-22 (canvassing cases); see, e.g., *Van Pelt v. Littler*, 14 Cal. 194 (1859); *Commonwealth ex rel. Davy v. Stockton*, 21 Ky. (5 T.B. Mon.) 192 (1827); *City of Lowell*, 51 Mass. (10 Met.) 309 (quoted *supra* notes 14, 116); *People ex rel. Kellog v. Schuyler*, 4 N.Y. 173 (1850) (quoted *supra* text accompanying note 113); *Jennings*, 4 Ohio St. 418 (quoted *supra* text accompanying note 116); *Carmack v. Commonwealth ex rel. Boggs*, 5 Binn. 184 (Pa. 1812) (quoted *infra* note 120); *Sangster*, 58 Va. (17 Gratt.) 124 (quoted *supra* text accompanying note 117).

wrong such as a trespass.¹²⁰ Indeed, this is confirmed by the caption of the suit on the surety bond; most are styled in the form — “Commonwealth *ex rel.* []” or “The People for the use of []”¹²¹ — characteristic of the early nineteenth-century public rights action.¹²² As one judge asked rhetorically: “[H]as not every citizen as well as *sutor* an interest in this security against his trespasses *under color of authority*”?¹²³

In summary, both English and American courts understood *colore officii* to refer specifically to the unlawful but nevertheless official actions of public officers. The strength of this consensus is all the more clear in light of the subtle discontinuities between the American and English usages of the common law terms. To Coke, nonfeasance was a paradigmatic example of a wrong committed *colore officii*.¹²⁴ In the surety cases, however, some of the reductive courts “extended” the *virtute officii* concept to include cases of nonfeasance and misfeasance.¹²⁵ They did so because they realized that a fully reductive approach would have eviscerated the statutory requirement that sheriffs obtain sureties.¹²⁶ But despite this adaptive change in the meaning and usage of the common law concepts of *virtute officii* and *colore officii*, the point critical to an understanding of section 1983 is that even the most reductive nineteenth-century courts understood that *colore officii* meant “without lawful authority.”¹²⁷ The related conceptual point, to which I shall return in succeeding sections, is that doctrinal

120. See *Carmack*, 5 Binn. at 191 (“The strong hold which the community have on a ministerial officer, is by subjecting his sureties to responsibility for his official misconduct.”).

121. See cases cited *supra* notes 111, 113, 116-17, 119.

122. See Winter, *supra* note 32, at 1396-406 (describing the relator and public mandamus actions of the eighteenth and early nineteenth centuries).

123. *Carmack*, 5 Binn. at 192; cf. *County Commrs. v. People ex rel. Metz*, 11 Ill. 202 (1849): [W]here the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.
11 Ill. at 208.

124. See COKE, *supra* note 13, at 206 (“[H]e may do it *colore officii* . . . when he hath a warrant, and doth not pursue it.”).

125. See *Reed*, 4 Hill at 572-73 (“The words cannot be extended beyond nonfeasance or misfeasance in respect to acts which by law [the sheriff] is required to perform.”); see also *Schuyler*, 4 N.Y. at 181 (“The English statutes and our own refer to acts done ‘*virtute officii*,’ and yet they have uniformly been held to extend to acts of misfeasance . . .”).

126. See *supra* text accompanying note 113.

127. *Reed*, 4 Hill at 573 (“It is no more the act of a sheriff because done *colore officii*, than if he had been destitute of process.”); 4 Hill at 574 (“an act done under the mere pretence or color of authority”); *Pennoyer v. McConnaughy*, 140 U.S. 1, 10 (1891) (referring to suits “against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff”); *Barney v. City of New York*, 193 U.S. 430, 439-40 (1904) (quoted *supra* text accompanying note 103).

anomalies of the sort faced in the surety cases are the inevitable consequence or the *reductio ad absurdum* of an approach that elides the social meaning of "the State."

B. *The Federalism Dimension*

The common law conceptions took on a new life among the complexities of a federal system. In that context, the resolution of the problems arising from the conceptual opacity of "the State" would determine not only where liability lay, but also the questions of which courts would have jurisdiction and whose law (state or federal) would govern. This is evident under section 1983, where the official quality of an act by a state officer is what transforms the case from a common law tort to be tried in the state courts into a constitutional case that a federal court may hear. But much the same issue arises in the obverse context, when a federal officer has been charged with violating state law and the question is whether the case may be removed for trial in federal court. This was the context in which Congress first invoked the *colore officii* concept.

In the early nineteenth century, sectional resistance to the collection of federal tariffs and import duties frequently led to state prosecutions of federal customs or revenue officers.¹²⁸ During the War of 1812, the New England states actively opposed the embargo on trade with England. In response, Congress provided for the removal to the federal circuit courts of all cases, both criminal and civil, brought in the state courts against federal customs officials "for any thing done by virtue of this act or under colour thereof."¹²⁹ The statute was twice extended, and expired at the end of the war.¹³⁰ In 1833, South Carolina's threats of nullification led Congress to enact a permanent removal statute covering all acts of federal officers acting "under the revenue laws of the United States, or under colour thereof. . . ."¹³¹ Congress enacted several additional removal statutes during and immediately after the Civil War.¹³²

128. See generally PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1257-58 (3d ed. 1988) [hereinafter HART & WECHSLER].

129. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. This was the first of the federal officer removal acts.

130. Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231, 233-34 (one-year extension); Act of Mar. 3, 1817, ch. 109, § 2, 3 Stat. 396 (four-year extension).

131. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633.

132. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755-56; Act of May 11, 1866, ch. 80, § 4, 14 Stat. 46; Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171; Act of July 28, 1866, ch. 298, § 8, 14 Stat. 328, 329 (providing for removal in cases involving "any acts done . . . under authority or color of" the Captured and Abandoned Property Act). The only removal act not to use the "under color of" formula was the Act of May 11, 1866, ch. 80, §§ 1, 3, 14 Stat. 46 (providing for

Here, too, the reductive analysis presented the kind of Catch-22 familiar from the nineteenth-century surety and municipal liability cases. Courts widely recognized that "Congress has power . . . to employ suitable officers and agents, and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty."¹³³ Typically, a defendant would premise removal on the claim that he had acted within his authority as a federal officer. But the basis for removal to federal court would be questionable if the officer's actions proved, as alleged, to be merely private wrongs such as murder, theft, or conversion of another's property.¹³⁴ In a quite circular fashion, then, the jurisdiction of the federal court would seem to turn on the outcome of the state suit it was about to try: Whether the officer had acted within his superior federal authority or beyond it in violation of state law would determine both the merits and the jurisdictional issue.

Nineteenth-century courts responded to the circularity problem in one of two ways. In the more conservative period following Reconstruction, courts conceded the practical necessity of allowing removal to permit the federal court to determine jurisdiction. But, consistent with the reductive analysis, they insisted that the federal court must remand the action if it determined that the officer had acted unlawfully or beyond his official capacity.¹³⁵ In *State v. Hos-*

removal in cases involving "any acts done . . . by virtue of any order . . . issued by the President or Secretary of War, or any military officer of the United States holding command").

133. *Findley v. Satterfield*, 9 F. Cas. 67, 68 (C.C.N.D. Ga. 1877) (No. 4792); *see also State v. Hoskins*, 77 N.C. 377, 380 (1877) (discussed *infra* text accompanying notes 136-42).

134. In *Willingham v. Morgan*, 395 U.S. 402 (1969), for example, "[r]espondent alleged in his motion for remand that petitioners had been acting 'on a frolic of their own which had no relevancy to their official duties.'" 395 U.S. at 407. Following twentieth-century precedent, the *Willingham* Court "interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and the asserted official authority." 395 U.S. at 409.

Even if the federal officer's act were seen as purely private, removal might still be possible under the modern concept of protective jurisdiction. *See HART & WECHSLER, supra* note 128, at 984-85; *cf. Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). But it is unlikely that Congresses of the early nineteenth century would have subscribed to this view. *See, e.g., Osborn*, 22 U.S. at 865 ("It has never been doubted, that all who are employed [as collectors of the revenue, the carriers of the mail, and in the mint establishment] are protected, *while in the line of duty* . . .") (emphasis added); *see also Findley v. Satterfield*, 9 F. Cas. at 68 (quoted *supra* text accompanying note 133). The current Court has recently rejected the protective jurisdiction argument, holding that removal is only available in cases where the federal officer raises a federal defense. *Mesa v. California*, 489 U.S. 121, 136-39 (1989). This is not entirely consistent, however, with the historical practice. *See infra* text accompanying notes 143-58.

135. *See, e.g., Tennessee v. Davis*, 100 U.S. 257, 261-62 (1880) ("[W]hen the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer [the removal statute] makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded."). The approach taken by the modern Court is roughly analogous. It resolves the circularity problem by allowing removal on a credible *claim* of jurisdiction: "The federal officer removal statute . . . is broad enough to cover all cases where federal officers can raise a colorable defense arising out of

kins,¹³⁶ for example, a federal tax collector was arrested and indicted for acts that "but for his office would have been an assault and battery and breach of the law of North Carolina."¹³⁷ The defendant filed a removal petition in the federal circuit court "upon the ground that he was an officer of the United States, and that what he did was by virtue of his office."¹³⁸ The circuit court granted the removal petition, and the state court complied.

On the state's appeal, the Supreme Court of North Carolina held that the state trial court had properly relinquished jurisdiction to the federal court. Recognizing that Congress' power to protect federal tax collectors is incident to its power to tax, the court observed that

[i]t is no answer . . . to say he may be protected when he does right, but not when he does wrong; for how can the United States know whether he has done right or wrong unless she can try him, and how can she try him unless he be delivered up on demand?¹³⁹

Nevertheless, the North Carolina court indicated its view that federal jurisdiction could only be maintained pursuant to the reductive analysis:

Nor is it to be understood from anything that we have said that when a man commits a crime against the laws of the State *in his individual capacity* . . . that he can defend himself by the fact that he is a United States officer. . . . It is only where the act complained of is an official act, or done by virtue or under color of his office, that he is entitled to have his case passed upon by the power which appointed him.¹⁴⁰

Noting the procedure followed in *The Mayor v. Cooper*,¹⁴¹ the court suggested that

the State ought to have followed the case to the Circuit Federal Court and moved to dismiss it upon the ground that the act complained of was done by the defendant, not as an *officer*, but as a *man*, and then the Federal court could have determined that matter; and if it had been satisfied that the defendant was not acting as an officer, or, if he was, that he was misbehaving, then the case could have been returned to the State court for trial.¹⁴²

their duty to enforce federal law." *Willingham*, 395 U.S. at 406-07. But, in *Mesa*, the Court held that jurisdiction may be premised only on a supremacy claim or other federal defense. 489 U.S. at 129.

136. 77 N.C. 377 (1877).

137. 77 N.C. at 379.

138. 77 N.C. at 379.

139. 77 N.C. at 380.

140. 77 N.C. at 389.

141. 73 U.S. (6 Wall.) 247, 249 (1868). In *Cooper*, the defendants removed the case to federal court, the state plaintiffs moved to remand, and the federal court held the removal statute unconstitutional. The defendants then appealed to the Supreme Court.

142. *Hoskins*, 77 N.C. at 390; see also *Findley v. Satterfield*, 9 F. Cas. 67, 69 (C.C.N.D. Ga. 1877) (No. 4792) ("Should we discover, either before or during trial, that the facts of a case did

This reductive understanding, however, deviated from the approach to the removal acts taken by earlier courts. In fact, the Supreme Court had concluded its opinion in *The Mayor v. Cooper* by rejecting the position espoused in *Hoskins*: "The validity of the defence authorized to be made is a distinct subject. . . . It has no connection whatever with the question of jurisdiction."¹⁴³ Similarly, a lower federal circuit court had held that the court's jurisdiction on removal was entirely independent of the merits of the state court action: "The right of removal . . . in no wise depended upon the nature or form of the question to be raised in the possible progress of the litigation The only condition of the right of removal was, that a suit had been commenced, and for a cause of action within the scope of the act."¹⁴⁴

In the antebellum period, moreover, the lower federal courts understood the 1833 removal act to have granted them the power to render judgment on the question of misbehavior. Thus, in *Woods v. Matthews*,¹⁴⁵ decided in 1852, the court held that

whether the horse in question was in truth seized and taken by the defendant in the . . . performance of his duty . . . is a matter of fact belonging to and forming a part of the merits of the case. It is involved in the inquiry whether the taking and detention were lawful and justifiable, and must be determined, not in a summary way, on motion and affidavits, . . . but on trial of the merits in the usual course of proceeding.¹⁴⁶

The court also held that, once the case was properly removed, the plaintiff had "no alternative but that of prosecuting the action here or becoming non-suited."¹⁴⁷

In *Van Zandt v. Maxwell*,¹⁴⁸ decided that same year, the court

not bring it within the act of congress, we should proceed no further with it, and should remand it to the state court.").

143. *Cooper*, 73 U.S. at 254.

144. *Lamar v. Dana*, 14 F. Cas. 973, 974 (C.C.S.D.N.Y. 1872) (No. 8005). The case arose under the 1863 act providing for removal of any suit for an act done "by virtue, or under color, of any authority derived from . . . the President . . . or any act of Congress." Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755-56. A subsequent statute retrospectively legalized various actions during the war and purported to preclude both state and federal courts from reviewing such actions. Act of Mar. 2, 1867, ch. 155, 14 Stat. 432-33. Lamar argued that the statute attempting to withdraw jurisdiction from the state courts was unconstitutional and, because the federal courts had effectively been deprived of jurisdiction, that the effect of the statute was to preclude removal of his state false imprisonment suit. The federal court rejected this argument, reasoning that removal was proper under the 1863 act regardless of whether the effect of the 1867 act was to withdraw federal court jurisdiction or merely to provide the federal officer with a complete defense. *Lamar*, 14 F. Cas. at 973-74. The case was subsequently tried, and the court directed the jury to enter a verdict for the federal defendant, Dana. *Lamar v. Dana*, 14 F. Cas. 975, 977 (C.C.S.D.N.Y. 1873) (No. 8006).

145. 30 F. Cas. 465 (C.C.D. Vt. 1852) (No. 17,955).

146. 30 F. Cas. at 465-66.

147. 30 F. Cas. at 466.

148. 28 F. Cas. 1093 (C.C.S.D.N.Y. 1852) (No. 16,884).

explicitly rejected the reductive analysis. The federal customs collector, Maxwell, removed to federal court a civil suit alleging that he had failed to pay Van Zandt the share of a forfeiture due him as an informer.¹⁴⁹ Van Zandt moved for a remand to the state court on the ground that "the collector has proceeded in his individual capacity only," or in other words, "that the defendant cannot transfer this cause to this court for the reason that he is sought to be charged in it as a wrong-doer."¹⁵⁰ The circuit court appreciated the conceptual Catch-22 that would result and, for that very reason, repudiated the reductive argument: "That doctrine would nullify the provisions of the [removal] act . . . because, in every case of prosecution against a collector or other revenue officer, the action seeks to charge such officer with a personal liability for acts asserted to have been done wrongfully and without authority of law."¹⁵¹ In language reminiscent of the *Dive* court of three centuries earlier,¹⁵² the *Van Zandt* court observed that "the collector takes into his possession the moneys derived from forfeitures, and holds and disposes of them, in his official character alone."¹⁵³ It concluded, moreover, that the officer

acts under the authority of the revenue law, whether he adopts a right or wrong interpretation of it. . . . The law has placed the fund under his control in his official character, and has required him to act as collector in the disposal of it. Most palpably he would, in such a case, be deemed to have acted under the revenue laws or under color thereof; or would be held to set up or claim a right or authority under those laws¹⁵⁴

149. Under the Act of Mar. 2, 1799, ch. 22, § 91, 1 Stat. 697, the proceeds of customs forfeitures under that act were to be divided in two: half to go the United States and the other "moiety" to be divided equally between the collector, the federal naval officer, and the surveyor of the port. If, however, the information leading to the forfeiture had come from some other person, the informer was to receive one half of the moiety with the remainder to be split among the three officers.

The informer statute at issue in *Van Zandt* was extremely unusual in that the customs collector enforced the forfeiture and collected the statutory penalty. Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. at 695-96. Under the typical informer statute, the statutory fine or forfeiture was collected by "he who shall sue for same." The informer proceeded on behalf of himself and the government, splitting the proceeds according to the formula provided by the particular statute. These early "private attorney general" statutes date to the fifteenth century in England and were used extensively by Congress and state legislatures throughout the eighteenth and nineteenth centuries. See Winter, *supra* note 32, at 1406-09 (collecting sources); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 826 & n.55 (1969).

150. *Van Zandt*, 28 F. Cas. at 1094.

151. 28 F. Cas. at 1094; *cf.* *The People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173, 180 (1850) (quoted *supra* text accompanying note 113).

152. See *supra* text accompanying notes 88-95.

153. *Van Zandt*, 28 F. Cas. at 1094.

154. 28 F. Cas. at 1094; see 28 F. Cas. at 1094 ("We think that the act of the defendant which is the foundation of this suit was either an official one done by him in the character of a collector, under the revenue laws, . . . or was, under the alternative in the statute, a right, authority or title set up by the defendant, under the revenue laws . . .").

In *Buttner v. Miller*,¹⁵⁵ a decision that virtually coincided with the passage of section 1983, the court plainly stated that the removal statute provided jurisdiction even when the officer had misbehaved. In that case, a customs collector removed a state defamation case that alleged that, while confiscating several casks of brandy and claret, he had “falsely and maliciously charged [the plaintiff] with importing and receiving said goods in fraud of the revenue laws of the United States.”¹⁵⁶ The circuit court denied the state court plaintiff’s motion to remand for lack of jurisdiction.

It is said, however, that the revenue laws do not authorize malicious slander. Neither do they authorize the wrongful seizure of goods, nor the commission of any offense. Yet in both these cases a suit or prosecution for an act done under the revenue laws, or under color thereof, may be removed to the federal court. Such removal is expressly authorized by the statute.¹⁵⁷

In contrast to the modern Court, which equates “under color of office” with “in performance of his duties,”¹⁵⁸ nineteenth-century courts like *Buttner* understood Congress’ incorporation in the removal statutes of the *color of office* language as connoting its intention to include unauthorized actions within the coverage of the acts.

Indeed, whatever their positions on the scope of the removal power, most courts of the period understood the common law phrase to refer to action taken without full legal authority. Thus, in *Tennessee v. Davis*,¹⁵⁹ the Court stressed that the allegations of the removal petition

represented that the act for which the defendant was indicted *was done not merely under color of his office* as a revenue collector, or under color

155. 4 F. Cas. 926 (C.C.S.D. Ala. 1871) (No. 2254).

156. 4 F. Cas. at 927.

157. 4 F. Cas. at 927 (emphasis added). As a defamation case, the issues in *Buttner* would be determined under the common law. The customs collector’s defense to the slander charge would be not that he had acted pursuant to his paramount federal authority, but that he had not slandered the plaintiff because the allegedly defamatory statement was in fact true. Thus, although the officer’s case could be restated to contain a federal element — that the goods were subject to confiscation under the federal revenue laws — the defense would prevail as a matter of state defamation law recognizing truth as a defense to slander. In *Mesa v. California*, 489 U.S. 121, 125-29 (1989), the Court engaged in a parallel analysis of the self-defense claim in *Tennessee v. Davis*, 100 U.S. 257 (1880), to explain why removal had been proper. The *Mesa* Court explained that, as in *Buttner*, the defense in *Davis* contained both state and federal elements: *Davis*’ self-defense claim would prevail as a matter of state criminal law only if he was justified in seizing the distillery under federal law. *Mesa*, 489 U.S. at 125-29. Ordinarily, however, a federal element in a state law claim does not suffice to found federal question removal jurisdiction under 28 U.S.C. § 1441. See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); cf. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

158. See *Mesa*, 489 U.S. at 135 (noting with approval that in previous cases the Court “concluded that ‘in the performance of his duties’ meant no more than ‘under color of office’”) (quoting 28 U.S.C. § 1442(a)(3) (1988)).

159. 100 U.S. 257 (1880).

of the revenue laws, . . . *but that it was done under and by right of his office*, and while he was resisted by an armed force in his attempts to discharge his official duty. *This is more than a claim of right and authority under the law of the United States . . .*¹⁶⁰

The dissent in *Hoskins* used the formula in the same manner when it complained that removal under the federal statute would, as a practical matter, operate to immunize federal wrongdoers and thereby cause disloyalty and rebellion.¹⁶¹ "The insurrection of Watt Tyler was caused by the crime of an internal revenue officer committed under color of his office. To deprive the State courts of the power of punishing such offenses would result in breeding a band of marauders under color of law . . ."¹⁶²

But, as in the surety cases,¹⁶³ the meaning of the *color of office* formula did not remain static. Some courts interpreted the phrase more narrowly to refer to conduct that, though ultimately proved mistaken, was at least a good faith assertion of authority.¹⁶⁴ In *Woods v. Matthews*,¹⁶⁵ for example, the court allowed that "[i]f the property sued for . . . was of such a nature as not to be liable to seizure . . . under any circumstances, it might, perhaps, be said to be apparent, that the case does not come within the act of congress."¹⁶⁶

A similar "good faith" interpretation was made of the "under color" clause of the Captured and Abandoned Property Act.¹⁶⁷

160. 100 U.S. at 261 (emphasis added).

161. *State v. Hoskins*, 77 N.C. 377, 393 (1877) (Rodman, J., dissenting). The dissent's concern was that the federal court might be too distant from the site of the offense and that, as a result, "in the great majority of the cases the prosecutor and the witnesses will be unable to attend, and a verdict of acquittal will be the necessary result." 77 N.C. at 393. The Court recently voiced a similar concern in support of its ruling on the narrow scope of the removal act. See *Mesa*, 489 U.S. at 138 ("[W]e can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions.").

162. *Hoskins*, 77 N.C. at 393-94 (Rodman, J., dissenting).

163. See *supra* text accompanying notes 124-27.

164. I explain below why the "good faith" interpretation might have arisen in these cases. See *infra* text accompanying notes 178-80. In section III.D., I discuss why this understanding of *under color of law* should have little or no bearing on the interpretation of § 1983. See *infra* text accompanying notes 403-06.

165. 30 F. Cas. 465 (C.C.D. Vt. 1852) (No. 17,955), discussed *supra* text accompanying note 145-47.

166. 30 F. Cas. at 465; see also *Tennessee v. Davis*, 100 U.S. 257, 261-62 (1880) ("[T]he act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer.") (emphasis added); *Findley v. Satterfield*, 9 F. Cas. 67, 68 (C.C.N.D. Ga. 1877) (No. 4792) (Congress' authority to prescribe removal extends to "acts done, or in good faith alleged to have been done, in the course of their duty.") (emphasis added).

167. Act of July 27, 1868, ch. 276, § 3, 15 Stat. 243-44 (amending Act of Mar. 3, 1863, ch. 120, 12 Stat. 820). Another statute provided for removal of cases brought under the act. Act of July 28, 1866, ch. 298, § 8, 14 Stat. 328, 329.

Under that act, one could sue in the court of claims to obtain compensation for property taken by federal officers during the Civil War if certain conditions, including loyalty during the war, were met.¹⁶⁸ The act provided that suit in the court of claims was the exclusive remedy, precluding personal liability against the officer, when the seizure had been made "in virtue or under color of said act."¹⁶⁹ In *McLeod v. Callicott*,¹⁷⁰ the plaintiff brought suit in federal court against a treasury agent who wrongly seized thirty-nine bales of his cotton after the cessation of hostilities. In its charge to the jury, the court explained that the defendant could not be held liable for an unlawful or mistaken seizure if made in good faith:

It will be for you to say whether the defendant, in taking this property, proceeded under color of that act. If he was proceeding in good faith, believing himself to be warranted . . . in taking charge of the cotton under that act, we think he is covered by its provisions. . . . If it was done by him . . . under a mistake as to the character of the property, he is in our judgment protected by this act. It would not protect the United States from a demand in the court of claims for this property, but it would protect the officer against a private suit, if he acted under color of this law, or under a mistaken sense of duty, though not in strict pursuance of the law.¹⁷¹

The Supreme Court subsequently relied on *McLeod* in *Lamar v. McCulloch*.¹⁷² In *Lamar*, the Court also discussed its decision of the previous year in *Lammon v. Feusier*,¹⁷³ which held sureties liable "because the [federal] marshal had acted *colore officii*, although he had acted without sufficient warrant."¹⁷⁴

Two conclusions stand out, however. First, as with the surety cases, the discrepancies among these various interpretations of the *under color of* formula merely underscore the degree of consensus on the critical question: Despite their differences, all these nineteenth-century courts understood that *under color of law* referred to official action *without* proper authority. This understanding survived into the next century. As explained in one turn-of-the-century removal case: "'Colorable' is defined as 'having the appearance, especially the false appearance, of right.'"¹⁷⁵ Thus, the court concluded that

168. Act of Mar. 3, 1863, ch. 120, § 3, 12 Stat. 820.

169. Act of July 27, 1868, ch. 276, § 3, 15 Stat. 243-44.

170. 16 F. Cas. 295 (C.C.D.S.C. 1869) (No. 8897).

171. *McLeod*, 16 F. Cas. at 297.

172. 115 U.S. 163, 186 (1885) ("Of course, there must be good faith, or there can be no color.").

173. 111 U.S. 17 (1884). *Lammon* is discussed *supra* text accompanying notes 118-19.

174. *Lamar*, 115 U.S. at 187 (discussing *Lammon v. Feusier*, 111 U.S. 17 (1884)).

175. *Virginia v. De Hart*, 119 F. Cas. 626, 628 (C.C.W.D. Va. 1902).

[t]he language of the statute does not authorize a removal of every prosecution against a revenue officer; but the words "under color of" and "right or authority claimed" show clearly that the act for which the prosecution is commenced need not be one done strictly in pursuance of a federal revenue statute in order to justify removal.¹⁷⁶

Second, these different glosses on the *under color of* language can be understood as the different ways in which the problem of the conceptual opacity of "the State" is refracted through different policy concerns. In the surety cases, the problem arises within a unified jurisprudential field and along a single policy axis: State law governs on both substantive and jurisdictional matters; the operative policy concern is the maintenance of appropriate legal controls over governmental agents. In this context, the invocation of the *colore officii* concept to sustain the applicability of the surety bond serves to maintain governmental accountability under law both by providing compensation to those harmed by illegal governmental action and by bringing to bear effective constraints on governmental officers.¹⁷⁷

In the removal cases, however, the difficulties generated by the ambiguous character of official action arise in the more complex context of a dual system. Here, the *colore officii* concept mediates between parallel jurisprudential fields and their competing policy vectors. Removal implicates not only the jurisdictional conflict between state sovereignty and federal supremacy, but also the substantive tension between individual accountability to basic state law codes of behavior (such as tort, contract, and criminal law) and the authority of the federal government both to act through its agents and to protect them against state discrimination. In this four-dimensional framework, dif-

176. 119 F. Cas. at 629. The court continued:

If, for instance, a revenue officer, while not even colorably engaged in the performance of duty, sets fire to a neighbor's dwelling, he should be tried for his arson by the state court. But if, while seeking to arrest a violator of a revenue law, who is fortified in his dwelling, the officer — even without sufficient justification — sets fire to the house in order to effect the capture, the trial of the charge of arson made against him should be removed to the federal court.

119 F. Cas. at 629. The holding of the court was only

that when an attack is made on a revenue officer, while he is in the actual pursuit of a violator of the revenue laws, by a third party actuated by mere personal malice towards the officer, and the officer, in repelling the attack, wounds or kills the person attacking him, such act is one done, at least colorably, in the line of official duty.

119 F. Cas. at 628.

177. Because sheriffs were likely to be persons of limited means, *see supra* note 111, full compensation would not be likely without third-party payment by the surety. Because they would forfeit the cost of the bond, the officers responsible would not go unpunished. Because of their financial risk, the sureties — who, in the early nineteenth century, were likely to be wealthy local citizens rather than distant insurance corporations — would have a substantial stake in exercising a moderating influence on local officials. *See Carmack v. Commonwealth ex rel. Boggs*, 5 Binn. 183, 191 (Pa. 1812) (Yeates, J.) ("The strong hold which the community have on a ministerial officer, is by subjecting his sureties to responsibility for his official misconduct.").

ferent interpretations of the *color of office* language represent different adjustments among these competing concerns.

Concern for federal authority was the obvious impetus for the removal statutes of 1815, 1833, 1863, and 1866. Accordingly, courts of the antebellum and Reconstruction periods interpreted these statutes to extend federal jurisdiction, leaving to the federal trial on the merits the task of reconciling the interests in federal authority with those in legal accountability. After the close of Reconstruction, however, the perceived need to restore some balance between the states and the nation led state decisions like *Hoskins*¹⁷⁸ and federal decisions like *Tennessee v. Davis*¹⁷⁹ and *Findley v. Satterfield*¹⁸⁰ to interpret the formula more narrowly, emphasizing comity for state processes and confining concern for federal supremacy to cases of good faith assertions of federal authority.

Yet another set of concerns predominated in the cases under the Captured and Abandoned Property Act. That statute used the *color of office* concept to extend personal immunity to federal agents at a two-fold cost. This grant of immunity not only compromised state jurisdictional and substantive interests, it also had the effect of imposing financial liability for compensation on the federal treasury. In this case, too, a narrow reading of the phrase was a predictable judicial response.

One would have expected Felix Frankfurter, more than most other Justices, to have been sensitive to the way questions of federal jurisdiction reflect such contemporaneous policy concerns.¹⁸¹ Accordingly, he should have recognized more readily the complex and subtle variations in the use of a jurisdictional formula like *under color of law*. Instead, Frankfurter dogmatically asserted a totalizing and historically incorrect version of the nineteenth-century understanding of *under color of law*. The removal cases, in contrast, demonstrate that nineteenth-century courts understood that Congress' adoption of the phrase *under color of law* signalled its intention to reach at least *some* wrongful acts by state officials.

178. See *supra* text accompanying notes 136-42.

179. See *supra* notes 135, 166 and accompanying text.

180. See *supra* notes 133-34, 142, 166 and accompanying text.

181. See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 59-60 (1927) ("For law and courts are instruments of adjustment, and the compromises by which the general problems of federalism are successively met determine the contemporaneous structure of the federal courts and the range of their authority.").

C. *Under Color of Frankfurter's Law*

How, then, could Frankfurter have been so wrong? The most probable explanation is that the mistake was not accidental. The idea that Frankfurter did not know the historical meaning of *under color of law* is highly implausible, to say the least. Frankfurter was more than just the foremost academic authority of his day on the law of federal courts; he invented the course.¹⁸² In any event, the evidence demonstrates that he either knew or should have known. We may infer, therefore, that he repressed or deliberately ignored what he knew in order to further a set of judicial objectives rooted in his opposition to the jurisprudence of the substantive due process era.¹⁸³

1. *The Political-Doctrinal Context*

In the period following Reconstruction, the Court read the Fourteenth Amendment to apply to action by state officials even though not in conformity with state law. In *Virginia v. Rives*,¹⁸⁴ the Court held that racial discrimination in jury selection violated the Fourteenth Amendment even when "the laws of Virginia make no such discrimination" and that the officer "made himself liable at the instance of the State and under the laws of the United States."¹⁸⁵ Affirming federal power to prosecute a state judge for discrimination in jury selection, the Court in *Ex parte Virginia*¹⁸⁶ explicitly recognized

182. Starting in the 1920s, Frankfurter taught a yearly senior seminar entitled "Jurisdiction and Procedure of the Federal Courts." BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* 76 (1982). In 1927, Frankfurter and Landis published their landmark history of the federal courts, FRANKFURTER & LANDIS, *supra* note 181, much of which had previously been published under the same title as a series of articles in the *Harvard Law Review* during 1925-1927. See MURPHY, *supra*, at 84. In 1929, Frankfurter institutionalized the series as an annual review of the previous Supreme Court Term — a practice that persists to this day. See *id.* at 385 n.38. In 1932, Frankfurter and Davison published what was the first casebook on both administrative law and what we now call Federal Courts. FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1932). Henry Hart and Herbert Wechsler dedicated the first edition of their classic casebook "TO FELIX FRANKFURTER who first opened our minds to these problems." HART & WECHSLER, *supra* note 128, at xix.

183. Some of those who knew Frankfurter have commented on his capacity for self-deception. Justice Murphy, for example, considered Frankfurter's "campaigns for judicial self-restraint as masks for personal drives that he condemned in others." Joseph P. Lash, *A Brahmin of the Law: A Biographical Essay*, in *FROM THE DIARIES OF FELIX FRANKFURTER* 3, 76 (Joseph P. Lash ed., 1975). Similarly, Learned Hand told Louis Henkin that "Frankfurter hasn't supreme self-restraint. He's learned a good deal of it. But he hasn't it." *Id.* at 77.

184. 100 U.S. 313 (1880).

185. 100 U.S. at 321. *Rives* was an attempt by two African-American defendants to remove their state murder trial to federal court because of the exclusion of blacks from the jury venire. The Court held that, although there was discriminatory state action, the case did not fall within the terms of the particular removal statute — a statute that does not employ the *under color of law* language. 100 U.S. at 318-19.

186. 100 U.S. 339 (1880).

that the abstract conceptual nature of "the State" rendered the reductive approach unworkable:

The constitutional provision . . . must mean that no agency of the State, or of the officers or agents by whom its power are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it. . . . [P]ower was given Congress to enforce its provisions by appropriate legislation. *Such legislation must act upon persons, not upon the abstract thing denominated a State.* . . .¹⁸⁷

With these cases, the Court ensured a role for federal judicial enforcement of the Reconstruction amendments' prohibitions against racial discrimination.

By the turn of the century, however, the Fourteenth Amendment had become a vehicle for business interests seeking federal judicial protection from unfavorable state regulation.¹⁸⁸ In *Barney v. City of New York*,¹⁸⁹ the Court invoked the reductive analysis to reject a due process claim. Barney sought to enjoin the construction of a subway tunnel, claiming that it would constitute a deprivation of his property in violation of the Due Process Clause. The Court affirmed the lower court's dismissal for want of jurisdiction on the ground that "the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment."¹⁹⁰

Holmes appreciated that the *Barney* doctrine promised severely to limit the possibilities of federal court intervention. In *Raymond v. Chicago Union Traction Co.*,¹⁹¹ the Court upheld a due process and equal protection challenge to a tax assessment on corporate stock. In dissent, Holmes invoked *Barney* to argue that the case should have been dismissed for want of federal jurisdiction.¹⁹² He went further

187. 100 U.S. at 347 (emphasis changed from original).

188. FINK & TUSHNET, *supra* note 41, at 17. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Davis & Farnum Mfg. Co. v. City of Los Angeles*, 189 U.S. 207 (1903).

189. 193 U.S. 430 (1904).

190. 193 U.S. at 437.

191. 207 U.S. 20 (1907).

192. 207 U.S. at 40 (Holmes, J., dissenting).

and drew attention to the intimate conceptual connection between *Barney* and the notion of exhaustion of state court remedies. He argued:

It seems to me . . . that the action of the state board of equalization should not be held to be the action of the State until, at least, it has been sanctioned directly, in a proceeding which the appellee is entitled to bring, by the final tribunal of the State, the Supreme Court. I am unable to grasp the principle on which the State is said to deprive the appellee of its property without due process of law because a subordinate board, subject to the control of the Supreme Court of the State, is said to have violated the express requirement of the State in its constitution; because, in other words, the board has disobeyed the authentic command of the State¹⁹³

In contrast, Justice Peckham's majority opinion found the state action issue simple and straightforward.¹⁹⁴ It distinguished *Barney* on the ground that only "where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State."¹⁹⁵

The reductive analysis swiftly proved a two-edged sword, however. In *Ex parte Young*,¹⁹⁶ the Court invalidated a Minnesota regulatory statute as a violation of the Due Process Clause and then applied the reductive analysis to treat the Minnesota Attorney General's effort to enforce that statute as the ultra vires act of a private individual.¹⁹⁷

193. 207 U.S. at 41 (Holmes, J., dissenting).

194. 207 U.S. at 35 ("The claim that the action of the state board . . . was the action of the State, and if carried out would violate the provisions of the Fourteenth Amendment . . . by taking property of the appellee without due process of law, . . . constitutes a Federal question beyond all controversy.").

195. 207 U.S. at 37. *Barney* was further undercut in *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909), where the Court declined to rule on the federal constitutional ground and ruled instead on the pendent state ground, holding that the complained-of action violated state law.

196. 209 U.S. 123 (1908). At the time, the Court had only recently extended the Eleventh Amendment to include suits brought against a state by its own citizens. See *Hans v. Louisiana*, 134 U.S. 1 (1890). An extensive, though not universally accepted, body of scholarship now demonstrates the historical inaccuracy of *Hans*' interpretation of the Eleventh Amendment as a general recognition of the sovereign immunity of the states from suit. Instead, according to the available historical evidence, the Eleventh Amendment was intended to abrogate citizen-state diversity jurisdiction and to leave intact federal question jurisdiction over cases brought against states. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); see also Amar, *supra* note 41, at 1473-75; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44-51 (1988); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 67-68 (1984); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting).

197. *Young*, 209 U.S. at 159-60 (quoted *supra* note 101). For a description of the reductive, ultra vires theory see *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913):

The proposition hence applies to the prohibitions of the [Fourteenth] Amendment the law of principal and agent governing contracts between individuals and consequently assumes that

But the Court soon faced the Catch-22 necessarily engendered by the reductive analysis: If illegal action is unauthorized and not attributable to the state, how can there be state action? In *Young*, the Court had canvassed state law governing the authority of the Attorney General and concluded, albeit cryptically, that “[h]is power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the . . . Court.”¹⁹⁸

The Catch-22 was pressed with greater vigor five years later in *Home Telephone & Telegraph Co. v. City of Los Angeles*.¹⁹⁹ The city argued that, if the acts of its officials violated the Due Process Clause as alleged, then those acts also violated the parallel state constitutional provision. “Under this hypothesis . . . it could not be assumed that the State had authorized its officers to do acts in violation of the state constitution until the court of last resort of the State had determined that such acts were authorized.”²⁰⁰ The Court recognized, however, that the radical implication of this argument was that the Eleventh and Fourteenth Amendments would cancel each other out:

[S]ince if there be no right to exert such [federal judicial] power until by the final action of a state court of last resort the act of a state officer has been declared . . . to be the lawful act of the State as a governmental entity, the inquiry naturally comes whether under such circumstances a suit against the officer would not be a suit against the State within the purview of the Eleventh Amendment. The possibility of such a result . . . [might] be to cause the Fourteenth Amendment to narrow Federal judicial power instead of enlarging it and making it more efficacious.²⁰¹

The Court pointed out, moreover, that this same reasoning could apply to other provisions of the Constitution such as the Contracts Clause.²⁰² The logical consequence would be the complete abrogation of federal judicial power to enforce the Constitution: If the officer’s act was unauthorized, there would be no state action; if it was authorized by the state, it would be immunized under the Eleventh Amendment. Necessarily, the Court rejected the argument, citing its prior

no act done by an officer of a State is within the reach of the Amendment unless such act can be held to be the act of the State by the application of such law of agency.
227 U.S. at 287.

198. *Young*, 209 U.S. at 160-61. I discuss this “inconsistency” *infra* text accompanying notes 370-76, 383-92.

199. 227 U.S. 278 (1913).

200. 227 U.S. at 283.

201. 227 U.S. at 285.

202. 227 U.S. at 285-86. This problem of self-cancelling provisions is one that only arose with the extension of the Eleventh Amendment in *Hans*. See *supra* note 196. The decision in *Hans* forced the Court to invent new strategies to reconcile federal supremacy with the quite inconsistent principle of state sovereign immunity.

decisions from *Rives* through *Raymond* and *Young*.²⁰³ As for *Barney*, the Court concluded that "it is now so distinguished or qualified as not to be here authoritative or even persuasive."²⁰⁴

But Frankfurter did not think so; he agreed with Holmes. Once on the Court, Frankfurter's opportunity to revive *Barney* came when the issue was explicitly raised by the parties in *Snowden v. Hughes*.²⁰⁵ Snowden had brought suit under the statute that is now section 1983 alleging that members of the Cook County Canvassing Board had fraudulently failed to certify his nomination for a seat in the State General Assembly.²⁰⁶ In affirming the dismissal of the complaint, the court of appeals had explicitly relied on *Barney*.²⁰⁷ Frankfurter's notes of the Conference show that he alone voted to affirm on that ground, although those same notes make clear that he had hoped to persuade others to join him.²⁰⁸ The majority voted to affirm on the ground that the plaintiff had failed to plead an adequate equal protection claim; Douglas and Murphy dissented.²⁰⁹

Chief Justice Stone wrote the opinion for the Court ruling against the plaintiff on the substantive ground.²¹⁰ He did not conclude without summarily dismissing Frankfurter's position:

The authority of *Barney v. New York*, on which the court below relied, has been so restricted by our later decisions that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action.²¹¹

Frankfurter, however, was not deterred. In a note to his clerk, Stanley Silverberg, he wrote:

I suggest you put your teeth into No. 57 and start with Isseks' article in 40 Harv. L. Rev. 969 and produce a memo (a) on the assumption that we

203. 227 U.S. at 289-93.

204. 227 U.S. at 294. In essence, the Court treated *Barney* as an aberration. See 227 U.S. at 284 (invoking "the substantially unanimous view which has prevailed from the beginning"); 227 U.S. at 289 (noting that "the cases are so numerous that we do not propose to review them all"); 227 U.S. at 296 (observing that previous cases enforcing the Contract Clause, which can only be violated if a state acts to abrogate a preexisting contract, are precedent for "the power which exists to enforce the guarantees of the Fourteenth Amendment").

205. 321 U.S. 1 (1944).

206. 321 U.S. at 3-4.

207. 321 U.S. at 5.

208. He wrote of Black, "can't get opening wedge," and of Rutledge, "reluctant." THE FELIX FRANKFURTER PAPERS, PART I: UNITED STATES SUPREME COURT CASE FILES OF OPINIONS AND MEMORANDA OCTOBER TERMS 1938-1952, microfilm series, Reel 10, Frame No. 00262 (Library of Congress, Box 6, Folders 18-19) [hereinafter FRANKFURTER PAPERS: PART I]. Ultimately, Rutledge concurred in the judgment without opinion. *Snowden*, 321 U.S. at 13.

209. FRANKFURTER PAPERS: PART I, *supra* note 208, at Reel 10, Frame No. 00262.

210. *Snowden*, 321 U.S. at 6-12.

211. 321 U.S. at 13 (citations omitted).

accept the state of the authorities (*Barney, Raymond, Home, Siler RR*) (b) on a consideration of the question on principle, e.g. including Holmes' dissent in *Raymond*

This is really interesting, as well as important, stuff F.F.²¹²

To this he appended a further note: "Of course the *Isseks* solution (equity's power of discretion) does not help here — where we have an action at law."²¹³

The article to which Frankfurter referred was a student Note published in 1927.²¹⁴ In the first footnote, Isseks had written the following acknowledgement: "This paper had its origin in a report prepared for the course on Federal Jurisdiction conducted by Professor Felix Frankfurter at the Harvard Law School. The writer is greatly indebted to Professor Frankfurter for suggestions in connection with the problem herein discussed."²¹⁵ Although the Note argued that *Barney's* reasoning was wrong,²¹⁶ it noted the "strong vitality" of the *Barney* doctrine and its continuing popularity among the lower federal courts.²¹⁷ More significantly, the Note concluded that "the result of the *Barney* case seems desirable"²¹⁸ for two reasons: first, that federal courts should avoid premature decisions on questions of state statutory construction; second, that they should refrain from deciding constitutional questions that could be easily avoided by remitting the plaintiff to her state court remedy.²¹⁹ The Note recommended "a revival of the *Barney* doctrine as a self-imposed limitation on the jurisdiction of the federal courts,"²²⁰ which should be implemented as a matter of the courts' equitable discretion.²²¹

The remarkable resemblance between this argument and Brandeis' famous opinion in *Ashwander*²²² is probably not accidental. During the 1920s and 1930s, Brandeis provided Frankfurter with a steady

212. FRANKFURTER PAPERS: PART I, *supra* note 208, Reel 10, Frame Nos. 00254-56.

213. *Id.*, Reel 10, Frame No. 00257.

214. Samuel S. Isseks, Note, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 HARV. L. REV. 969 (1927).

215. *Id.* at 969 n.*. In a striking slip, Justice Frankfurter at first addressed the note to his law clerk, "Mr. Isseks." He then crossed out "Isseks" and wrote "Silverberg" above. FRANKFURTER PAPERS: PART I, *supra* note 208, Reel 10, Frame No. 00258.

216. See Isseks, *supra* note 214, at 972, 983-84. Isseks was quite dismissive of *Barney's* analysis. To him, *Barney* was "a metaphysical denial of the actual facts" that did "not comport with a realistic view of state administrative action." *Id.* at 972, 983.

217. *Id.* at 969 ("The *Barney* doctrine has, however, shown strong vitality, and has been applied by several federal courts within the past few years.").

218. *Id.* at 988.

219. *Id.* at 984-85.

220. *Id.* at 970.

221. *Id.* at 984-88.

222. *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J. concurring).

stream of suggestions for law review articles that would be helpful to Brandeis on the Court.²²³ Some of these ideas would then turn up in articles by Frankfurter.²²⁴ Frankfurter would suggest others to the students whom he had handpicked for his federal jurisdiction seminar.²²⁵ In fact, Brandeis cited the Isseks article in a 1931 opinion for the Court in *Iowa-Des Moines National Bank v. Bennett*.²²⁶ There, Brandeis followed the traditional approach to state action established in *Rives* and *Ex parte Virginia* and held that "acts done 'by virtue of a public position under a State Government . . . ' are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law."²²⁷ But Brandeis did invoke Isseks' equity idea to distinguish *Barney* without having to question its validity.²²⁸

As indicated by the latter part of his note to Silverberg, however, this was not the strategy Frankfurter adopted for the *Snowden* concurrence. Although he thought it "unlikely that the plaintiff could establish his case," he nevertheless argued that the plaintiff had stated a colorable claim for discrimination in the application of state laws.²²⁹ Instead, paraphrasing Holmes' dissent in *Raymond*,²³⁰ Frankfurter argued that federal jurisdiction was lacking because "I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the authentic command of the State."²³¹ Agreeing with the court of appeals that *Barney* "is controlling,"²³² Frankfurter declared: "Neither the wisdom of its reasoning nor its holding has been impaired by subsequent decisions."²³³

223. MURPHY, *supra* note 182, at 76-78, 84-89.

224. See, e.g., Felix Frankfurter & Adrian Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 623-32 (1938) (discussing limitations on constitutional claims imposed as a matter of equitable discretion in order to avoid unnecessary decisions on constitutional issues).

225. MURPHY, *supra* note 182, at 76-78, 84-89.

226. 284 U.S. 239, 246 n.6 (1931).

227. 284 U.S. at 245-46 (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1880)).

228. 284 U.S. at 246-47.

229. *Snowden*, 321 U.S. at 15.

230. See *supra* text accompanying note 193. Consistent with Holmes' dissent in *Raymond*, Frankfurter too invoked the concept of exhaustion of state court remedies. See *Snowden*, 321 U.S. at 16 (citing *Ex parte Royall*, 117 U.S. 241 (1886)).

231. 321 U.S. at 17 (citing *Raymond*, 207 U.S. at 41 (Holmes, J., dissenting)).

232. 321 U.S. at 17. At this point, Frankfurter also included an unexplained reference to the Isseks article.

233. 321 U.S. at 17. Frankfurter pointed to *Bennett* for the proposition that there is federal jurisdiction "when a case comes here on review from a decision of a state court as the ultimate

Commentators widely recognize that "Justice Frankfurter attempted a resuscitation of the *Barney* doctrine in his concurrence in *Snowden v. Hughes*" ²³⁴ But what is less well known is that Frankfurter did not give up after *Snowden*; he simply shifted the focus of his concerns from the constitutional question of what constitutes state action to the statutory question of what constitutes action "under color of" state law.

The fact of Frankfurter's shift is demonstrated by comparison with the Court's unanimous decision in *United States v. Classic* ²³⁵ three years prior to *Snowden*. In *Classic*, Democratic Party officials in Louisiana were charged with fraud in counting and certifying the vote in a party primary to nominate a candidate for Congress. They were prosecuted under the criminal civil rights statute, which proscribes conduct "under color of" state law that willfully deprives a person of his or her constitutional rights. ²³⁶ Extensively canvassing state law, the defendants argued that they were not "officers or employees of the State of Louisiana" and that, as a matter of state law, they acted solely as officers of a political party "and therefore do not act under color of any law of the State of Louisiana." ²³⁷ The federal government, represented by Herbert Wechsler, argued that the right to vote in a federal election was a right secured by the Constitution and that "action under color of their office, even though contrary to state law, constitutes state action within the meaning of the Fourteenth Amendment." ²³⁸ The government argued, moreover, that the statutory phrase "under color of" law should be read as coextensive with the concept of state action under the Fourteenth Amendment. ²³⁹ Chief Justice Stone wrote for a majority of the Court that included Frankfurter. Accepting the government's position, the Court held that *under color of law* encompassed "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." ²⁴⁰

The Court was asked to reexamine the scope, meaning, and consti-

voice of state law." 321 U.S. at 17. Frankfurter would later embroider on this recharacterization of *Bennett*. See *infra* text accompanying notes 255-59.

234. See, e.g., HART & WECHSLER, *supra* note 128, at 1226.

235. 313 U.S. 299 (1941).

236. Originally § 2 of the Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, the statute is now codified as 18 U.S.C. § 242 (1988).

237. Brief for Defendants and Appellees at 14, 13-22, *United States v. Classic*, 313 U.S. 299 (1941) (No. 618).

238. Brief for the United States at 37, *Classic*, 313 U.S. 299 (No. 618).

239. *Id.* at 44-46.

240. *Classic*, 313 U.S. at 326.

tutionality of the same statute a year after *Snowden* in *Screws v. United States*.²⁴¹ Sheriff Screws and his associates arrested Robert Hall, an African American, on a charge of theft. They handcuffed Hall and transported him to jail. Outside the jail, the sheriff and his fellow officers beat Hall for about thirty minutes until he was unconscious, and then dragged him into the jail. Later that same night Hall was transferred to a hospital where he died. The officers were charged and convicted under the criminal civil rights statute.²⁴²

The primary claim raised by the defendants on appeal was that their actions did not come within the coverage of the statute because, under *Barney* and the court of appeals decision in *Snowden*, their conduct did not amount to state action.²⁴³ The dissent in the court of appeals had also raised the question whether the statute, which defines a crime in terms of conduct that deprives a person of his or her constitutional rights, was unconstitutionally vague.²⁴⁴ The plurality opinion, written by Justice Douglas, saved the statute from vagueness by interpreting the "willfulness" provision to require specific intent to violate the constitutional rights of the victim: "One who does act with such specific intent is aware that what he does is precisely that which the statute forbids."²⁴⁵ Douglas' opinion, which reversed and remanded for a new trial consistent with the Court's decision, was joined by Chief Justice Stone and Justices Black and Reed. Justice Murphy dissented on the ground that the statute was not vague with respect to the particular actions of the defendants and, therefore, that the convictions should be affirmed.²⁴⁶ Although Justice Rutledge too would have held the statute constitutional, he concurred in the result in order to permit disposition of the case.²⁴⁷ Justices Roberts, Frankfurter, and Jackson dissented, arguing for outright reversal of the convictions.²⁴⁸

On November 30, 1944, while the case was under advisement, Frankfurter sent a personal memorandum to Chief Justice Stone imploring him not to join Douglas' opinion. Addressing only the vagueness issue, Frankfurter argued that the opinion was so unprincipled that it would bring the Court into disrepute.²⁴⁹ Frankfurter later cir-

241. 325 U.S. 91 (1945).

242. *Screws*, 325 U.S. at 92-94.

243. Brief for Petitioners at 8-9, *Screws*, 325 U.S. 91 (No. 42).

244. See Brief for the United States at 52, *Screws*, 325 U.S. 91 (No. 42).

245. *Screws*, 325 U.S. at 104.

246. 325 U.S. at 136-37.

247. 325 U.S. at 134.

248. 325 U.S. at 138-61.

249. FRANKFURTER PAPERS: PART I, *supra* note 208, Reel 12, Frame Nos. 00794-795.

culated to the full Court two memoranda — dated December 13 and 21, 1944 — that also focused solely on the vagueness question.²⁵⁰

In the meantime, on December 8, Justice Reed had circulated a memorandum addressing the other issue. Although Reed agreed with the plurality's interpretation of the "willfulness" requirement,²⁵¹ he argued for reversal on the ground that the "under color of law" provision should not be read to cover actions by state officers that were criminal under state law.²⁵² Reed canvassed and distinguished the state action cases from *Ex parte Virginia* through *Home Telephone* and *Bennett*, but concluded that "the fact that the authority of *Barney* has been restricted is of no significance in determining how far we are to extend the reach of the phrase 'color of law'"²⁵³

Frankfurter responded to Reed with a private memo, also dated December 8, 1944. It began:

Since, in any event, you and I are going in the same direction, may I steer you on the way.

Your memorandum stirs thoughts in me, as you well know, on which I could write a whole paper in the Harvard Law Review. But immediately I wish to make only two observations.²⁵⁴

In numbered paragraphs, Frankfurter made two narrow points addressing particular statements in Reed's memo on the vagueness and "color of law" issues, respectively. On the latter, Frankfurter contended that Reed had mischaracterized Brandeis' opinion in *Bennett*.²⁵⁵ According to Frankfurter, the operative distinction was that the *Barney* line of decisions

concerns suits brought in the *federal* courts for deprivation by a State of rights safeguarded by the Fourteenth Amendment on the basis of action taken by some subordinate agency of a State in disobedience of what Holmes in the *Raymond* case called the "authentic command of the state", 207 U.S. at 41. But in the *Bennett* case, as Brandeis pointed out,

250. *Id.*, Reel 12, Frame Nos. 00787-790 & 00791-793.

251. *Id.*, Reel 12, Frame No. 00797 ("The suggestion that there must be a willful intent to violate a constitutional right seems sound.").

252. *Id.*, Reel 12, Frame Nos. 00797-799; see also *id.* at 00798 ("Screws et als [sic], while acting as sheriff, policeman and special deputy under the Georgia law, comitted [sic] this murder after an arrest, it is true, but entirely beyond and disconnected with any duties which they had under the law of Georgia.").

253. *Id.*, Reel 12, Frame No. 00799. Reed ultimately joined Douglas' plurality opinion. A handwritten note by Frankfurter, which appears on Frankfurter's copy of Reed's memo, explains that Reed "later . . . abandoned his position because, so he told me, he just couldn't bring himself to '— out' an old statute. 'But don't ask me to defend my vote by my conscience', is what he told me. . . ." *Id.*, Reel 12, Frame No. 00797 (illegible material omitted).

254. *Id.*, Reel 12, Frame No. 00800.

255. *Id.*, Reel 12, Frame No. 00801. On Frankfurter's view, Bennett "stands apart from the *Barney* line of decisions." *Id.* But see *supra* text accompanying notes 227 and *infra* text accompanying notes 257-59.

“the petitioner sued in a state court”, 384 U.S. at 246. . . . In other words, the *Bennett* case comes precisely within the distinction taken by Holmes in the *Raymond* case, for in the *Bennett* case “the authorized interpreter of that [the State] Constitution, the Supreme Court [of Iowa], had said that it sanctioned the alleged wrong.” In reviewing the Iowa Supreme Court decision, this Court had indubitably before it the action of the State of Iowa, for the constitution and laws of a State are what the highest court of a State says they are. That is precisely why Brandeis said in the *Bennett* case that the Court had no occasion to discuss the *Barney* case. The Chief failed to observe this vital distinction in *Snowden v. Hughes*, and I hope you will not treat problems that are jurisdictionally vitally different as identic.²⁵⁶

This memorandum to Reed suggests both how keenly Frankfurter felt about the continuing vitality of *Barney* and how far he was willing to go to defend it. In his attempt to steer Reed his way, Frankfurter was not above exploiting his reputation for expertise on matters of federal jurisdiction to advance an outright misrepresentation. Reed had in fact correctly characterized Brandeis’ *Bennett* opinion. As we have seen,²⁵⁷ Brandeis had applied the traditional nonreductive approach to state action. Consequently, Brandeis had distinguished *Barney* on the ground suggested by Isseks: that *Barney* was a federal equity case while, in *Bennett*, “the petitioners sued in a state court.”²⁵⁸ But, unlike Brandeis, Frankfurter adhered to Holmes’ more radical position, espoused in his *Raymond* dissent, that there was no state action until the state’s highest court had sanctioned the alleged wrong. Frankfurter simply misrepresented “precisely why” Brandeis said in *Bennett* that *Barney* was distinguishable and need not be discussed. Indeed, the “authorized interpreter” quote — which Frankfurter so artfully disguised and for which he neglected to provide a citation — actually appears in Holmes’ *Raymond* dissent.²⁵⁹

Frankfurter’s sleight of hand raises a further question. If Frankfurter was so strongly committed to *Barney*, why had he not raised it as a separate ground for reversal? One can understand why Frankfurter had not broached the issue in his memorandum to Stone: given the opinion in *Classic* and the exchange in *Snowden*, *Barney* was

256. *Id.* (underlining and bracketed material in original).

257. See *supra* text accompanying note 227.

258. *Bennett*, 284 U.S. at 246-47; see *supra* text accompanying notes 226-27.

259. *Raymond*, 207 U.S. at 41 (“I should have thought that the action of the State was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution, the Supreme Court, had said that it sanctioned the alleged wrong.”) (Holmes, J., dissenting). It should be noted, however, that Frankfurter’s mischaracterization of Brandeis’ reasoning in *Bennett* is consistent with what Frankfurter had said about *Bennett* in his *Snowden* concurrence. See *supra* note 233.

hardly the point on which to enlist Stone. But why didn't Frankfurter argue the issue in his subsequent memoranda to the full Court?

Perhaps Frankfurter thought it sufficient that the "color of law" issue had been flagged by others. In addition to Reed, Jackson also circulated a memorandum indicating that he would "hold that this deprivation of rights was not committed under color of any law or custom, was not the act of the State of Georgia, and therefore . . . reverse the conviction."²⁶⁰ Moreover, both Reed's and Jackson's memoranda appear to have been shared with Frankfurter in advance.²⁶¹ But neither of these memoranda approached the issue with the technical precision Frankfurter thought "vital." And neither of these memoranda framed the issue as an application of *Barney*, as had the defendants. Rather, both memoranda seemed content to accept the state of the authorities on state action and on the "color of law" issue and distinguish the *Screws* case as calling for an unwarranted extension.²⁶²

A close analysis of the published dissent suggests that Frankfurter's decision not to raise the *Barney* issue may have been strategic. The published dissent gave pride of place to the "color of law" issue even as it coyly concealed pride of authorship. The opinion appears in the U.S. Reports with the designation "MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON, dissenting."²⁶³ But, on his copy of the printed version of the dissent as it was circulated, Frankfurter wrote: "written by me F.F."²⁶⁴ And what Frank-

260. FRANKFURTER PAPERS: PART I, *supra* note 208, Reel 12, Frame No. 00807. The version of Jackson's memorandum that appears among Frankfurter's papers is undated. Internal evidence suggests that it was written sometime in December, because it refers to the previously circulated memoranda of Justices Reed and Frankfurter. *Id.*

261. I infer this from three facts: First, the versions of both memoranda that appear among Frankfurter's papers are printed, but in each case the bracket where the date normally appears is left blank. Second, the copies of both memoranda contain minor editing by Frankfurter. Third, and most important, each contains a handwritten notation by Frankfurter indicating that the memorandum was circulated. On Jackson's memorandum, Frankfurter inscribed "Circulated but not delivered." *Id.*, Reel 12, Frame No. 00802. On Reed's memorandum, Frankfurter wrote "Circulated by Reed on December 8, 1944. . . ." *Id.*, Reel 12, Frame No. 00797. It should be pointed out that Frankfurter's response to Reed bears the same date, and it too contains a handwritten footnote indicating that Reed's memo had been circulated. *Id.*, Reel 12, Frame Nos. 00800. Together, these notations suggest that, at the time Frankfurter sent his response to Reed on December 8, Reed had not yet circulated his memorandum to the Court.

262. For Reed's memorandum, see *id.*, Reel 12, Frame No. 00799 (quoted *supra* text accompanying notes 251-53). Jackson discussed the Court's prior interpretation of the statute in *Classic*, which he characterized as "not flawless." *Id.*, Reel 12, Frame No. 00803. He wrote: "I am not without fault in the matter, for the prosecution in *United States v. Classic* was instituted and was argued . . . while I held the responsibilities of Attorney General. But I do not think that decision requires us to go the length now asked of the Court." *Id.*, Reel 12, Frame No. 00804.

263. *Screws*, 325 U.S. at 138.

264. FRANKFURTER PAPERS: PART I, *supra* note 208, Reel 12, Frame No. 00776. On his copy of Jackson's memorandum, Frankfurter wrote: "Circulated but not delivered, but some

furter wrote suggests that, like the defendants, he thought the "color of law" issue important precisely because of its relationship to the repudiated *Barney* doctrine.

First, Frankfurter argued that the Court's interpretation of the statute conflicted with the plain meaning of the language, with the intent of the Congress that passed it, and with the principles of federalism.²⁶⁵ Second, he argued that the same phrase in the removal statute had been read in *Tennessee v. Davis* not to encompass "misuse of federal authority."²⁶⁶ Third, he argued that *Classic* should not control because "the focus of attention in the *Classic* case was not our present problem . . ."²⁶⁷ Finally, in a passage as skeptical about the "state of the authorities" as it is familiar in its language and reasoning, Frankfurter wrote:

It was assumed quite needlessly in the *Classic* case that the scope of [the statute] was coextensive with the Fourteenth Amendment. . . . It may well be that Congress could . . . treat action taken by a State official even though in defiance of State law and not condoned by ultimate State authority as the action of "a State." It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State. . . . Although action taken under such circumstances has been deemed to be deprivation by a "State" of rights guaranteed by the Fourteenth Amendment for purposes of federal jurisdiction, the doctrine has had a fluctuating and dubious history. . . . *Barney v. City of New York*, *supra*, which ruled otherwise, although questioned, has never been overruled.

But assuming unreservedly that conduct such as that now before us, perpetrated by State officers in flagrant defiance of State law, may be

portions of this memorandum were incorporated in dissent I drafted for Roberts, Jackson & myself. F.F." *Id.*, Reel 12, Frame No. 00802.

In an early draft of the memorandum that would develop into Frankfurter's dissent in *Monroe v. Pape*, 365 U.S. 167 (1961), the law clerk had written: "Mr. Justice Roberts' dissent in *Screws* pointed up the unwisdom of extending federal criminal jurisdiction into areas of conduct punished by state penal law. . . ." Frankfurter crossed out the first eight words. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 68, Frame No. 00233; cf. *Monroe*, 365 U.S. at 239 (Frankfurter, J., dissenting).

265. *Screws*, 325 U.S. at 141-45. The provenance of the dissent is as follows: Part I was drafted by Frankfurter. A partial draft of this section appears not with Frankfurter's other papers on *Screws*, but with drafts from various other cases. FRANKFURTER PAPERS: PART I, *supra* note 208, Reel 12, Frame Nos. 00495-528 (original folder marked "Scratch of opinions"). Portions of the final pages of Part I were adopted almost verbatim from Frankfurter's *Snowden* concurrence. Compare *Screws*, 325 U.S. at 147-48 & n.1 with *Snowden v. Hughes*, 321 U.S. 1, 16-17 (1944). Part II, discussing the vagueness issue, was adapted from Frankfurter's memoranda of December 13 and 21. See *supra* text accompanying note 250. Part III, discussing the administrative difficulties likely to ensue from a broad reading of *under color of law*, was largely taken from Jackson's memorandum, see *supra* text accompanying notes 260-62, as Frankfurter noted. See *supra* note 264.

266. *Screws*, 325 U.S. at 145 (citing *Davis*, 100 U.S. at 261-62).

267. 325 U.S. at 147.

attributed to the State under the Fourteenth Amendment, this does not make it action under "color of any law." Section [242] is much narrower. . . . Even though Congress might have swept within the federal criminal law any action that could be deemed within the vast reach of the Fourteenth Amendment, Congress did not do so.²⁶⁸

I have quoted this passage at some length so that the reader can get the full flavor of Frankfurter's gambit, repackaging his longstanding but failed advocacy of *Barney* and the reductive approach in the protective coloration of a narrower question of statutory interpretation. In fact, much of the passage is a thinly veiled paraphrase of Frankfurter's *Snowden* concurrence.²⁶⁹ Although personally committed to reviving *Barney*, Frankfurter must have realized that a direct assault would fail. No one, not even his fellow dissenters, had responded to the defendants' *Barney* argument. Frankfurter must have thought that his repackaging of the issue would be more likely to succeed if he did not tip his hand by openly proclaiming authorship. Still, one must wonder how it is that Frankfurter believed the opinion would not itself betray his hand.

Sixteen years later, Frankfurter was to acknowledge more candidly in *Monroe* that the "color of law" issue "concerns directly a basic problem of American federalism" that "has significance approximating constitutional dimension."²⁷⁰ Even at that late date, *Barney* was clearly never far from his agenda. A year before *Monroe*, the Court concluded that *Barney* had been completely eroded as precedent.²⁷¹ Frankfurter, however, wrote separately to cushion the blow: "Whatever may have been the original force of *Barney*, that decision has long ceased to be an obstruction . . ." ²⁷² The footnotes in *Monroe* show Frankfurter still struggling not only to distinguish his defeat on the state action issue from the "under color of" law question,²⁷³ but also to save some pathetic space for a "non-obstructive" version of the *Barney* doctrine: "The various analyses which have enabled this

268. 325 U.S. at 147-48 (citations to *Raymond*, *Barney*, *Home Telephone*, *Bennett*, and *Snowden* omitted).

269. Compare *Screws*, 325 U.S. at 147-48 & n.1 with *Snowden*, 321 U.S. at 16-17.

270. *Monroe*, 365 U.S. at 222 (Frankfurter, J., dissenting).

271. See *United States v. Raines*, 362 U.S. 17, 25-26 (1960).

272. 362 U.S. at 28 (Frankfurter, J., concurring) (citation omitted). The next year, Frankfurter told his law clerk working on *Monroe*: "[A]lso consider *United States v. Raines*. . . . I conceded *Barney* is gone — was not necessary we face the issue." FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 68, Frame No. 00221 (Library of Congress, Box 143, Folders 1-16). This is a marginal note on an early draft of the memorandum discussed *infra* text accompanying notes 280-81.

273. *Monroe*, 365 U.S. at 218 n.27 (Frankfurter, J., dissenting) ("That the Court had not in the *Classic* case isolated the 'under color' issue from the question of 'State action' is indicated by the opinions in *Snowden v. Hughes*.").

Court to find state action in situations other than that presented by *Barney* . . . are plainly not appropriate to consideration of the question whether in a given instance official conduct is 'under color' of state law."²⁷⁴

2. *Monroe and the Moment of Truth*

Frankfurter's final opportunity to press the reductive approach came in *Monroe v. Pape*. The case arose when the Chicago police, acting without a warrant, broke into the Monroe home early one morning. James Monroe and his family were "routed . . . from bed,"²⁷⁵ taunted with racial epithets,²⁷⁶ and made to stand naked in the living room while the police ransacked the house. Monroe was then taken to the police station where he was held incommunicado and interrogated for ten hours. He was subsequently released without any charges having been filed. Alleging that the police had violated the Fourth Amendment, Monroe sued the officers and the City of Chicago under section 1983. The federal district court dismissed the complaint, the court of appeals affirmed, and the Supreme Court reversed in part.²⁷⁷

Monroe argued that he was entitled to sue under section 1983 for the violation of his rights under the Fourth Amendment without first exhausting state court remedies.²⁷⁸ The City argued that the officers' conduct violated the state constitution, state statutes, and local ordinances and, therefore, was not action "under color of [state] law."²⁷⁹

This time Frankfurter came prepared. On November 9, 1960, the day after oral argument, he circulated a memorandum to the Court

274. 365 U.S. at 212 n.16 (citation omitted). Although there is nothing in Frankfurter's *Monroe* files as explicit as his note to Silverberg in the *Snowden* case, see *supra* text accompanying note 208, there is a tantalizing set of research notes compiled by his 1961 law clerk. It is divided into two sections. One is entitled "*Barney* and spawn." The other has the heading "Is *Barney* sapped by . . ." and is followed by notes on such cases as *Raymond* and *Home Telephone*. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 68, Frame Nos. 00060-62.

275. *Monroe*, 365 U.S. at 169.

276. 365 U.S. at 203 (Frankfurter, J., dissenting).

277. 365 U.S. at 170, 192. Monroe argued that the city was a "person" within the meaning of the statute and not immune from liability. The Court disagreed, affirming dismissal of the case only against the city. 365 U.S. at 187-92. The Court subsequently overruled this aspect of *Monroe* in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). See *infra* text accompanying notes 415-24.

278. Brief for Petitioners at 9-16, *Monroe*, 365 U.S. 167 (1961) (No. 60-39). The bulk of the argument was addressed to the municipal liability issues. *Id.* at 21-65. Discussion of the state action and "color of law" questions in petitioners' initial brief is confined to a single sentence. *Id.* at 10. Their reply brief devotes only four pages to the "color of law" issue, relying on the Court's prior decisions in *Classic*, *Screws*, and *United States v. Williams*, 341 U.S. 97, 99-100 (1951). Reply Brief for Petitioners at 1-5 (No. 60-39).

279. Respondents Brief at 4-19 (No. 60-39).

noting “[t]he far reaching importance of this case” and bemoaning the fact that

neither petitioner nor respondent has examined, with appropriate attention to detail, the legislative history relevant to the meaning of the phrase “under color of any statute, ordinance, regulation, custom, or usage of any State”. . . .

In view of these inadequacies in the presentation of the case by counsel, I deem it appropriate to circulate this memorandum. It is the result of weeks of investigation, discussion and formulation between my law clerk, Anthony Amsterdam, and myself. Apart from all else, it would call for too large a draft on the time of the Conference for me to expound these matters orally.²⁸⁰

Attached was a fifty-three page memorandum largely corresponding to the first four sections of Frankfurter’s published dissent, but with an additional section on the municipality’s immunity from suit.²⁸¹

Despite months of research, Frankfurter and his clerk had turned up little that was new. In fact, the passages from the legislative history upon which Frankfurter placed principal reliance — the statement of Senator Trumbull and the colloquy between Senators Sherman and Casserly²⁸² — had been discussed previously in his *Screws* dissent.²⁸³ More importantly, their extensive efforts turned up even less that could be called dispositive. Indeed, the persuasiveness of Frankfurter’s argument in *Monroe* derives not from his review of the legislative history, but rather from three extralegislative, fundamental postulates: (1) a federalist presumption that “[a]s between individuals, that body of mutual rights and duties which constitute the civil personality of a man remains essentially the creature of the legal institutions of the States”;²⁸⁴ (2) the correlative insistence on a clear statement rule so that Congress should not be assumed to have displaced this presumption unless it said so clearly;²⁸⁵ and (3) the assumption that *under color of law* means *by authority of law* and, thus,

280. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 67, Frame No. 00939.

281. *Id.*, Reel 67, Frame Nos. 00942-95. These efforts had begun months earlier. There is a printed version of the memorandum as early as August of 1960. *Id.*, Reel 68, Frame No. 00668. An even earlier version — written in Amsterdam’s hand and otherwise largely identical to the version that was circulated on the 9th — concludes with the observation: “All of the above conclusions are, of course, tentative. Briefs and argument in the case may serve to clarify the issues and alter the analyses.” *Id.*, Reel 68, Frame No. 00127. Frankfurter’s private memorandum on the Court’s Conference in *Monroe*, discussed *infra* notes 306, 314 and accompanying text, describes the November 9 memorandum as the “product of months of work.” *Id.*, Reel 67, Frame No. 00929.

282. See *Monroe*, 365 U.S. at 226-27. The Trumbull statement is discussed *infra* text accompanying notes 287-89. The Sherman-Casserly colloquy is examined *infra* text accompanying notes 295-96.

283. *United States v. Screws*, 325 U.S. 91, 142-44 (1945) (Frankfurter, J., dissenting).

284. *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting).

285. 365 U.S. at 238-39 (“But until Congress has declared its purpose to shift the ordinary

is a clear statement that Congress intended not to change the presumption.²⁸⁶

While this reading of Frankfurter's *Monroe* dissent renders it perfectly principled, it renders the opinion wholly unfounded as well. For, as we have seen, *under color of law* was widely understood in the nineteenth century to connote "without authority of law." In that event, Frankfurter's first and second postulates point to the opposite conclusion — that Congress did specifically and with precision indicate its intention to reach conduct otherwise wrongful under state law. In other words, Frankfurter's entire argument turns on his third, incorrect assumption about the meaning of the phrase *under color of law*.

Much the same circularity attends Frankfurter's reading of the legislative history. Many of the key passages relied on by Frankfurter (and, later, by Zagrans as well) support his position only if one already presumes that *under color of law* refers to authorized action.²⁸⁷ For example, Frankfurter relied on the following statement by Senator Trumbull:

If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State law because he is

distribution of judicial power for the determination of causes between co-citizens of a State, this court should not make the shift.").

286. 365 U.S. at 239 ("Indeed, its precise limitation to acts 'under color' of state statute, ordinance, or other authority appears on its face designed to leave all questions of the nature and extent of liability of individuals to the laws of the several States . . ."); 365 U.S. at 244 ("Under color' of law meant by authority of law in the nineteenth century.").

287. Thus, for example, Zagrans makes much of a colloquy concerning the 1866 Act, the model for § 1983, that addresses the reason for the "under color of" law language:

Mr. Loan: . . . I desire to ask the chairman who reported this bill, why the committee limit [sic] the provisions of the second section to those who act under color of law. Why not let them apply to the whole community where the acts are committed?

Mr. Wilson. . . . That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide the persons who under the color of these local laws should do these things shall be liable to this punishment.

Mr. Loan. What penalty is imposed on other than officers who inflict these wrongs on the citizen?

Mr. Wilson. . . . We are not making a general criminal code for the States. Zagrans, *supra* note 8, at 544 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866)). For Zagrans, "[t]his colloquy leaves little doubt as to the meaning of section 2. Whatever other discrimination might have existed in the community as a whole, section 2 was intended only to reach discrimination accomplished pursuant to discriminatory state laws." *Id.* at 544-45. But this is true only if *under color of* means "pursuant to." If, however, *under color of law* is properly understood to mean "in wrongful application of state law" or to signify action that is an abuse of state office, then the passage proclaims that the statute covers official misconduct as opposed to private wrongs.

colored, then it becomes necessary to interfere for his protection.²⁸⁸ But this passage makes equally good sense if Senator Trumbull understood *under color of law* to mean, for example, "in wrongful application of the law." On that understanding, his statement would mean only that, as suggested by Justice Harlan, "Congress had no intention of taking over the whole field of ordinary state torts," but that it nevertheless "regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern."²⁸⁹ And so on, and so on, through virtually every bit of the legislative history and each permutation of the nineteenth-century case law applying the *colore officii* concept.²⁹⁰

From statements like Trumbull's, Frankfurter deduced that "[w]rongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs."²⁹¹ But, again as Harlan pointed out, reliance on statements concerning the existence of "adequate remedies in the State courts" is wholly uninformative. Unauthorized state torts and authorized constitutional deprivations are equally amenable to redress in the state courts because state judges are obligated under the Supremacy Clause to enforce the Constitution notwithstanding state law provisions to the contrary.²⁹² "[T]he same state remedies would, with ultimate aid of Supreme Court review, furnish identical relief in the two situations."²⁹³ Thus, any inference concerning Congress' in-

288. 365 U.S. at 226 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866)).

289. 365 U.S. at 193 (Harlan, J., concurring). Interestingly, among Frankfurter's papers is a handwritten note from Harlan that accompanied a revised copy of Harlan's concurring opinion forwarded to Frankfurter on January 17, 1961. It reads: "Thanks — but sorry it makes more work for you! As I'm sure you inferred, I would have been with you as *an original matter*." FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 67, Frame No. 00941.

290. To take another example, Frankfurter elsewhere referred to "Mr. Perry's assertion . . . that the wrongs which Congress may remedy 'are not injuries inflicted by mere individuals or upon ordinary rights of individuals,' but injuries inflicted 'under color of State authority or by conspiracies and unlawful combinations with at least the tacit acquiescence of the State authorities.'" *Monroe*, 365 U.S. at 231 n.46. But, far from proving Frankfurter's interpretation of the statute, this statement can equally be read as indicating that, while Congress did not intend to reach private action by individuals, it did intend to cover wrongful actions whenever there was a governmental element: either misconduct by individual officers ("under color of State authority") or by organized groups condoned by the government ("unlawful combinations with at least the tacit acquiescence of the state authorities").

291. 365 U.S. at 231 n.46. For Frankfurter's more prominent statement of this conclusion in the text of his opinion, see 365 U.S. at 237.

292. U.S. CONST. art. VI. Much the same point had been stressed a few years earlier by Frankfurter's former student, Henry Hart, in his famous dialectic. Henry M. Hart, *The Power of Congress To Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); see also Bator, *supra* note 31, at 606 (describing this as an original purpose of the Supremacy Clause).

293. *Monroe*, 365 U.S. at 195 (Harlan, J., concurring). Frankfurter's response to this argu-

tent vis-à-vis unauthorized actions must depend on one's understanding of the phrase *under color of law*.

Notwithstanding his contrary assertion,²⁹⁴ it is improbable that Frankfurter did not know or at least suspect that *under color of law* referred to wrongs committed without adequate authority. Three types of evidence, in roughly ascending order of significance, demonstrate that Frankfurter either knew or should have known that his reading of the statute was wrong.

First, there is the evidence internal to Frankfurter's dissent. In a colloquy that Frankfurter characterized as "particularly revealing," Senator Sherman responded to questions from Senator Casserly concerning the effect of a predecessor statute protecting the right to vote that also employed the "under color of" law language:

MR. SHERMAN: If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it.

MR. CASSERLY: Suppose the State law authorizes the colored man to vote; what then?

MR. SHERMAN: That is not the case with which we are dealing. . . . No man could be convicted under this bill . . . unless the denial of the right to vote was done *under color or pretense* of State regulation. . . . [T]he first and second sections of the bill . . . simply punish officers as well as persons for discrimination under color of State laws or constitutions. . . .²⁹⁵

In a later portion of his *Monroe* opinion, Frankfurter stated explicitly that he did not think that section 1983 covered pretense of authority.²⁹⁶ Yet Sherman's statement clearly included pretense of authority in the coverage of a statute whose operative provision only precluded actions "under color of" law.

Other evidence ignored by Frankfurter appears in his analysis of the legislative history of section 1983. In support of his claim that section 1983 did not reach conduct in violation of state law, Frankfurter explained that

[t]he general understanding of the legislators unquestionably was that, as

ment relies on his federalist presumption, *see supra* text accompanying note 284, which he imputes to the Reconstruction Congress. 365 U.S. at 252-53 (Frankfurter, J., dissenting).

294. 365 U.S. at 244 ("Under color" of law meant by authority of law in the nineteenth century.).

295. 365 U.S. at 227 (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3663 (1870)) (emphasis added). *Cf. Ex parte Reed*, 4 Hill 572, 574 (N.Y. Sup. Ct. 1843) (referring to "an act done under the mere pretence or color of authority").

296. *Monroe*, 365 U.S. at 238-39 (Frankfurter, J., dissenting) ("The pretense of authority alone might seem to Congress sufficient basis for creating an exception to the ordinary rule that it is to the state tribunals that individuals within a State must look for redress But . . . Congress has not in § [1983] manifested that intention.").

amended, the Ku Klux Act did "not undertake to furnish redress for wrongs done by one person upon another in any of the States . . . in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery. . . ."297

But this statement supports Frankfurter's position only if one focuses in isolation on the clause "the Ku Klux Act did 'not undertake to furnish redress for wrongs done by one person upon another in any of the States . . . in violation of their laws.'" The very next portion of the quotation — "unless he *also* violated some law of the United States" — clearly indicates that section 1983 was intended to cover actions that violated *both* state and federal law.

Frankfurter, moreover, specifically discounted those statements in the legislative history that contradicted his view. In a footnote, he acknowledged that an opponent objected to section 1983

as providing a federal forum for deprivations of a suitor's rights although "The offenses committed against him may be the common violations of the municipal law of his State." . . . And one supporter of the measure, who argued that the Fourteenth Amendment gave Congress the power to enact a general criminal law, if necessary, . . . said . . . that it punished acts which would otherwise be "mere misdemeanors" at state law.²⁹⁸

Frankfurter rejected these statements as authoritative because "these two remarks are the only assertions, throughout hundreds of pages of debate, that § [1983] might reach conduct which state law proscribed."²⁹⁹ But these statements are more significant than Frankfurter allowed. As Frankfurter knew,³⁰⁰ the "under color of" language would have been thoroughly familiar to Congress from the many removal acts. There would have been little reason for Congress to discuss or debate the meaning of a recurrent statutory term such as *under color of law*. Consequently, the legislative history's virtual silence on the meaning and reach of the phrase is neither surprising nor particularly revealing. To the contrary, what little discussion there is indicates that opponents and proponents alike agreed that *under color of law* included conduct patently illegal under state law.

Moreover, the full quotation of Senator Pratt's statement in support of the bill is slightly more emphatic than Frankfurter suggested. After quoting the full text of what is now section 242, Pratt observed:

Now, the "deprivation" of any right secured by that act, or rather

297. 365 U.S. at 233 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 579 (1871) (statement of Sen. Trumbull)).

298. 365 U.S. at 229 n.44. The second reference in this quotation does not quite capture the sense of the original. See *infra* text accompanying note 301.

299. 365 U.S. at 229 n.44.

300. See *supra* text accompanying note 266; *infra* text accompanying notes 308-11.

the means employed to effect the deprivation, might in law be an assault and battery, a riot, or imprisonment, mere misdemeanors, *ordinarily punishable exclusively in the State courts*. But because these acts, whatever they were, related to a class of persons whose rights were placed under the guardianship of Federal legislation, they became offenses against the United States and punishable in their courts.³⁰¹

Second, some provocative references appear in the research notes of Frankfurter's law clerk, Amsterdam. In preparing the memorandum that Frankfurter circulated to the Court on November 9, Amsterdam had come across some of the earlier uses of the *under color of* language. His research notes mention the fact that the phrase appears in the removal provision of the Captured and Abandoned Property Act. The notation is followed by a cite to *McLeod v. Callicott*,³⁰² accompanied by the line "interprets 'under color of' as good faith belief of warrant under law. (approved *Lamar v. McCulloch*, 115 U.S. 163, 167 (1885))."³⁰³ The same page contains a citation to *People ex rel. Kellogg v. Schuyler*, one of the nineteenth-century surety cases that followed the majority rule.³⁰⁴ Either one of these sources would have alerted Frankfurter to the predominant historical meaning of *colore officii*. *Lamar v. McCulloch*, for example, discussed the Supreme Court's decision in the federal surety case, *Lammon v. Feusier*, that held the sureties liable "because the marshall had acted *colore officii*, although he had acted without sufficient warrant."³⁰⁵

Nothing indicates, however, either that these leads were followed further or that Frankfurter was told about this material.³⁰⁶ But, given that Frankfurter's dogmatic assertion that "[u]nder color' of law meant by authority of law in the nineteenth century" was not supported by a single citation,³⁰⁷ the failure to pursue authorities of such

301. CONG. GLOBE, 42d Cong., 1st Sess. 504 (1871) (emphasis added).

302. 16 F. Cas. 295 (C.C.D.S.C. 1869) (No. 8897).

303. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 68, Frame No. 00052. *McLeod* and *Lamar* are discussed *supra* text accompanying notes 167-74.

304. 4 N.Y. 173 (1850); *see supra* text accompanying notes 111-27.

305. *Lamar*, 115 U.S. at 187 (discussing *Lammon v. Feusier*, 111 U.S. 17 (1884)); *see supra* text accompanying notes 118-19, 172-74; *see also* *People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173 (1850); *supra* text accompanying notes 112-13.

306. On November 14, Frankfurter prepared a private memorandum concerning the Conference discussion of *Monroe*. It records that the November 9 memorandum was the "product of months of work, interchange of ideas, discussion and reflection" between the law clerk and the Justice. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 67, Frame Nos. 00929. According to the recollection of Justice Frankfurter's clerk, he would not have made oral reports to the Justice on the progress of his research. Instead, he would have provided Frankfurter with outlines and written drafts of the memorandum. Probably three such drafts were passed between them prior to completion of the memorandum. Interview with Anthony G. Amsterdam, Professor, and Director of the Lawyering Program, at New York University School of Law, in New York, N.Y. (Oct. 2, 1988).

307. *Monroe v. Pape*, 365 U.S. 167, 244 (1961) (Frankfurter, J., dissenting).

obvious relevance is noteworthy.

Third, and most decisive, there is the material of which Frankfurter was demonstrably aware. In the *Screws* dissent, Frankfurter had specifically noted the correspondence between the criminal civil rights provision's "under color of" law and the removal statute's "under color of office."³⁰⁸ He argued that, because *Tennessee v. Davis* had "indicated that misuse of federal authority" was not covered by the removal statute,³⁰⁹ the same rule should apply to section 1983.³¹⁰ But the passage cited by Frankfurter was actually one in which the Court distinguished an assertion of lawful authority from an allegation of conduct that was "merely under color of his office" and "a claim of right and authority under the law."³¹¹ Significantly, Frankfurter did not repeat this argument in *Monroe*.

Frankfurter was certainly familiar with Brandeis' opinion in *Bennett* and with Isseks' article on *Barney*. Both had used the phrase "under color of state authority" to refer to illegal or unauthorized actions by state officers. Although Isseks' usage of the phrase is somewhat occluded by its context,³¹² Brandeis' is unmistakable: "When a State official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law."³¹³

But the most damning proof that Frankfurter was aware of the correct historical meaning of *under color of law* comes from two unimpeachable sources. The first is a memorandum preserved among Frankfurter's *Monroe* files. Prepared by Frankfurter from his hand-

308. *United States v. Screws*, 325 U.S. 91, 145 (1945).

309. 325 U.S. at 145 (citing *Tennessee v. Davis*, 100 U.S. 257, 261-62 (1880)).

310. 325 U.S. at 146.

311. *Davis*, 100 U.S. at 261-62 (emphasis added). The full passage is quoted *supra* text accompanying note 160.

312. Isseks wrote:

[B]y the time of the *Home Telephone* case it had become abundantly clear that Chief Justice Fuller's language in the *Barney* case [that action forbidden by state legislation is not action by the state] was inconsistent with the facts of actual state administrative conduct. Subsequent to the *Barney* decision, the Supreme Court had definitely held that the action of state administrative officials acting under color of state authority was state action within the Fourteenth Amendment.

Isseks, *supra* note 214, at 980. Given the doctrinal developments to which he referred, the passage is rendered nonsensical if *under color of law* is read as "by authority of law."

313. *Iowa-Des Moines Natl. Bank v. Bennett*, 284 U.S. 239, 246 (1931). This did not escape the law clerk's notice. Recorded in Amsterdam's research notes is the observation concerning Brandeis' opinion in *Bennett*: "*Barney* is distinguished (& denigrated) & dictum says official acts 'under color of state authority' and although 'contrary to an express command of state law' are state action . . ." FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 68, Frame Nos. 00060-61.

written notes of the Conference discussion, it says: "*Whittaker, J.* said he thought 'under color' means under claim of law and whatever a policeman does, he does under a claim of legal right to do so."³¹⁴ It is damning because it corresponds so closely to the definition of "under color of" law given in two cases of which Frankfurter was indubitably aware. As we have just seen, *Tennessee v. Davis* equated *under color of office* with "a claim of right and authority under the law."³¹⁵ But most telling of all is the testimony of *Barney v. New York*. In language that could hardly have been more clear, the *Barney* Court explained that suits *colore officii* were "those against officers of the State *when claiming to act as such without lawful authority*."³¹⁶

III. METAPHOR AND THE MEANING OF SECTION 1983

A. *Why Metaphor?*

When the phrase *under color of law* was incorporated into the Reconstruction civil rights statutes, it came already freighted with the historical and legal significance of six centuries of legal usage. The ordinary canon of statutory interpretation that we should accord a provision the meaning intended by the legislators suggests a quite conventional legal argument in support of the decision in *Monroe*: in using the "under color of" law language, Congress adopted a common law term of art with a well-known meaning. That is why the legislative history contains little direct discussion and no explicit definition of the statutory phrase. In order to maintain fidelity to legislative intent, we must interpret the statute in light of the legal understanding of the phrase that prevailed at the time of the law's passage.³¹⁷

One advantage of this argument, aside from its conventionality, is that it offers a coherent way of parsing a statute whose legislative his-

314. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 67, Frame No. 00930. This is the second page of Frankfurter's memorandum, dated November 14, 1960, of the Conference discussion. Frankfurter's original handwritten note can be found at Reel 68, Frame No. 00534.

On the final page of this memorandum, Frankfurter noted that the fact that he "took notes of what several members of the Court said" at Conference was "[c]ontrary to my usual practice. . . ." *Id.*, Reel 67, Frame No. 00931. We have seen, however, that he also took notes of the Conference in *Snowden*. See *supra* notes 208-09 and accompanying text. It is noteworthy that, both in these cases and in *Screws*, Frankfurter was exceedingly meticulous in preserving the historical record.

315. *Davis*, 100 U.S. at 261-62 (emphasis added); see *supra* text accompanying note 311.

316. *Barney v. City of New York*, 193 U.S. 430, 439-40 (1904) (emphasis added). The full quotation appears *supra* text accompanying note 103. Whittaker's explanation corresponds as well with the reasoning in *Van Zandt v. Maxwell*, 28 F. Cas. 1093 (C.C.S.D.N.Y. 1852) (No. 16,884), which read the removal statute to apply when the customs collector "acts under the authority of the revenue law, whether he adopts a right or wrong interpretation of it." 28 F. Cas. at 1094; see *supra* text accompanying notes 148-54.

317. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

tory is otherwise rather opaque.³¹⁸ But it has familiar weaknesses. How many of those who voted for the statute were lawyers? How many actually knew the technical legal significance of the phrase *under color of law*? And with which of the divergent definitions might they have been familiar?

Cognitive theory can make two contributions at this juncture, and at two different levels of sophistication. At the first level, it enables us more meaningfully to examine the ordinary language meaning of the *color of law* metaphor. Significantly, the debate about the legal import of section 1983 has been reflected in a debate about the "plain meaning" of the phrase. Dissenting in *Monroe*, Frankfurter argued that "the prior decisions . . . have given 'under color of [law]' a content that ignores the meaning fairly comported by the words of the text."³¹⁹ Douglas, however, had come to the opposite conclusion in *Screws*: "If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of state law' were hardly apt words to express the idea."³²⁰ Cognitive theory provides an intelligible methodology, supported by extensive empirical evidence, that makes it possible to test these competing assertions. A cognitive analysis of how the metaphor expresses the meaning that it does leads to the conclusion that Douglas was exactly right: the phrase *under color of law* is an unlikely, even counterintuitive way in which to express the position advocated by Frankfurter. Rather, a cognitive analysis of the metaphor demonstrates that it connotes something like "under a deceptive appearance of authority" and that this meaning is *overdetermined*.

At the second level, cognitive theory answers the skeptical questions that trouble the conventional argument by undermining the fundamental assumptions that give them force. In the absence of some objectivist theory of meaning, the standard approach to statutory interpretation assumes that the historical legal usage of the phrase is relevant only if the legislators were aware of it and intended to incorporate that meaning into the statute. This understanding in turn depends on two highly conventional, but mistaken, assumptions: (1) that linguistic meaning is essentially arbitrary; and (2) that, even if meaning is socially contingent, it is still largely a matter of (or, if you prefer, dependent on) the conscious intention of self-directing actors.

318. As previously noted, the legislative history of § 1983 and its predecessor statute are widely recognized as remarkably unhelpful concerning the meaning of "under color of" law. See *supra* note 11.

319. *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J. dissenting).

320. *United States v. Screws*, 325 U.S. 91, 111 (1945) (plurality opinion).

Developments in cognitive theory challenge both these assumptions. They present, instead, a complex picture of human rationality as an embodied process that is experientially grounded and imaginatively elaborated through conceptual operations such as metaphor.³²¹ One implication of this understanding, however, is that questions of meaning no longer fit into the conventional epistemological categories. The recognition that meaning is grounded in experience entails a rejection of both the determinacy sought by objectivist logic and the arbitrariness assumed by most social coherence theories.³²² Meaning is not determinate. The import of transfigurative processes such as metaphor is that there can be no linear, algorithmic function that links experiential input to imaginative output. But neither is meaning arbitrary. Not only is meaning configured by the kinds of bodies and experiences that we have, but it is framed and constrained by the systematic nature of cognitive processes like metaphor.³²³

To put it another way, human conceptualizations are not arbitrary in the sense that they can be *just anything*. Rather, the metaphoric nature of these conceptualizations means that they can be many things *of a specified, related type*.³²⁴ Thus, as we will see, the many different legal senses of *color* (as well as the various doctrinal interpretations of *under color of law* that we have already considered) are organized around a central sense of *color* as "deceptive appearance." Similarly, there is a second metaphorical sense of *under color of law* that is grounded in socially contingent practices. Here, too, we will see that the historical meaning of the phrase is neither arbitrary nor isolated. Rather, it is related to those practices metaphorically and elaborated in legal reasoning in a coherent, systematic manner.

321. It is *embodied* in the sense that the mental is not separate from the physical, but rather that meaning is a function of body and brain structure; it is *grounded* in the sense that meaningfulness is contingent upon our embodied social interactions; and it is *imaginative* in the sense that brain operations are largely a matter of conceptual processes such as metaphor, metonymy, and modeling rather than rule-governed formulae. See LAKOFF, *supra* note 64, at 153-54; MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* xiv-xvi, xix-xx (1987); Winter, *supra* note 38, at 1129-59.

322. Cf. MAURICE MERLEAU-PONTY, *SENSE AND NON-SENSE* 131 (Hubert L. Dreyfus & Patricia A. Dreyfus trans., 1964) ("The spirit of a society is . . . transmitted . . . through the cultural objects which it bestows upon itself and in the midst of which it lives. It is there that the deposit of its practical categories is built up, and these categories in turn suggest a way of . . . thinking to men.")

323. Cf. Winter, *supra* note 45, at 758 ("Metaphor is not a process of 'too easy synthesis,' . . . but rather of relation.")

324. See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2244-46 (1989). Compare Anderson, *supra* note 37, at 1214 (expressing the concern that metaphor "may evoke different ideas in different readers") with Winter, *supra* note 38, at 1157 (empirical data on language use shows that metaphor is "orderly and systematic in operation").

The understanding of human rationality as grounded in experience yields the further conclusion, which is a familiar tenet of all postmodernisms, that meaning cannot be viewed as a matter of the conscious intention of self-directing actors. As I have argued previously, every aspect of legal reasoning occurs against the backdrop of a massive cultural tableau which provides the tacit assumptions or *sedimentations* that render those legal conceptions intelligible.³²⁵ Because these socially constructed contexts are always anterior to any of us as an individual, we are inescapably situated in preexisting social practices and conditions that constitute both the grounds of intelligibility for and the horizons of our world. Consequently, our very ability to have a world is already constrained by the cultural constructs in which we find ourselves. In a crucial sense, therefore, the grounded nature of our cognition means that we unconsciously replicate and sustain the stabilized, socially constructed contexts in which we are situated.³²⁶ Because legislators too can only act in terms of the embedded cultural understandings that enable meaning, an important part of any statute is not made by the legislator but is contingent on the preexisting practices that are conventional for and constitutive of that culture.³²⁷ The meaning of the *color of law* metaphor is not merely a matter of consistent historical usage by judges and legislators, but a function of its continuing vitality as an embedded part of our culture's sociolinguistic system.³²⁸

This does not mean that a statutory phrase like *under color of law* has some determinate or static meaning, but only that possible meanings are contingent on the cultural conceptions that configure legal thinking.³²⁹ The problem with the Frankfurter-Zagrans misinterpretation, in addition to its historical inaccuracy, is that it is not even a

325. The term *sedimentation* originated with Husserl and was adapted by Merleau-Ponty. The metaphor expresses the alluvial accumulation of categories and concepts in the course of our interactions and experiences in the physical and social world. Cf. *supra* note 322. For a more extended discussion of this process, see Winter, *supra* note 74, at 1485-94. For some detailed examinations of this process as it operates in legal decisionmaking, see Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEXAS L. REV. 1881 (1991).

326. Winter, *supra* note 74, at 1452.

327. Cf. LON L. FULLER, *ANATOMY OF THE LAW* (1968):

[T]he proper interpretation of the ordinance will depend on the meaning attributed to the institution . . . by the practices and attitudes of the society in question. . . .

. . . .

. . . This means that in applying the statute the judge . . . must be guided not simply by its words but also by . . . conceptions . . . implicit in the practices and attitudes of the society of which he is a member.

Id. at 58-59.

328. Cf. Winter, *supra* note 45, at 753-57 (demonstrating the stability, persistence, and pervasiveness of the related CONDUIT metaphor-system).

329. Cf. FULLER, *supra* note 327, at 59 ("All this adds up to the conclusion that an important part of the statute in question is not made by the legislator, but grows and develops as an

plausible reading of the *color of law* metaphor. To put it more forcefully: as a matter of ordinary, conventional English, the Frankfurter-Zagrans position makes no sense.

If this claim seems too strong, consider this simple question: On their reading, what is signified by the word *color*? The Frankfurter-Zagrans interpretation proceeds as if the word *color* did not appear in the statute, as if the statute read: "Every person who, under any statute [etc.] of any state, subjects any person to the deprivation of any right secured by the Constitution shall be liable to the party injured." In fact, that is exactly how Frankfurter did depict the antebellum removal acts in his landmark study of the federal courts — that is, without any reference whatsoever to the "under color of" provision that each contained.³³⁰

Frankfurter's omission is not an isolated or idiosyncratic mistake. The current Court has effectuated much the same elision, reducing the "under color of office" provision of the present statute to mere surplusage by equating it with the act's "in performance of his duties" provision.³³¹ The mistake is common because lawyers, who are trained to think analytically and reductively, generally take a dim view of metaphor.³³² Often, they assume that metaphor is merely figurative speech that makes no real contribution to meaning. Alternatively, they concede that metaphor may be useful as a rhetorical matter, but only at the risk of ambiguity and imprecision.

Cognitive theory has overturned both these misconceptions. It has shown that metaphor is an irreducible aspect of human rationality that is not only indispensable to meaning, but regular and systematic within a given culture. In the next two sections, I present a cognitive analysis of the metaphorical expression *under color of law*. Surpris-

implication of complex practices and attitudes which may themselves be in a state of development and change."); see also Winter, *supra* note 74:

Human rationality is a dynamic process of meaningful interaction in and with an environment that is constantly in flux. Whatever our "built-up predispositions," we inevitably encounter situations that we "have previously never met or thought of." In this context, to react along the lines marked out by our sedimented knowledges is unavoidably to act imaginatively in a new circumstance, reasoning in terms of a known one. Thus, the subject is neither autonomous in its ability to transform its context nor determined by the objects of its past introjections.

Id. at 1491-92 (quoting Llewellyn, *supra* note 74, at 27).

330. See FRANKFURTER & LANDIS, *supra* note 181:

This section provided for the removal of suits from the state courts in cases against federal . . . officers acting under the authority of the Act [of Feb. 4, 1815] The Act of Mar. 2, 1833 . . . authorized removal of all suits against officers of the United States on account of any acts done by them under the revenue laws.

Id. at 11 n.22.

331. See *supra* text accompanying note 158.

332. See *supra* notes 36-37 and accompanying text.

ingly complex in structure, the expression is actually premised on two different sets of metaphoric conceptions. One is a highly general set of metaphors from perceptual experience; the other is a metaphor and a metonymy that arose from very specific contingent social practices. Despite this difference in origin and structure, each metaphorical concept expresses in a different way the sense of deceptive appearances. Thus, the sense of the statutory phrase as "abuse of authority" can be said to be overdetermined. Perhaps most important of all, we will see how this meaning-rich metaphor expresses a sophisticated response to the conceptual ambiguity of "the State" and the problem of official misconduct.

B. *What Can Be Done by "Color"?*

In cognitive theory, "metaphor" is a matter of thought and not mere language: It refers to a tightly structured set of conceptual mappings in which a target domain is understood in terms of a source domain of more readily comprehended, embodied experience. This conceptual mapping is conventionally represented by means of a mnemonic of the form TARGET-DOMAIN-IS-SOURCE-DOMAIN; but the metaphor is the set of conceptual mappings and not the TARGET-DOMAIN-IS-SOURCE-DOMAIN mnemonic, which is only a representation. Similarly, one should not confuse a conceptual metaphor of this sort with the many metaphorical expressions that are its linguistic manifestations.³³³ For example, a conceptual metaphor like CONTROL IS UP will motivate many different metaphorical expressions such as "he's *under* my thumb" or "she's *on top* of the situation." Conversely, metaphorical expressions that use the same linguistic term can represent entirely different conceptual metaphors. Thus, metaphorical expressions such as "slow *up!*" and "he's cooking *up* a storm" are not instances of a single "up" metaphor, but rather different metaphorical expressions predicated on different conceptual metaphors — in this case CONTROL

333. See George Lakoff, *The Contemporary Theory of Metaphor*, in METAPHOR AND THOUGHT (Andrew Ortony ed., 2d ed., forthcoming 1992) (manuscript at 4-8, on file with author):

This view of metaphor is thoroughly at odds with the view that metaphors are just linguistic expressions. If metaphors were merely linguistic expressions, we would expect different linguistic expressions to be different metaphors. Thus, "We've hit a dead-end street" would constitute one metaphor. "We can't turn back now" would constitute another, entirely different metaphor. "Their marriage is on the rocks" would involve still a different metaphor. And so on for dozens of examples. Yet we don't seem to have dozens of different metaphors here. We have one metaphor, in which love is conceptualized as a journey. . . . And this unified way of *conceptualizing* love metaphorically is realized in many different *linguistic* expressions.

Id. at 7.

IS UP and ACTIVITY IS UP, respectively.³³⁴

Accordingly, a single linguistic expression can have more than one operative conceptual metaphor contributing to its meaning. Consider the idiomatic expression that refers to a robbery as a *hold up*. This apparently simple colloquialism has a complex, twofold derivation that yields a single coherent meaning. One sense of the phrase is the same as a *stick up* and, rather than being a case of metaphor, involves a conceptual metonymy in which the entire robbery scenario is referred to in terms of one of its elements — the part where the robber commands the victim, “Stick ‘em up!” or “Reach for the sky!”³³⁵ A second sense of the expression derives from the interaction of two separate conceptual metaphors. The first is the LIFE IS A JOURNEY metaphor.³³⁶ This metaphor consists of a set of conceptual mappings from the source domain “journey” to the target domain “life” in which the person is a traveler, to be born is “to start out in life,” to die is to “come to one’s end” or “pass away,” and a problem in one’s life is an “obstacle to be overcome” or an “impasse.” The second conceptual metaphor is CONTROL IS UP. A robbery is a *hold up* because someone has, by force or threat of force, interfered with or interrupted one’s normal course of affairs. Thus, we might have a highly conventional statement like: “The vacation was *going along* fine until we were *held up* right in front of our hotel.”

The statutory expression *under color of law* has an analogous, twofold structure. In this section, I examine the sense that is predicated on the CONTROL IS UP metaphor together with a set of very common conceptual metaphors for intellectual processes. In the following section, I discuss a second, more particular metonymic and metaphoric conception that evolved from a specific set of historically contingent social practices. Both metaphoric senses are widespread and system-

334. See LAKOFF & JOHNSON, *supra* note 19, at 14-17; Winter, *supra* note 38, at 1142-48. This is how we can have conventional expressions that might otherwise seem contradictory like “slow up” and “slow down.” The former is premised on CONTROL IS UP and connotes an exercise of mastery or control. The latter is an instance of the ACTIVITY IS UP metaphor and connotes cessation of activity or a decrease of energy. In many contexts, both connotations will be applicable, and either expression might be used. But, in other cases, the conceptual metaphors will constrain the appropriate expressions — which is why one can say to a horse “giddy up,” but never “giddy down.”

335. On metonymies and metonymic models, see LAKOFF & JOHNSON, *supra* note 19, at 35-40, and LAKOFF, *supra* note 64, at 77-90.

336. Technically speaking, the idiom derives from the more generic Event Structure Metaphor of which LIFE IS A JOURNEY is a subcase. See Lakoff, *supra* note 333, at 17-21. I have used the more familiar subcase for accessibility and ease of exposition. Because the metaphoric structure of the subcase is exactly the same as the generic metaphor, there is no material difference in the analysis.

atic in legal reasoning. Both also connote deception and false appearances.

A widespread, cross-cultural set of conceptual metaphors is based on the MIND-AS-BODY metaphor. In this latter metaphor, the mind is conceptualized as a body moving through space, and various entailments of travel are mapped onto intellectual operations. Thus: ARGUMENTS (AND OTHER LOGICAL STRUCTURES) ARE JOURNEYS, as when the professor asks "*Where were we?*" or, in questioning a student, "*where is this argument going?*"; KNOWING IS SEEING, as in a conventional phrase like "*which view do you espouse?*"; and IDEAS ARE LIGHT-SOURCES, as in familiar expressions like "*his theory really sheds some light on our problem*" or "*she wrote a brilliant paper.*"³³⁷

The first, most general sense of the statutory expression *under color of law* derives from these metaphors. The simple phrase *under law* is predicated on the CONTROL IS UP metaphor and expresses the sense of lawful action — i.e., that the person's (or institution's) actions are governed by the law.³³⁸ The meaning of the term *color* derives from the conceptual metaphors KNOWING IS SEEING and IDEAS ARE LIGHT-SOURCES. In its nonmetaphoric sense, color is "[t]he quality or attribute in virtue of which objects present different appearances to the eye, when considered with regard only to the kind of light reflected from their surfaces."³³⁹ The metaphorical expression *under color of law* uses two entailments of our everyday knowledge of color. The first is that color is a quality of surfaces and, therefore, may reveal absolutely nothing about the interior or substance of the object under view. Thus, the *color of law* metaphor expresses much the same sense as the conventional aphorism "looks can be deceiving." The second experiential entailment is that color perception is highly dependent upon the quality of light. We know that if we view an object in diminished light or in other than white light, the color we see will not be true. Action "under color of" state law is action that has only the *appearance* of being governed by law — i.e., not action "under law," but only "under the *color* of law."³⁴⁰ Thus, a deprivation of rights *under color of law* connotes an injury by an officer acting with an air of

337. EVE SWEETSER, FROM ETYMOLOGY TO PRAGMATICS: METAPHORICAL AND CULTURAL ASPECTS OF SEMANTIC STRUCTURE § 2.2 (1990); see also LAKOFF & JOHNSON, *supra* note 19, at 48, 87-96.

338. See Winter, *supra* note 38, at 1217 ("[T]he confluence of the personification of LAW and the CONTROL IS UP metaphor . . . yields the meaning of rights *under the law*.").

339. OED, *supra* note 12, at 499 (definition 1).

340. There is a related sense in which the phrase connotes action that, rather than having the appearance of being governed by law, is governed by the appearance of law as in the "good faith" interpretation of the "under color of" provision of the Captured and Abandoned Property Act. See *supra* text accompanying notes 167-72. This is the sense in which the aspiration to "legal

authority that is deceptive or tainted;³⁴¹ or, in the older variant *under color of office*, the officer presents himself to the victim in a “false light” so that “the thing is grounded upon vice, and the office is as a shadow thereto.”³⁴²

The sense of *color* as “false light” or “deceptive appearance” is systematic both in ordinary English and in legal discourse. The common notion that metaphor is merely “colorful” language in contradistinction to “clear” prose is, ironically, an instance of these conceptual metaphors.³⁴³ Shakespeare uses the phrase *under the color of* to connote deception in *Two Gentlemen of Verona*.³⁴⁴ A more familiar example is the legal concept of a “colorable argument,” which connotes an argument that has surface plausibility (i.e., *color*) but that, when examined closely or thought through clearly, may prove wrong.³⁴⁵ As one of the removal cases noted: “‘Colorable’ is defined as ‘having the appearance, especially the false appearance, of right.’”³⁴⁶ Thus, *color* also signifies pretextuality, as in the following rather virulent statement during the House debate by an opponent of section 1983:

Mr. Speaker, under the pretext of protecting the people, the people are enslaved; under the pretext of establishing order, liberty is being

color” dominated political debate in England the second half of the seventeenth century. See *infra* text accompanying notes 355-59.

341. This sense of *color* is not related to the conventional expression *true colors*. (As in the sentence: “He acts like a nice guy; but when something important is at stake, he really shows his *true colors*.”) As we will see in the next section, the metaphorical expression *true colors* is related to the second sense of *color of law*. See *infra* text accompanying notes 360-63. But both the expression *true colors* and its complement *under false colors* also take their significance from the fact that appearances can be deceiving.

342. *Dive v. Maningham*, 1 Plowden Rep. 60, 64, 75 Eng. Rep. 96, 102 (Common Bench 1551) (argument of counsel).

343. See, e.g., THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* 36 (1991) (“[T]he kind of misrepresentation most significant in law is the rhetorical coloring of objective reality with subjective wishes and desires. Using rhetorical tropes and figures, a speaker can project emotions to an audience in the *guise* of objective qualities. . . .”) (emphasis added). The distinction between prose and metaphor is closely related to the Enlightenment conception of Reason, which seeks transparency and strives to avoid the coloration of emotion. See, e.g., 2 JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 411 (bk. 3, ch. 10, ¶ 34) (London, Routledge 1909) (“But yet, if we would speak of things as they are, we must allow that all the art of rhetoric, besides order and clearness, all the artificial and figurative applications of words eloquence hath invented, are for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment. . . .”); cf. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 260 (1989) (“A standard feature in the analysis of secondary properties is that they are correlated with primary qualities and thought to be part of the subjective “colouration” attending our experience of these latter.”).

344. Already have I been false to Valentine, And now I must be as unjust to Thurio.

Under the color of commending him, I have access my own love to prefer.

WILLIAM SHAKESPEARE, *THE TWO GENTLEMEN OF VERONA* act 4, sc. ii, ll. 1-4.

345. Thus, it would be conventional for a lawyer to say: “My opponent has made a *colorable* argument, Your Honor, but if you view it *in light of* what the Supreme Court said in the . . . case, you’ll see that it’s wrong.”

346. *Virginia v. De Hart*, 119 F. Cas. 626, 628 (C.C.W.D. Va. 1902).

overthrown; under the pretext of securing the rights of the voter, the voter is disenfranchised; under color of maintaining the manhood of man in the political equality of the colored man, the manhood of man is denied in the political degradation of the white man.³⁴⁷

A related usage appears in eighteenth- and nineteenth-century English law concerning contempt of Parliament, where it refers both to illegal actions and false accusations.³⁴⁸

Over the course of centuries, the term *color* in legal doctrine has invariably connoted some degree of falsity ranging from fraud to pretext to mistaken appearance. In *Woolsey v. Dodge*,³⁴⁹ for example, the federal circuit court rejected the defendant's contention that "the mode of giving jurisdiction in this case is merely colorable; or in other words that it is a fraud upon the law."³⁵⁰ The term had a different but related connotation in the rather charming medieval doctrine of "col-

347. CONG. GLOBE, 42d Cong., 1st Sess. 364 (1871) (statement of Rep. Arthur). Arthur went on to quote a passage from Story on the Guarantee Clause that contains a similar usage. *Id.* at 366 ("Every pretext for intermeddling with the domestic concerns of any State, under color of protecting it against domestic violence, is taken away by that part of the provision . . ."). The OED gives a related nonlegal usage of *colour* as "[a] show of reason, a specious or plausible reason or ground; fair pretense, pretext, cloak." OED, *supra* note 12, at 500 (definition 12.a.).

348. See HOMERSHAM COX, THE INSTITUTIONS OF THE ENGLISH GOVERNMENT (1863):

In a report to the House of Commons in 1771, it is said that the general heads of breaches of privilege and contempts of that House are these three: — "1st, Evasion. 2nd, Force. 3rd, Colour of Law." . . .

With regard to the third head, viz. breaches of privilege and contempts of the House under "colour of law," these have been committed — by discharging persons committed by the House; . . . by accusations tending to call such words or actions [spoken or done under the authority of the House] in question before the courts of law, under pretended denominations of offences not entitled to privilege.

Id. at 218.

349. 30 F. Cas. 606 (C.C.D. Ohio 1854) (No. 18,032), *aff'd.*, 59 U.S. 331 (1855).

350. 30 F. Cas. at 608. In *Woolsey*, a bank shareholder sued in equity to enjoin the collection of a state tax on the ground that the tax violated the Contract Clause. Federal jurisdiction was founded on diversity; the reference to "jurisdiction" is to the court's equity jurisdiction.

Woolsey also contains a usage of *color of law* that is in conflict with the Frankfurter-Zagrans understanding of the term, although congenial to their reading of § 1983. Observing the nineteenth-century distinction between laws that are void and those that are merely voidable, the court remarked:

A void law can afford no justification to any one who acts under it; and he who shall attempt to collect the illegal tax, under the law referred to, will be a trespasser. He will proceed, it is true, *under the color of law*, an act standing on the statute book, *but a void act*. If he open the vaults of the bank by force, and abstract a portion of its specie, *under pretense* of collecting the tax, he, though the treasurer of the county, will stand without justification or excuse. He has no more right to do this than any other person, *who can set up no pretense of authority*.

30 F. Cas. at 607 (emphasis added). This passage makes clear that the court understood *under color of law* to refer to "pretense of authority," a reading that both Frankfurter and Zagrans explicitly reject. See *Monroe*, 365 U.S. at 238-39 (Frankfurter, J., dissenting); Zagrans, *supra* note 8, at 501-02. At the same time, *Woolsey* indicates that the use of *under color of law* in § 1983 certainly would have been understood to *include* conduct pursuant to an unconstitutional statute. The problem with the Frankfurter-Zagrans misreading is that it would restrict the application of the statute to only one of the many circumstances comprehended by the phrase *under color of law*.

our.” A “colour” was a common law pleading device, already extant by 1400,³⁵¹ that continued in use in England until the beginning of the nineteenth century.³⁵² The purpose of the device was to avoid pleading the general issue and, thus, to take the case away from the jury. It allowed the defendant to convert the issue to a question of law “by giving the plaintiff a ‘show’ or ‘colour,’ i.e. by imagining a fictitious title for the plaintiff, specious, but inferior to his own, and asking the judgment of the Court upon it. . . .”³⁵³ Another usage appears in various nineteenth-century American property law doctrines. Under many state statutes of limitations for cases of adverse possession, for example, a defendant with “color of title” who had been in possession for the requisite period could defeat a plaintiff with superior title. “The courts have concurred, it is believed, without an exception, in defining ‘color of title’ to be that which in appearance is title, but which in reality is no title.”³⁵⁴

A related usage of *color of law* as “pretense or appearance of law” is of particular interest because it was widespread in English political culture during the second half of the seventeenth century. The concept of “colour of law” was a potent political and rhetorical tool used by both sides in the political struggle between King and Parliament that culminated in the Revolution of 1688.³⁵⁵

[T]he condemnation of legal form as a weapon of political persecution was used not only against the king but by him, as well, as an offensive device. In the *quo warranto* proceedings against the City of London, the corporation was charged with the “oppression of the Kings Subjects by Colour of Law.” It was alleged that the City was pretending, and indeed seeming, to act in compliance with law but in fact was not. It is probable

351. EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 163 (6th ed. 1949) (citing a reported case in the Year Book for the second year of the reign of Henry IV).

352. 9 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 301-02 (1922).

353. JENKS, *supra* note 351, at 164; *see also* 9 HOLDSWORTH, *supra* note 352, at 299 (“The doctrine of colour got over the difficulty that a particular plea merely amounted to the general issue, by inventing facts which made a plea in confession and avoidance appropriate. . . . The doctrine of colour was founded on a fiction . . .”).

354. *Wright v. Mattison*, 59 U.S. (18 How.) 50, 56 (1855); *see also* *Beaver v. Taylor*, 68 U.S. (1 Wall.) 637, 641 n.2 (1863) (“A void deed taken in good faith is a sufficient color of title.”); *Pillow v. Roberts*, 54 U.S. (13 How.) 472 (1851):

One who enters upon a vacant possession, claiming for himself upon any pretence or color of title, is equally protected with the forcible disseizor. . . . Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself . . . adversely to all the world.

54 U.S. (13 How.) at 477. A related usage of *color of title* in the sense of apparent authority appears in *Cocke v. Halsey*, 41 U.S. (16 Pet.) 71 (1842). There, the Supreme Court held that, even if the clerk’s appointment had been irregular under state law, the fact that he had “color of title” meant that his acts were “colore officii” and binding on third parties. 41 U.S. at 86-87.

355. HOWARD NENNER, BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660-1689, at 130 (1977) (“Legal process, or at least its appearance ‘by colour of law,’ would serve as the constant guide to political action from 1660 on.”).

that the City was less guilty than the king of the pretense of legal regularity. . . . But what is more important is that these allegations were being directed from all sides.³⁵⁶

In subsequent political debate, the claim that a particular procedure had "legal color" was invoked to maintain the appearance of continuity and legitimacy even in the face of substantial change.³⁵⁷ Used in this sense, the phrase "by color of law" was an affirmative assertion concerning success in "keeping up [legal] appearances." "The argument could be completely wrong and at the same time totally convincing. All that was really required was the application of legal principle to the political problems at hand. Of little consequence was the relevance of the legal procedures employed. The 'colour of law' was usually quite enough."³⁵⁸ These seventeenth-century debates confirm that *color of law* was more than a technical legal term; it had become part of the larger English-speaking political culture at least two centuries prior to Reconstruction.

In the period leading to the Revolution of 1688, the concern with oppression under pretense of law and abuse of legal form merged with the need to preserve the appearance of legality while one legal regime supplanted its predecessor.³⁵⁹ In Reconstruction, the concern with oppression under pretense of law and abuse of legal form confronted the attempt to subvert the post-War legal regime and to reestablish a social and political hierarchy dislodged by military defeat. In a different way in each context, "color of law" was invoked as the tool with which to restore a sense of legal order. In the former period, "by colour of law" marked Parliament's concern that its political actions be governed by the appearance of legality. In the latter period, "under color of" law signified Congress' concern with actions by Southern officials that used the appearance of legality to mask oppression.

356. *Id.* at 65 (footnote omitted).

357. *Id.* at 23 ("[T]he older fiction of a supreme law, independent of human control, had not been abandoned. . . . For this majority of the political nation there was a greater reliance upon the pretense of regularity and procedure by color of law . . .").

358. *Id.* at 83. As Nenner astutely observes:

It was an interesting road to sovereignty: political supremacy founded upon control of the law, which in turn was based, as it had to be, upon an understanding of what the law could be made to do. . . . Parliament's victory, when it came in 1688-89, . . . was indeed the defeat of an "evil" king, but it was less attributable to Parliament's legal right than to the richness of its legal imagination.

Id.

359. The Stuarts had exploited the law not wisely but too well. The legal past was theirs, but it was . . . jeopardized and then lost through politically insensitive, even if constitutionally proper, use. . . . Parliament opposed the king with its own interpretation of the law; and, when that failed, it assumed the burden of legal justification by recourse to the best, indeed the only, approximation of law it could find — the weapon of legal color.

Id. at 199.

C. "Amphibians" and the Rule of Law

There is another sense of *color of law* that, unlike the first sense, is contingent on particular social practices relating to government officials. Perhaps for that reason, this other sense of *under color of law* seems primary. It is the principal sense that animates the reasoning in many of the most important cases dealing with official misconduct. Moreover, it is the sense that best captures the doubled ambiguity caused by the conceptual opacity of "the State" and the amphibious character of its agents.

One less familiar connotation of *color* comes from heraldry, where it refers concretely to the tints employed in heraldic crests. An early use of the term referred to the insignia of a knight.³⁶⁰ A contemporary usage that bears much the same sense is that of *colors* as referring to the flag (and, hence, the flag's bearers as the "color guard"). In these expressions, *color* is a metonymy where the color — which is often more striking or more easily perceived than the design — stands for the entire emblem.³⁶¹

The original expression *by Colour of his Office* dates from the thirteenth-century statute of Edward I, a time when many of the King's officers and agents would actually have worn the King's coat of arms. As it is used in this early statute, the metonymic expression *color of office* signified conduct that had all the trappings and indicia of an official act even though it was without sufficient warrant in law.³⁶² Thus, the phrase *color of office* is a compound metonymic expression: *Color* stands for the King's coat of arms; the coat of arms stands for the office (and/or the King himself). The phrase also becomes a metaphorical expression once the metonymy is extended to represent the general *concept* of official misconduct (that is, without regard to the actual dress of the governmental agent). *Color of office* is a metaphor based on a metonymy; it signifies the appearance or guise of authority. Or, as argued by Maningham's counsel, "*colore officii* implies that the thing is under pretence of office, but not duly, and the office is no more

360. OED, *supra* note 12, at 499 (definitions 2.b. & 6.a.).

361. This is the sense employed in the phrases *to show one's true colors* and *acting under false colors*. See *supra* note 341. Note, however, that this usage is invariably plural and, when used metaphorically, is usually marked by the antecedents "true" or "false." Accordingly, this does not appear to be the basis for the metaphor at work in § 1983. If it were, the statute might have said something like: "Every person who, under the true [or false] colors of state law deprives. . ."

362. The text of the statute, discussed *supra* text accompanying notes 12-13, provided "That no Escheator, Sheriff, nor other Bailiff of the King, by Colour of his Office, without special Warrant, or Commandment, or Authority certain pertaining to his Office, disseise any Man of his Freehold, nor of any Thing belonging to his Freehold . . ." 3 Edw. 1, ch. 24 (1275) (Eng.), reprinted in 1 STATUTES AT LARGE 92-93 (Danby Pickering ed., 1762).

than a cloak to deceit."³⁶³

This metaphoric sense of *color of office* is not just some ancient relic of interest only to etymologists. An experiential grounding for the metaphor persists in contemporary practices like the uniforms and insignia of the military and police. The enduring vitality of the metaphor as part of our conceptual system is conspicuous in legal doctrine. Virtually every one of the modern cases dealing with either the scope of the Reconstruction statutes or the meaning of state action uses metaphorical expressions premised on this sense of *color of office*. The standard definition of *under color of law* that appears in contemporary cases like *Classic* and *Monroe* is: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law"³⁶⁴ In much the same language, Frankfurter conceded that the conduct of the police in *Monroe* was state action "because they are clothed with an appearance of official authority which is itself a factor of significance in dealings between individuals."³⁶⁵ Elsewhere in *Monroe*, Douglas observed for the Court "that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . . , whether they act in accordance with their authority or misuse it."³⁶⁶

These are not mere rhetorical expressions. In each of these quotations, the metaphoric sense of *color of office* as "guise of authority" is the basis for an inference pattern in which the outward appearance of official power — a "show of authority" under state law³⁶⁷ — explains why police misconduct falls within the reach of the Fourteenth

363. *Dive v. Maningham*, 1 Plowden Rep. 60, 64, 75 Eng. Rep. 96, 102 (Common Bench 1551) (first reported in 1578).

364. *United States v. Classic*, 313 U.S. 299, 326 (1941) (emphasis added); see also *Monroe v. Pape*, 365 U.S. 167, 184 (1961); *Screws v. United States*, 325 U.S. 91, 109 (1944).

365. *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting) (emphasis added); see also *Terry v. Adams*, 345 U.S. 461, 475-76 (1953) (Frankfurter, J., concurring) ("If the Jaybird association . . . is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme.") (emphasis added). Ironically, in a memorandum to Frankfurter that addressed the argument's raised by Harlan's concurrence, Amsterdam wrote: "But if language means anything, Congress did not make a tort of every violation of the Constitution, but only such as were sanctioned by the compulsive force and overawing dignity of the State, dressed up in some 'statute, ordinance, regulation, custom, or usage.'" FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 68, Frame No. 00572 (emphasis added).

366. *Monroe*, 365 U.S. at 171-72 (emphasis added). Similarly, in the same passage, quoted *supra* text accompanying note 365, Frankfurter recognized that "[c]ertainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar." 365 U.S. at 238 (Frankfurter, J., dissenting).

367. 365 U.S. at 238 (Frankfurter, J., dissenting) ("The aura of power which a show of authority carries with it has been created by state government.") (emphasis added).

Amendment. It is also significant that only one of these quotations concerns the interpretation of the statutory phrase *under color of law*. In each of the other passages, the *color of office* concept is the underlying cultural metaphor that supports pivotal inferences in doctrinal areas where neither the *color of office* nor the *under color of law* language otherwise appears.

For example, as noted in *Screws*, the federal statute at issue in *Ex parte Virginia* did not contain the words *under color of law*.³⁶⁸ Nevertheless, this was where the Court first invoked the "guise of authority" conception to decide the state action question:

Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws violates the constitutional inhibition; and as he acts in the name and for the State, and *is clothed with the State's power*, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State *has clothed one of its agents with power* to annul or to evade it.³⁶⁹

So too, we can also observe patterns of inference premised on this same cultural metaphor at work in *Ex parte Young*.³⁷⁰ There, the Court used the *color of office* metaphor to explain the application of the ultra vires doctrine to the Eleventh Amendment immunity problem: "[T]he officer in proceeding under such [unconstitutional] enactment 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."³⁷¹

Commentators have criticized these "classic" doctrines as logically inconsistent,³⁷² and Justices have treated *Young* as an embarrassing, but necessary, fiction.³⁷³ But this inconsistency arises only within an objectivist analysis that assumes that there can be but one referent for the concept "State" and that, once we have identified the "authentic" State, that abstract entity will remain stable regardless of context. This more "rigorous" approach, however, is the one premised on a

368. *Screws*, 325 U.S. at 110.

369. *Ex parte Virginia*, 100 U.S. 339, 347 (188) (emphasis added); see also *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913) ("[T]he theory of the Amendment is that where an officer or other representative of a State in the exercise of *the authority with which he is clothed* misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant . . .") (emphasis added).

370. 209 U.S. 123 (1908).

371. 209 U.S. at 159-60 (emphasis added).

372. See FINK & TUSHNET, *supra* note 41, at 127 ("[T]he *Young-Home Telephone* pair retains the air of mysticism that surrounds most legal fictions.")

373. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-07 (1984).

fallacy — the fallacy of reification.³⁷⁴ For, as the Court pointed out in *Ex parte Virginia*, the Fourteenth Amendment “must act upon persons, not upon the abstract thing denominated a State.”³⁷⁵

These persons do not exhaust the social meaning of “the State,” which is an imaginative social construct over and above the personnel and other material manifestations that represent it. Nor do they personify it fully; the persons who act as “the State” do so only contingently as the temporary embodiments of that construct. Thus, although *Young* remains problematic for other reasons,³⁷⁶ its doctrine makes quite good sense in the run-of-the-mill case where it is no “fiction.” A social construction like “state official” is real precisely to the extent that the society in question has internalized and actualized the cultural meaning that it represents. Officials who exploit or abuse their office are capitalizing on this social meaning to effectuate what we might call a constitutional tort of conversion, transforming “the State” into a government of men and not of laws. It is, therefore, perfectly logical that these persons are understood to act as “the State” and, at the same time, that they remain individuals who may be called to account for their actions.

These are precisely the connotations that the *color of office* metaphor captures. It expresses the way in which the trappings of office provide a veneer of authority, proclaiming that the officer acts with the full power and prestige of “the State.” At the same time, however, the metaphor communicates the transient and provisional character of that representation — the fact that beneath the uniform and insignia of authority is a person who, in any given case, may not conform his behavior to the legal requirements of his office. “[B]y virtue of public position under a State,” he may be “clothed with the State’s power.”³⁷⁷ But when he violates that trust, he is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”³⁷⁸

374. See Winter, *supra* note 45:

Because conceptual metaphor is cognitively entrenched and operates without reflection, reductionism comes easily; we may come to think that understanding really does have all the entailments of grasping. Thus, if for us, UNDERSTANDING IS GRASPING and IDEAS ARE OBJECTS, we may come to see the world as composed of discrete, mind-independent, bits of reality (the objectivist fallacy) or to treat abstract ideas as if they were somehow concrete and real (the fallacy of reification). Both are errors of conflation, in which we mistake one of many possible relations for an identity or equation.

Id. at 759.

375. *Ex parte Virginia*, 100 U.S. 339, 347 (1880).

376. See *infra* text accompanying notes 383-92.

377. *Ex parte Virginia*, 100 U.S. at 347.

378. *Ex parte Young*, 209 U.S. 123, 160 (1908).

The *color of office* metaphor has been used by Anglo-American judges and lawyers over hundreds of years and across otherwise unrelated doctrinal categories to express the complex social meaning of official misconduct. It is the metaphoric conceptualization by which our legal-political culture historically has mediated the problems arising from the conceptual opacity of "the State." As this cultural metaphor has taken shape in the case law, it has an intricate set of quite sophisticated entailments.

First, and most simply, it connotes the sense in which the office may serve to camouflage or mask misbehavior. "[F]or this word *colore officii sui* . . . signifies an act badly done under the countenance of an office, and it bears a dissembling visage of duty . . ." ³⁷⁹ Thus, the *color of office* metaphor conveys that the more serious evil of official misconduct is that the injury is compounded by deception:

As if an officer will take more for his fees than he ought, this is done *colore officii sui* . . . [and] is no other than robbery, but it is more odious than robbery, for robbery is apparent, and always hath the countenance of vice, but extortion, being equally as great a vice as robbery, carries the mask of virtue. . . . ³⁸⁰

Second, it expresses the special significance of "the State" as a social institution that is manifested not merely in "patterns of doing (or of inhibition) . . . , but also accompanying patterns of thinking and of emotion."³⁸¹ Official misconduct does not have the same social meaning as a private wrong "because [the wrongdoers] are clothed with an appearance of official authority which is in itself a factor of significance in dealings between individuals."³⁸²

This last point, and the import of the *color of office* metaphor, should not be confused with analogous doctrines of agency law such as the doctrine of apparent authority.³⁸³ The issue exemplified in the sec-

379. *Dive v. Maningham*, 1 Plowden Rep. 60, 67-68, 75 Eng. Rep. 96, 108 (Common Bench 1551).

380. *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108.

381. Llewellyn, *supra* note 74, at 18.

382. *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting).

383. One can easily confuse the *color of office* concept with one of the agency doctrines if one fails to recognize the metaphoricality of the phrase and attempts instead to treat it in more reductive terms. Cf. ALEXANDER & HORTON, *supra* note 26, at 32-35 (equating "color of" law with "pretense of" law, and arguing that neither the concept of "pretense of authority" nor that of "agency" provides a workable test by which to determine what is "acting in official capacity").

Moreover, as a matter of conventional legal analysis, "under color of" law does not just extend government responsibility from cases of actual to cases of apparent authority. Pursuant to *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), the government is not liable for the action of its agents "under color of law" absent a policy or custom (that is, absent authority or causal responsibility). 436 U.S. at 692, 694. Rather, an officer who violates the Constitution while acting "under color of" law is personally responsible to the victim for the damages. See *Hafer v. Mello*, 112 S. Ct. 358 (1991).

tion 1983 cases is not whether the agent is authorized to act for the principal. Who exactly is the principal? There is no "authentic" State separate from the amphibious and ambiguous public-private actors and the reification they temporarily embody. Rather, the problem in the section 1983 cases is conceptually closer to those that arise in the corporate context.³⁸⁴ But even this analogy is deficient because the problems that result from the conceptual opacity of a reified entity like a corporation or a "State" are refracted through different policy concerns. In the corporate context, the more typical problem concerns the expectation and reliance interests of third parties who deal with representatives of the corporate entity. In the section 1983 context, however, the issue is not that the injured party mistakenly thinks that the agent acts for the governmental entity. If it were, then "a rapist who lures his victims by flashing a fake police badge would be the subject of constitutional commands, while a police officer who engages in illegal government surveillance while in plainclothes would be acting beyond the reach of those commands."³⁸⁵ Rather, the problem of conduct *under color of office* concerns the distinctive social meaning occasioned by abuse of official authority. It arises only when the actor has a bona fide identity as a state official or when he or she acts in concert with such an official — a point confirmed by the otherwise incomprehensible state action decisions.³⁸⁶

In other words, the issue concerns the inherent ambiguity of a social role like that of a public official. The *color of office* metaphor signifies the amphibious character of the officer who is the provisional embodiment of "the State." It conveys the sense in which, contrary to the reductive view, an officer who commits a wrong continues to be an official. As Justice Whittaker aptly put it during the Court's deliberations in *Monroe*: "[W]hatever a policeman does, he does under a claim of legal right to do so."³⁸⁷ When, for example, the Los Angeles police

384. See CHEMERINSKY, *supra* note 30, § 7.5, at 346-47 (quoted *supra* note 100).

385. ALEXANDER & HORTON, *supra* note 26, at 33.

386. Compare *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) with *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). In *Lugar*, the participation of the clerk of the court in issuing the ex parte writ of attachment and of the sheriff in executing that writ was sufficient to establish state action "under color of" law. 457 U.S. at 924, 942. In *Flagg Bros.*, the unaided action of a private storage company was not considered state action even though the company acted pursuant to the authorization of positive state law establishing a warehouseman's lien. 436 U.S. at 151-53. One can make sense of these cases only in light of the social understanding in which the officer embodies the abstraction called "the State." Under the reductive analysis, they cannot be rationalized at all.

That being said, I do not want to create the misimpression that I think these two cases are rightly decided. They remain deeply problematic for the reasons articulated by Hale. See Hale, *supra* note 43. Accordingly, I think it would be a mistake if state action doctrine were conflated with the *color of office* conception.

387. FRANKFURTER PAPERS: PART II, *supra* note 18, Reel 67, Frame No. 00930 (Frank-

beat Rodney King, they were acting as police and not as private individuals with a personal vendetta. At the same time, they were acting in a manner neither authorized nor approved by the city, its mayor, or most of its constituents. They were acting *officially*, but not necessarily *legally*.

An act *under color of office* can be said to be a paradigmatic case in which “the clothes make the man.” The issue is not that the officer is sometimes a lamb and sometimes a shark.³⁸⁸ Nor, to mix metaphors, is it that the officer is a wolf in sheep’s clothing. Rather, he is a renegade who appears to be one thing *and is that thing* even as he betrays his appearance by his action. What the *color of office* metaphor enables is a conceptual complexity or layering of meaning not possible with more conventional analytic tools.³⁸⁹ *Under color of law* is the expression of simultaneous social truths (or, rather, concurrent socially constructed meanings). As one of the surety cases put it, when an officer commits a wrong, “[h]e does this in his character of sheriff, *colore officii*, and not as a naked trespasser without color of authority.”³⁹⁰

The problem with the “fiction” of *Young* and the Eleventh Amendment cases is that it conflates the *colore officii* concept with the doctrine of *ultra vires*. Where the common law distinguished official misconduct from the act of a “naked trespasser,” *Young* treats the two as if they were the same.³⁹¹ The fictive quality of the *Young* doctrine is a consequence of its failure to recognize the metaphorical quality of its own reasoning: as if the officer actually were “stripped of his official character” and reduced to a “naked trespasser.” Thus, it endorses the purely reductive view that the governmental agent who acts illegally

further, J., summarizing comments of Whittaker, J.). Strictly speaking, of course, Whittaker’s statement is too broad. The observation is quite astute, however, if it is read — as one assumes it was intended — as “whatever a policeman does [as a policeman].” See *infra* text accompanying notes 446-55.

388. Imagine the opinion in *Screws*: “When the sheriff beat the petitioner, he was alternating — striking some blows as Sheriff Screws and others as Mr. Screws. We hold these two people jointly and severally liable.”

389. In one sense, we are so used to this complex understanding (in part because the cognitive metaphors involved are so deeply entrenched) that we do not recognize the complexity even as we perform this sophisticated, nondichotomous feat. We do not recognize it in part because we ourselves occupy many simultaneous roles and characters in our own self-understandings: We are parent-child, teacher-student, mentor-disciple, professional-private person, all at the same time. Ordinary personal identity of this sort is a synthetic achievement. In real life, people who take a particular role too seriously (petty bureaucrats, for example), who rigidly divide their selves and inflexibly insist on distancing the formal requisites of their “current” role to the exclusion of any “personal,” more humane personae are perceived as deficient automata or, more clinically, as schizoid personalities. See Winter, *supra* note 57, at 982, 987-91.

390. *Sangster v. Commonwealth*, 58 Va. (17 Gratt.) 124, 130 (1866).

391. See *supra* text accompanying notes 100-27.

acts not qua agent but qua private person amenable to a common law action for redress. This leads to the rather bizarre bit of transcendental nonsense in which the Court says that “[s]tate officers sued for damages in their official capacity are not ‘persons’ for purposes of the suit because they assume the identity of the government that employs them. . . . By contrast, officers sued in their personal capacity come to court as individuals.”³⁹² The common fiction in both these doctrines is that the officer is not sued as an individual tortfeasor at common law but rather as a state official who has violated constitutional norms. These are not mistakes that arise under the nonreductive, metaphoric understanding expressed by the *colore officii* concept.

Third, and this follows from the previous point, the *color of office* metaphor connotes the sense that the evil of official misconduct is not so much a matter of deception as of duplicity and betrayal. In this sense, the notion of *color of office* as “guise of authority” is subtly different from the sense of *under color of law* as “false light.” The latter metaphor suggests that the problem is a matter of false appearances. But the fundamental difficulty addressed by the *color of office* metaphor is that there is no other “reality” beneath the social meaning of “the State,” as there is no other “State” separate from the officials who instantiate it. The actor *is* an officer *and* a wrongdoer. Thus, the *color of office* metaphor signifies that the fundamental problem is not a matter of truth and falsity so much as a problem of integrity of role performance. To put it another way, the concern is less a matter of truth and deception than a matter of virtue and vice.³⁹³

This is the reason that the obverse of *under color of office* is by *virtue of office* and not simply *under law* or by *authority of law*. Coke, echoing the earlier language of *Dive*, explained that the import of these terms is a matter of wickedness and virtue: “*Colore officii* is ever taken *in malam partem*, as *virtute officii* is taken *in bonam*”³⁹⁴ The officer who acts *under color of office* acts within his or her role as an officer, but without fidelity to that role — hence, “*in malam partem*” (the evil or wicked part of the office). This understanding explains why the standard definition of *under color of law* speaks in terms of “[m]isuse of power, possessed by *virtue of state law*”³⁹⁵ which would

392. *Hafer v. Mello*, 112 S. Ct. 358, 362 (1991).

393. See, e.g., *Dive v. Maningham*, 1 Plowden Rep. 60, 64, 75 Eng. Rep. 96, 102 (Common Bench 1551) (“[T]he thing is grounded upon vice.”) (argument of counsel); *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108 (quoted *supra* text accompanying note 380).

394. 2 COKE’S INSTITUTES, *supra* note 13, at 206; *Dive*, 1 Plowden at 68, 75 Eng. Rep. at 108 (“for this word *colore officii sui* is always taken *in malam partem*, and signifies an act badly done under countenance of an office, and it bears a dissembling visage of duty”).

395. *United States v. Classic*, 313 U.S. 299, 326 (1941) (emphasis added); *Monroe v. Pape*,

otherwise be self-contradictory. Action *under color of law* is conduct that is understood to be that of "the State" and, therefore, has all the affective power of an act of betrayal by those upon whom one relies for protection.

D. *Interpreting Section 1983*

A statute must always be interpreted; its meaning is not some determinate thing deposited in its text by the intentions of its drafters. Nothing can prevent the author of the next chapter of the serial novel from reconfiguring the plot, the characters, the scene, or the genre in ways that change the meaning of what has come before.³⁹⁶ To the contrary, change and reinterpretation is a familiar and inevitable aspect of legal meaning.³⁹⁷ "All words (that is, linguistic symbols) and all rules composed of words continuously change meaning as new conditions emerge."³⁹⁸ Besides, there are always instrumental choices to be made. The most important value of history, therefore, is what it can say to us about our possibilities — a point I take up in the conclusion. An understanding of the cognitive structure and historical meaning of the *color of office* metaphor is important to interpretation, however, because it can provide important clues both to what the Reconstruction Congress might have meant and to what the statute can mean for us today.

In today's conventions of statutory interpretation, the intent of a statute's drafters remains a touchstone in determining its legal meaning. On that score, there can be little doubt about the scope of section 1983. It was not particularly controversial when Congress considered it. As Senator Edmunds, who was both chair of the Senate Judiciary Committee and one of the drafters of the legislation, observed at the time: "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State

365 U.S. 167, 184 (1961); *Screws v. United States*, 325 U.S. 91, 109 (1945); see also *Ex Parte Young*, 209 U.S. 123, 160-61 (1908) (referring to the Attorney General's "power by virtue of his office" even though he was "stripped of his official or representative character"); *Ex parte Virginia*, 100 U.S. 339, 347 (1880) (referring to illegal actions made possible "by virtue of public position under a State government").

396. See Winter, *supra* note 324, at 2260-61 (discussing RONALD DWORIN, *LAW'S EMPIRE* 228-38 (1986); Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEXAS L. REV. 551, 552-56 (1982)).

397. Steven L. Winter, *Foreword: On Building Houses*, 69 TEXAS L. REV. 1595, 1623 (1991) (discussing the "inevitable process of diachronic shift" that affects all meaning, including legal meaning); see also Lewis & Blumoff, *supra* note 30, at 764-68 (documenting the modern Court's open-ended approach to the interpretation of § 1983).

398. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 83 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

law. . . ."³⁹⁹ Thus, contrary to Frankfurter's and Zagrans' assertion that section 1983 was only addressed to deprivations pursuant to unconstitutional state laws, it was clearly intended to cover a second category of deprivations "under color of any State law." As we have seen,⁴⁰⁰ the most widespread understanding at the time of section 1983's passage was that the phrase *under color of law* connoted something much like "under pretense of authority."⁴⁰¹ This reading of the phrase is consistent, moreover, with its metaphorical meaning in its "false light," "deceptive appearance," and "guise of authority" senses.

The only plausible issue concerning the intent of the drafters concerns which of the variously nuanced technical definitions of the phrase might have been intended. For, as we have seen,⁴⁰² the exact definition of the phrase varied somewhat between cases and across doctrinal categories despite an overwhelming consensus that it connoted some kind of official action without lawful authority. Here, the historical and cognitive material cannot preclude all choice. But it does afford a meaningful framework for analysis and interpretation of the statute. Certain choices make little sense within the frame of the legislative history, the historical usage, and the range of meanings expressed by the phrase *under color of law*.

For example, the "good faith but mistaken" gloss applied to the Captured and Abandoned Property Act and to the post-War removal act in cases like *McLeod v. Callicot*,⁴⁰³ *Lamar v. McCulloch*,⁴⁰⁴ and *Tennessee v. Davis*⁴⁰⁵ makes little sense in this context. It would yield a bizarre and counterintuitive reading of section 1983 in which state officers would be subject to suit in federal court only when they made honest mistakes in applying state law and not, for example, when they intentionally abused their authority in order to discriminate on the basis of race. Such an interpretation would satisfy the concerns neither of the Reconstruction Congress, which sought to protect Republicans and African Americans in the South, nor of Justice Frankfurter, who sought to vindicate and protect state law processes.

399. CONG. GLOBE, 42d Cong., 1st Sess., App. 586 (1871), quoted in *Monroe*, 365 U.S. at 171, and *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 725-26 (1989).

400. See *supra* text accompanying notes 295-97, 344-59.

401. I have qualified this statement only to suggest that *pretense of authority* should not be understood to convey the same meaning connoted by *apparent authority*. Rather, we might say that the *pretense of authority* would also have had to be a "colorable" assertion of authority as opposed to the fraud of an outright impostor. See *supra* text accompanying notes 383-86.

402. See *supra* text accompanying notes 124-27, 163-81.

403. 16 F. Cas. 295 (C.C.D.S.C. 1869) (No. 8897); see *supra* text accompanying notes 167-71.

404. 115 U.S. 163 (1885); see *supra* text accompanying notes 172-74.

405. 100 U.S. 257 (1880); see *supra* text accompanying notes 135-42, 163-66. A similar usage appears in some of the nineteenth-century "color of title" cases. See *supra* note 354.

On the other hand, the understanding of *colore officii* that prevailed in the nineteenth-century surety cases is much closer in policy and spirit to the concerns that animate section 1983.⁴⁰⁶ The problem of official misconduct has historically been at the heart of the *colore officii* concept. In the surety context, as under section 1983, the central policy concern is to control official misconduct by affording a remedy that provides meaningful deterrence to the wrongdoer and that offers compensation to the victim. It is true that, like the removal cases, any interpretation of section 1983 must also take into account considerations of federal-state relations.⁴⁰⁷ But the removal cases do not present an apt parallel to the concerns raised by cases under section 1983. The more direct interference with ongoing state court processes that is occasioned by federal removal has traditionally been regarded as more intrusive on state sovereignty than concurrent state and federal jurisdiction over official misconduct.⁴⁰⁸ Accordingly, the surety cases provide the best contemporaneous basis for a sensible interpretation of the intended meaning of the statutory phrase.

Finally, the historical understanding of *under color of law* as connoting action under pretense or guise of authority best preserves the overall coherence and integrity of the statute. Section 1983 was part of a statute directed against the oppression of the newly free African Americans through the systematic abuse and clandestine subversion of legal processes in the South. The interpretation of section 1983 that is most consistent with this end is one that reads its prohibition of action "under color of" state law as speaking to illegal behavior under pretense of authority. Moreover, we frequently forget that section 1983 is

406. See *supra* text accompanying note 177.

407. This article has not discussed the federalism issues more directly in part because such a rich and thoughtful literature exists on the subject. See Bator, *supra* note 31; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Whitman, *supra* note 31. Of these, Cover's *Jurisdictional Redundancy* is probably the best and most sophisticated. Neuborne's *Myth of Parity* is a thoughtful assessment of the issues as they stood 15 years ago; the transformation of the federal judiciary since that time has severely weakened, although not necessarily negated, its conclusions.

408. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971). But see Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 1009 (1987) (arguing that "the framers of the statute were far more concerned with achieving constitutional compliance than with respecting traditional notions of state sovereignty. As a result, they fashioned a highly interventionist cause of action that was designed, in no small measure, to assure the constitutional accountability of state courts."). Under Nichol's analysis of the legislative history, the argument in text has even greater force.

part of a statute colloquially referred to as the "Ku Klux Act."⁴⁰⁹ Thus, salient among the prohibitions of section 2 of that Act is the provision making it a crime "if two or more persons . . . shall conspire together, *or go in disguise upon the public highway* . . . for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws."⁴¹⁰ The meaning of *under color of law* that best preserves the metaphorical coherence of the statute is the oldest historical understanding in which the phrase connotes abusive official behavior that "carries the mask of virtue."⁴¹¹

IV. PENTIMENTO

To understand the section 1983 decisions of the Burger and Rehnquist Courts, it is not enough to know that the Court is motivated by considerations of federalism, concern for federal court dockets, or antipathy to the typical section 1983 claim. One must understand as well the way the underlying concepts frame and constrain the Court's instrumentalist choices. Regardless of the doctrinal level at which the Court formulates the issue — statutory or constitutional, substantive or procedural — the problem of the conceptual opacity of "the State" lies at the heart of every one of these cases. For the most part, the Court's recent decisions have been animated by a reductive understanding in which "the State" is represented only by the authorized actions of its officers.

This is clear in due process cases such as *Parratt v. Taylor*⁴¹² and *Hudson v. Palmer*,⁴¹³ where the Court held that "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy."⁴¹⁴ But exactly the same reductive analysis figures with increasing prominence in the Court's decisions under

409. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

410. Ku Klux Act, ch. 22, § 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)) (emphasis added).

411. *Dive v. Maningham*, 1 Plowden Rep. 60, 68, 75 Eng. Rep. 96, 108 (Common Bench 1551).

412. 451 U.S. 527 (1981). Taylor, a state prisoner, had ordered a hobby kit worth \$23.50. When it arrived, he was in special confinement. Contrary to prison regulations, a guard delivered the hobby kit to someone other than Taylor and, not surprisingly, it disappeared. Taylor's § 1983 suit alleged that he had been deprived of property without due process. The Court held that there was no constitutional violation. Considering the case solely as a matter of procedural due process, the Court held that a predeprivation hearing was not possible before an unforeseeable and negligent deprivation of property by prison guards. 451 U.S. at 541.

413. 468 U.S. 517 (1984). *Hudson* involved a prisoner who claimed that guards had maliciously destroyed his property during a search of his cell. The Court reasoned that unauthorized intentional deprivations were no more foreseeable by the state than negligent deprivations and, thus, could not be preceded by hearings either. 468 U.S. at 533.

414. 468 U.S. at 533.

Monell v. Department of Social Services.⁴¹⁵ There, the problems caused by the conceptual opacity of "the State" reappear as the Court attempts the metaphysically impossible: "to distinguish acts of the municipality from acts of employees of the municipality."⁴¹⁶ It is not surprising, therefore, that the question how to ascertain whether a particular act of a municipal official is "really" that of the municipality has frequently fractured the Court.⁴¹⁷ With typical understatement, Justice O'Connor has acknowledged that "[i]t may not be possible to draw an elegant line that will resolve this conundrum."⁴¹⁸

The Court's most extensive and revealing explorations of these issues can be found in *Pembaur v. City of Cincinnati*⁴¹⁹ and *City of St. Louis v. Praprotnik*.⁴²⁰ *Pembaur* held that the authorization of a county prosecutor was enough to bind the city under *Monell* when standard operating procedure directed the line officers to check with the prosecutor for approval.⁴²¹ In *Praprotnik*, the Court held that the personnel decisions of the director of a city agency did not count as "policymaking" for the city because "[t]he Mayor and Aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees" and the director's actions were reviewable by "an independent Civil Service Commission . . . empowered . . . to review and correct improper personnel actions."⁴²² Justice O'Connor explained:

[T]he authority to make municipal policy is necessarily the authority to make final policy. . . . When an official's discretionary decisions are con-

415. 436 U.S. 658 (1978). In *Monell*, the Court overruled part of *Monroe* and held that a municipality is a "person" within the meaning of the statute. 436 U.S. at 690. Rejecting the common law doctrine of respondeat superior, the Court held that municipal liability must be premised on a municipal "policy" or "custom." 436 U.S. at 690-91. Justice Stevens now takes the position that the common law doctrine would have been incorporated by the drafters of § 1983. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 (1986) (Stevens, J., concurring); *Oklahoma City v. Tuttle*, 471 U.S. 808, 838 (1985) (Stevens, J., dissenting).

416. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (plurality opinion).

417. As Justice White observed: "The inquiry is a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*." *City of Canton v. Harris*, 489 U.S. 378, 385-86 (1989); see also *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, for example, a plurality suggested not only that the "policy" requirement implies a deliberate choice, but also that it is not enough if the policy merely leads to a constitutional violation by a subordinate. Rather, it suggested that the policy itself must violate the Constitution. 471 U.S. at 823, 824 n.7. In *Canton*, however, the Court recognized that a municipality may be held responsible when deliberate indifference in the training of its police officers is the cause of a constitutional deprivation. *Canton*, 489 U.S. at 390-92.

418. *Praprotnik*, 485 U.S. at 126-27 (plurality opinion).

419. 475 U.S. 469 (1986).

420. 485 U.S. 112 (1988).

421. *Pembaur*, 475 U.S. at 484-85 (plurality opinion).

422. *Praprotnik*, 485 U.S. at 128 (plurality opinion).

strained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.⁴²³

She concluded, moreover, that "the identification of policymaking officials is a question of state law."⁴²⁴

In *Pembaur*, Justice White concurred in an opinion that emphasized that the officers had followed standard operating procedure that had not yet been held unconstitutional. "It would be different," he reasoned, if the Court had already ruled on the illegality of a warrantless entry of a third-party's premises,

if the state constitution or statutes had forbidden forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy.⁴²⁵

If these analyses seem familiar — and they should — it is because they are precisely the same as Holmes' *Raymond* dissent.⁴²⁶ There, Holmes argued that the action of "a subordinate board, subject to the control of the Supreme Court of the State," could not be attributed to the state "until, at least, it has been sanctioned directly . . . by the *final* tribunal of the State, the Supreme Court."⁴²⁷ So too, White's analysis in his *Pembaur* concurrence is indistinguishable from Holmes' observation that the action of the board cannot be attributed to the state because it "has disobeyed the authentic command of the State."⁴²⁸

423. 485 U.S. at 127 (plurality opinion) (citing *Pembaur*, 475 U.S. at 481-84 (plurality opinion)).

424. 485 U.S. at 124. This aspect of the *Praprotnik* plurality's analysis was explicitly endorsed by a full Court in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). Justice O'Connor's pronouncement that the question of authority is *determined* by state law and is not a federal question, *see Praprotnik*, 485 U.S. at 124 ("[T]he identification of policymaking officials is not a question of federal law."), is so obviously wrong as a conceptual matter that it is difficult to believe that the *Praprotnik* doctrine will survive for long. *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)) ("Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement protected by the Due Process Clause.'").

425. *Pembaur*, 475 U.S. at 486 (White, J. concurring).

426. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 41 (1907) (Holmes, J., dissenting); *see supra* text accompanying notes 191-93, 255-59.

427. 207 U.S. at 41 (emphasis added).

428. 207 U.S. at 41 (emphasis added).

This is why the various decisions of the Burger and Rehnquist Courts are not isolable or easily cabined.⁴²⁹ The conceptual opacity of “the State” is not a problem unique to one doctrinal area or another; it arises in every case of official action. Thus, in *Zinerman v. Burch*,⁴³⁰ where the Court restricted the reach of *Parratt* and *Hudson* to cases in which predeprivation process is impossible, it was — in addition to all the other distinctions — forced to invoke a more realistic, functional conception of “authorization” that cannot be reconciled with the analysis relied on in the *Monell* cases.⁴³¹ Regardless of the instrumental designs that drive its decisions, the Court can only effectuate its intentions by means of a limited set of conceptual alternatives. It can achieve all of its disparate goals only at the cost of theoretical tension and doctrinal incoherence.⁴³²

If, however, the Court maintains conceptual consistency and adheres to the reductive approach, it risks an even higher price: If the reductive analysis were applied in all cases of official action, the inescapable conceptual Catch-22 would overwhelm the very idea of constitutional accountability. For if no person acts for “the State” unless he or she acts pursuant to law, then “the State” can never act illegally.⁴³³ Indeed, there is a sense in which, if carried to its logical extreme, the reductive analysis could undermine the viability of the incorporation doctrine: no “deprivation” could truly be said to have the sanction of

429. Compare Monaghan, *supra* note 30, at 984-90 (concluding that each of several limiting interpretations of *Parratt* is problematic) with Lewis & Blumoff, *supra* note 30, at 815-20 (concluding on the basis of *Zinerman v. Burch*, 494 U.S. 117 (1990), that *Parratt* “pertains only to constitutional violations that turn on the denial of some sort of process”). But see *id.* at 823-24 nn.292 & 294 (recognizing that Justice White’s *Pembaur* concurrence echoes *Ex parte Young* and is inconsistent with *Home Telephone*).

430. 494 U.S. 113 (1990).

431. See *Zinerman*, 494 U.S. at 138. In *Zinerman*, the plaintiff argued that state officials had failed to follow state procedures for involuntary commitment to a mental hospital. The Court reasoned that the defendants’ actions were not “unauthorized” in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement.” 494 U.S. at 138. In retreating from the fully reductive approach of *Parratt* and *Hudson*, the Court took a position inconsistent with its treatment of the question of delegated authority in *Praprotnik*, see *supra* text accompanying notes 422-23, and endorsed instead a functional approach corresponding more closely to Chief Judge Shaw’s analysis in *Thayer v. City of Boston*, 36 Mass. (19 Pick.) 511, 516-17 (1837). See *supra* text accompanying notes 104-09.

432. Other examples of the distortions that arise when the Court attempts to limit the reach of § 1983 include *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986). The Court’s interpretations of § 1983 have been borrowed heavily from standard tort conceptions of private injury, see *Whitman*, *supra* note 66, at 225-26, thus failing to consider the particular contours of a statutory claim intended to deal with the special problems of official misconduct. Consequently, the Court has frequently been forced to engraft additional, largely *ad hoc* limitations on the statutory cause of action in order to avoid the potentially expansive reach of the standard tort doctrines.

433. Amar, *supra* note 41, at 1490 n.257.

“the State” as long as some state court remedy remained available.⁴³⁴

If these dire conclusions seem outlandish or unimaginable, consider the absurdity of the reasoning offered by Justices O'Connor and White. In our polity, the decisions of *every* official “are constrained by policies not of that official’s making” for, in every case, “the controlling law places limits on their authority.” That, after all, is what it means to be “a government of laws and not of men.” Nor is it plausible to say that the power to make policy resides only in those with ultimate authority to review a subordinate’s decision for compliance. We might just as well conclude that the decisions of the U.S. Court of Appeals for the Ninth Circuit are not “really” law unless and until the Supreme Court has granted certiorari and affirmed. After all, to paraphrase Justice O'Connor, “the authority to make law is necessarily the authority to make *final* law.” And if that seems farfetched, consider that this was the position of the Reagan administration in the Social Security cases of the early 1980s.⁴³⁵

As the doctrinal moves and the accompanying judicial reasoning become increasingly transparent, the historical conception expressed by the *color of office* metaphor looms larger and larger in the background. Even on issues for which the *color of office* language has no obvious doctrinal relevance, the historical understanding offers an alternative vision in which the old conception shows through with a picture of different possibilities. On this view, actions of the state are recognized by means of their social significance and not interpreted by some reductive, literal code of “official” behavior.

Consider the implications of this earlier conception for the difficult

434. See Zagrans, *supra* note 8:

The source for many such substantive rights is the Bill of Rights, insofar as it has been incorporated through the due process clause of the fourteenth amendment to apply to the states. Thus, extension of the . . . doctrine to substantive due process would signal an attack on the incorporation doctrine itself. For example, . . . the conduct of state officers is circumscribed by the fourth amendment only by virtue of the amendment’s incorporation into the due process clause of the fourteenth amendment. Thus, [the recent due process cases] may require in suits against state officers that the courts focus on the remedial process available rather than on the reasonableness of the search. If so, *Monroe* would be reversed . . . because Illinois provided a damage remedy for the assault and battery and the trespass and consequently Monroe received all the process that was due.

Id. at 522-23 (footnotes omitted). Strictly speaking, this “disincorporation” would not follow from the reductive approach alone but would require two steps: (1) the conversion of all constitutional restrictions on the states into due process questions; and (2) the application of the reductive analysis to those questions.

435. During this period, the Social Security Administration observed a policy of “nonacquiescence” in adverse decisions of the courts of appeals. This meant that, while it would comply with the judgment in a litigated case, the Social Security Administration would refuse to follow those rulings in subsequent cases concerning similarly situated claimants in the same circuit. See, e.g., *Lopez v. Heckler*, 725 F.2d 1489, 1493-94 (9th Cir. 1984); see also Robert Pear, *U.S. Flouts Courts in Determination of Benefit Claims*, N.Y. TIMES, May 13, 1984, § 1, at 1; Robert Pear, *U.S. Will Drop Efforts to Halt Aid to Disabled*, N.Y. TIMES, June 4, 1985, § 1, at 1.

questions that arise under *Monell*. In *Praprotnik*, the Court expressed its confidence "that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business."⁴³⁶ Among other problems, this assumes that a large bureaucracy runs from the top down, that most social organizations function with clearly stated lines of authority, and that — for those that do — the formal lines of authority actually correspond to real-life institutional practices. But the reality is frequently otherwise, especially within an agency like a municipal police department. The larger the organization, the more decentralized its structure, the more discretionary the line jobs, the more policy will effectively be made from the bottom up. Moreover, it is a fact of life that, in a political system in which unpopular decisions can cost politicians their jobs, plausible deniability is often preferable to clear lines of authority.⁴³⁷ Accordingly, even if the Court's confidence were supportable, reliance on state law to identify the policymakers in actual bureaucracies would frequently lead the courts astray either by pointing to the wrong persons or to no one at all.

Another consequence of the reductive analysis is to allocate decisionmaking authority to the court rather than the jury. Thus, the Court has held that "the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge."⁴³⁸ In *Praprotnik*, Justice O'Connor explained this determination with the *ipse dixit* that "certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself."⁴³⁹ But surely this conclusory assertion is no substitute for a reasoned analysis of the question of how decisionmaking authority should be allocated. Careful consideration of the issue leads to the opposite conclusion.

One of the lessons of the *color of office* conception is that the social meaning of "the State" is not reducible to the lifeless provisions of

436. *Praprotnik*, 485 U.S. at 125.

437. Which is why Harry Truman's "The buck stops here" is still such a wistful anomaly.

438. *Jett*, 491 U.S. at 737. Akhil Amar has argued that modern Fourth Amendment doctrine has effectuated a similar transfer of decisionmaking authority. The collapse of the clauses prohibiting unreasonable searches and seizures and requiring warrants "has had the effect of taking a later trespass action away from a *jury* of ordinary Citizens. Because juries could be trusted far more than judges to protect against government overreaching . . . , warrants were generally disfavored. Judges and warrants are the heavies, not the heroes, of our story." Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991).

439. *Praprotnik*, 485 U.S. at 126.

positive law.⁴⁴⁰ Long before today's sprawling bureaucracies, Chief Judge Shaw appreciated that the reductive view fails to accommodate the complex social reality of the patterns of action that constitute "the State."⁴⁴¹ It was accordingly clear to him that the question of authorization was a quintessential jury question.⁴⁴² Justice O'Connor's rhetorical assertion notwithstanding, the recognition that "the State" is an imaginative social product — and, therefore, that the question of authority to make policy for a governmental agency is a question of social meaning — provides a very powerful justification for allocating decisionmaking authority on this question to the jury. For the jury is the social institution best situated to answer questions of social meaning.⁴⁴³ Indeed, O'Connor's own premise, that "the identification of policymaking officials . . . is not a question of fact in the usual sense,"⁴⁴⁴ supports rather than undercuts the importance of the jury as the appropriate decisionmaker on these issues. For if the question of authority to make policy "is not a question of fact in the usual sense," then it follows that it cannot be a question of law in the usual sense either (since it is, admittedly, a question of fact in some — albeit "unusual" — sense). The question then becomes, who should determine this "unusual" fact? The judge, who is likely to reduce such complex social questions to putatively objective, positivistic criteria? Or the jury, whom O'Connor fears will exercise its "discretion" in an unchanneled and lawless way? On this point, Kalven and Zeisel's classic study *The American Jury* provides instructive counsel. They found that

[t]he jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values. . . . The upshot is that when the jury reaches a different conclusion from the judge on the same evidence, it does so not

440. *Cf. Nashville, Chattanooga, & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of a written text.").

441. *Thayer v. City of Boston*, 36 Mass. (19 Pick.) 511, 515 (1837) (reasoning that a municipality should be liable for "an act done by the officers having competent authority . . . by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage"); see *supra* text accompanying notes 104-10. In contrast, the *Praprotnik* plurality rejected any notion of "*de facto*" authority, which it saw "as a step toward overruling *Monell* and adopting the doctrine of *respondet superior*." *Praprotnik*, 485 U.S. at 131.

442. See *Thayer*, 36 Mass. at 516: "Whether a particular act . . . was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case."

443. *Taylor v. Louisiana*, 419 U.S. 522, 529 n.7 (1975) ("[T]he jury is designed . . . to reflect the community's sense of justice.").

444. *Praprotnik*, 485 U.S. at 124.

because it is a sloppy or inaccurate finder of facts, but because it gives recognition to values which fall outside the official rules.⁴⁴⁵

Once we recognize that questions such as who has authority to make policy for a social organization like a municipality are questions of social meaning and social values in their very essence, it follows that the jury is the entity most competent to decide the issue.

The historical understanding expressed by the *color of office* metaphor can also contribute to analysis of questions concerning the *substantive* scope of section 1983. One concern that has explicitly driven the Court's reductive analysis is the fear that a broader "reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon . . . the States."⁴⁴⁶ In *Paul v. Davis*, Justice Rehnquist remarked rhetorically that "it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983."⁴⁴⁷ But, we might ask, are these two cases really the same?

In fact, even a cursory review of the Court's decisions reveals that it has failed to identify any articulable policy or precept for explaining which cases belong in state rather than federal court. Why, from the point of view of federalism, should a case like *Paul*⁴⁴⁸ or *Parratt*⁴⁴⁹ be brought in state court and a case like *Tennessee v. Garner*⁴⁵⁰ in federal court? Why is *Baker v. McCollan*⁴⁵¹ a state case? We might all agree

445. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 495 (1966).

446. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Justice Frankfurter earlier expressed much the same sentiment: "Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country." *Monroe v. Pape*, 365 U.S. 165, 242 (1961) (Frankfurter, J., dissenting).

447. *Paul*, 424 U.S. at 698.

448. 424 U.S. at 698 (holding alleged misidentification of plaintiff as shoplifter not actionable under the Due Process Clause because there was no state created liberty or property interest in one's reputation). *But see infra* note 460.

449. *Parratt v. Taylor*, 451 U.S. 527 (1981) (discussed *supra* note 412).

450. 471 U.S. 1 (1985) (holding that shooting of unarmed, nondangerous, fleeing felony suspect violates the Fourth Amendment). The obvious doctrinal distinction is that *Garner* falls under a specific provision of the Bill of Rights. *See Paul*, 424 U.S. at 710-11 n.5. This explanation, however, is conceptually incomplete. *Garner* could just as easily been decided as a due process case. *See Garner v. Memphis Police Dept.*, 710 F.2d 240, 246-47 (6th Cir. 1983). More importantly, it is not clear why the doctrinal basis of the constitutional claim explains the resolution of the jurisdictional overlap. First, *Garner* could have been treated as a state law matter, either under the state criminal law of homicide or tort law of wrongful death. Second, *Garner* suggests a different resolution of the hypothetical put in *Paul*: If the officer aimed at *Garner* but hit an innocent bystander, would the federal interest be any different or any less?

451. 443 U.S. 137 (1979). In *Baker*, the Court held that *McCollan* had stated no claim of deprivation of liberty for his mistaken arrest and three-day detention without even reasonable measures to ascertain his correct identity. Justice Rehnquist assumed

that . . . mere detention . . . in the face of repeated protests of innocence will after the lapse

that *Parratt* is not a federal case, but still conclude that *Hudson*⁴⁵² or *Baker* should be. So too, if we conclude that people injured by sheriffs who drive their patrol cars negligently cannot sue under section 1983, does it follow that innocent bystanders do not have a federal cause of action when they are shot by police officers? Or that Davis cannot sue under section 1983 when the police misidentify him as a shoplifter?

The traditional doctrinal approach has been to treat all these cases together as instances of action "under color of" state law pursuant to a test that understands the statutory phrase in the broad sense of state action and simple, "but for" causation.⁴⁵³ Here again, we see that the conventional legal tools prove either too much or too little. For this would indeed mean that sheriffs who drive their patrol cars negligently are acting in a manner potentially subject to constitutional scrutiny under section 1983. That prospect pressures the Court to adopt sharply limiting constitutional analyses like those in *Paul* and *Parratt*, which exclude far too many cases. On the other hand, the more complex metaphorical understanding expressed by the *color of office* conception provides an alternative way to think about these cases, an approach that avoids the rigid, overinclusive categorical method in which every action causally associated with the actor's governmental status is necessarily covered by the statute.

In all these cases, the basic question is how to discern when an officer's actions are like those of a private person and when they are those of "the State" itself. This, of course, is the issue historically addressed by the *color of office* metaphor. The entire point of the conception was that the official quality of an act could not be ascertained by reference to objective criteria — whether found in positive law or positivistic notions of "but for" causation. Rather, the *color of office* metaphor expresses that dimension of the harm occasioned by the social meaning pertaining to the actor's behavior — that is, the fact that the injury was effectuated under the guise of the actor's official status. Or, as Justice Brennan correctly observed in his *Paul* dissent: "The

of a certain amount of time deprive the accused of "liberty . . . without due process of law." But we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation.

443 U.S. at 145. Accordingly, McCollan was remitted to his state tort claim of false imprisonment.

452. *Hudson v. Palmer*, 468 U.S. 517 (1984) (discussed *supra* note 413).

453. See, e.g., *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 288-89 (1913) ("[T]he subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority."); cf. *Willingham v. Morgan*, 395 U.S. 402, 409 (1969) (interpreting the "color of office" provision of the current federal officer removal statute "to require a showing of a 'causal connection' between the charged conduct and the asserted official authority").

essential element of this type of § 1983 action is *abuse of . . . official position*.⁴⁵⁴

Viewed from this perspective, Rehnquist's hypothetical sheriff who injures a pedestrian while negligently driving the patrol car is indistinguishable from the ordinary citizen who may also drive a car in a negligent fashion.⁴⁵⁵ But there is only one group of people whom society arms, puts on the street, and authorizes to exercise the power of life and death. Surely Rehnquist is wrong and the Constitution does speak to how they exercise that power. Should an innocent bystander have a federal cause of action when he or she is shot by the police officer? One way to answer that question might be to ask what standard of care we expect from that officer before she shoots. Must she consider the likelihood that an innocent bystander will be shot? To put it in perhaps more familiar terms, it is a question of what "process" is due. It is but a small step from there to suggest that section 1983 also speaks to the availability of a federal forum when that governmental agent injures someone as a consequence.

This analysis is different from, but consistent with, *Monroe*. For surely *Monroe* was correct that the actions of a police officer may be unauthorized by state law and still be a misuse of power unique to "the State." But it is obvious that the obverse does not follow: not every action of a person who is a police officer is a misuse of that state power.⁴⁵⁶ The only way to discern the difference between those actions that are uses of state power and those that are not is by recourse to the social understandings that constitute these meanings. Thus, this question too is a quintessential jury question.⁴⁵⁷

I do not want to leave the reader with the impression, apparently

454. *Paul*, 424 U.S. at 717 (Brennan, J., dissenting) (footnote omitted); see also *Monroe v. Pape*, 365 U.S. 167, 193 (1961) (Harlan, J. concurring) ("One can agree . . . that Congress had no intention of taking over the whole field of ordinary state torts and crimes without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary tort, and therefore as a matter of federal concern.").

455. Of course, if the sheriff was driving with the siren on or if he failed to heed a traffic signal because he was patrolling while on duty, then we would have a different case.

456. As one court reasoned in a turn-of-the-century removal case:

If, for instance, a revenue officer, while not even colorably engaged in the performance of duty, sets fire to a neighbor's dwelling, he should be tried for his arson by the state court. But if, while seeking to arrest a violator of a revenue law, who is fortified in his dwelling, the officer — even without sufficient justification — sets fire to the house in order to effect the capture, the trial of the charge of arson made against him should be removed to the federal court.

Virginia v. De Hart, 119 F. 626, 629 (C.C.W.D. Va. 1902).

457. Cf. *McLeod v. Callicott*, 16 F. Cas. 295, 297 (C.C.D.S.C. 1869) (No. 8897) (jury charged with determining the question whether the federal officer acted "under color of" the Captured and Abandoned Property Act); see *supra* text accompanying notes 170-71.

held by some members of the Court, that allocating these questions to the jury is a license for lawless verdicts premised on purely subjective values. This highly conventional juridical phobia confuses social construction with solipsism and cultural meaning with emotivism.⁴⁵⁸ One way to give content to what I mean by the social significance of action *under color of office* and its relation to the concept of "the State" as a social construct is by considering the facts of *Paul v. Davis*.⁴⁵⁹ There, the police distributed a leaflet identifying Davis as an active shoplifter solely on the basis of a prior arrest that did not result in a prosecution. Davis sued the police under section 1983 for damage to his reputation, and the Court held that he had no federal cause of action.⁴⁶⁰

Why and in what sense might the distribution of the leaflet constitute official misconduct warranting treatment different from a libel by a private party? It might be that Davis had no state tort recourse against the police who published the flyer because, as a matter of Kentucky defamation law, such police action may be privileged in the same way a witness' testimony is privileged. This would distinguish Davis' case from a hypothetical case in which a private association of shopkeepers distributed the flyer. In that case, even the reductivist should agree that Davis could sue the police under section 1983 because state law clearly sanctioned their abusive conduct.

But even if there is no such privilege, the case is not like the hypothetical case of private action by the shopkeepers because, as Frankfurter recognized in *Monroe*, the responsible parties "are clothed with an appearance of official authority which is in itself a factor of significance in dealings between individuals."⁴⁶¹ When the police brand someone as an active shoplifter the stigma is greater and the harm worse than if a private citizen had made the same defamatory statement. "The State," after all, is placing its imprimatur on the defamatory characterization. The average person is likely to ascribe greater credibility to the government's determination; it has the files, the com-

458. See Winter, *supra* note 397, at 1602.

459. 424 U.S. 693 (1976).

460. The Court held that Davis had not been deprived of a "liberty" or "property" interest protected by the Due Process Clause because he had no state-created right to his reputation. 424 U.S. at 710-12. It should be noted, however, that Kentucky law did recognize Davis' interest in his reputation through the medium of its common law protections against libel; the Court acknowledged that Davis had a "classical claim for defamation." 424 U.S. at 697. It is likely, therefore, that Davis could have obtained not only damages but also an injunction against the continued distribution of the leaflets. Thus, the Court was probably incorrect when it asserted that "Kentucky law does not extend to respondent [Davis] any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' [Paul, et al.] actions." 424 U.S. at 711-12.

461. *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting).

puter banks, the information networks and, therefore, is more likely to know. And, in any event, the average citizen is likely to believe the government's statement simply because it is "the State."

Even when the action is such that it does not carry that extra credibility, the imprimatur of "the State" implicates another incremental harm also on the basis of social meaning. The victim is not likely to view the harm as the same as that inflicted by a private actor because the malefactor is, in Brandeis' famous words, the "Government . . . the potent, the omnipresent teacher."⁴⁶² One can hear the victim's refrain: "But I'm a taxpayer." And this would not be some subjective or idiosyncratic emotional response. As Robert Cover explains: "Creation of legal meaning entails . . . the disengagement of the self from the 'object' of law, and at the same time requires an engagement to that object as a faithful 'other.'"⁴⁶³ What this means is that the complex set of social and legal meanings represented by "the State" is not some random *mélange* of arbitrary denotations. Rather, "the metaphor of separation"⁴⁶⁴ that Cover invokes is a specific invocation of the childhood experience of separation from parent. The process of law-creation is a projection of childhood experience. "The State" as the social manifestation of law is the projected parent, the first faithful other.⁴⁶⁵ When "the State" is unfaithful, when the actors who embody it do not conform to the law, the harm is greater because it is experienced as the most basic form of betrayal. One can understand why the victims might want to make a federal case of it.

Or, in the words of William Penn: "Every Oppression against Law, by Colour of any usurped Authority, is a Kind of Destruction, and it is the worst Oppression that is done by Colour of Justice."⁴⁶⁶

462. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("the government itself — 'the social organ to which all in our society look to for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals of social conduct.'") (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring and dissenting)).

463. Cover, *supra* note 52, at 45.

464. *Id.*

465. Winter, *supra* note 38, at 1208-09. In popular culture, the national government is often represented by the avuncular Uncle Sam. Of course, there are subcultures in which the image of the government is not so benign, where the government is "the man." But even here, the Oedipal overtones are manifest. In that case, we might say that "the State" is a projection of the first repressive, unfaithful other.

466. 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 27 (1726).