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The Impact of Constitutional Liability on the Privatization Movement After "Richardson v. McKnight"

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NOTES

The Impact of Constitutional Liability on the Privatization Movement After *Richardson v. McKnight*[1]

I. INTRODUCTION 490
II. THE PRIVATIZATION MOVEMENT 492
A. *Historical Context and the Present State of the Movement* 492
B. *Arguments For and Against Privatization* 494
C. *The Judicial Branch's Role in Deciding the Future of Privatization* 496
III. 42 U.S.C. § 1983 497
A. *Original Meaning of § 1983* 497
B. *The Changing Interpretation of § 1983* 499
IV. STATE ACTION DOCTRINE: EXPANDING 1983'S REACH 500
V. IMMUNITY DOCTRINE 504
A. *Development of Qualified Immunity from § 1983 Liability for State Officials* 504
B. *Qualified Immunity Not Extended to Private Parties* 507
VI. *RICHARDSON V. MCKNIGHT* 508
A. *Holding* 508
B. *Facts* 509
C. *Critical Analysis of the Court's Reasoning* 510
1. Rejection of Functional Approach to Historical Analysis 510

1. Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100 (1997).

2. Rejection of Functional Approach to Public Policy Analysis 512
3. Treating Private Parties Like the State for Liability But Not for Immunity 515
VII. CONCLUSION 516
A. Richardson's *Effect on the Privatization Movement* 516
B. *A Way to Level the Playing Field After* Richardson 518
C. *A Way to Mitigate the Negative Effects of* Richardson 519

I. INTRODUCTION

"Privatization" is the process of delegating control of a governmental function to the private sector.[2] Although privatization is a relatively new word,[3] the concept of privatization can be traced back to the very founding of this continent. Christopher Columbus was a private contractor for the Spanish monarch when he accidentally ran into America while trying to find a quicker route to China.[4] Since Columbus' blooper and the subsequent formation of the United States, privatization has been a part of this country's political culture.[5] Over the last twenty years privatization has experienced an unprecedented

2. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 928 (10th ed. 1998) ("privatize: . . . to change (as a business or industry) from public to private control or ownership"); E.S. Savas, *Symposium: Privatization of Prisons: Privatization and Prisons*, 40 VAND. L. REV. 889, 889 (1987) (" 'Privatization' means increased governmental reliance on the private sector, rather than on government agencies, to satisfy the needs of society."); Mary M. Shirley, *The What, Why, and How of Privatization: A World Bank Perspective*, 60 FORDHAM L. REV. S23, S24 (1992) (conceding that there are many different definitions of privatization but defining "privatization" within the article as "the transfer of ownership of assets to the private sector"). Of course, the definition of "privatization" as delegation begs the question of what is a "governmental function." In deciding to privatize, governments must decide what is properly a governmental function and what would be better left to the private sector. The line between the public and private sector is blurred where functions are shared by governmental and private interests. *See* Alan K. Chen, *"Meet the New Boss . . ."*, 73 DENV. U. L. REV. 1253, 1269 (1996) (arguing that public and private realms of governance cannot be distinguished). This Note defines a governmental function as a public service that is either performed by government or delegated by government to the private sector.

3. *See* Savas, *supra* note 2, at 889 (finding that the word "privatization" was first used in 1969).

4. *See* KENNETH C. DAVIS, DON'T KNOW MUCH ABOUT HISTORY: EVERYTHING YOU NEED TO KNOW ABOUT AMERICAN HISTORY BUT NEVER LEARNED 3-5 (1990).

5. *See* Lisa Vecoli, *The Politics of Privatization*, 15 HAMLINE J. PUB. L. & POL'Y 243, 243 (1995) (noting that the Bank of the United States, the Homestead Act, and the Pony Express were all examples of privatization).

level of global support and has become a central part of a strong American anti-government political movement.[6] This political climate has prompted different levels of government to contract with private companies for the performance of services as varied as prison operation, fire protection, and electricity production and distribution.[7]

Proponents of privatization claim that the private sector can perform governmental functions better and with less expense. Proponents argue that government-provided service is inherently inefficient because the government lacks profit motive and competition. Critics of privatization, on the other hand, argue that any value created by privatization comes at the expense of the general public good, and that privatization only benefits greedy corporations. Critics complain that the private sector uses its delegated governmental power to sacrifice equality of service, privacy, and individual liberty for profit.[8]

The critics' fear of this lost liberty and equality raises the issue of how courts should treat private performers of governmental services with regards to constitutional liability. Three alternatives exist. First, courts could treat these parties like other private industries and apply no constitutional scrutiny to their actions.[9] Second, courts could recognize the delegated governmental power of private performers of governmental services and treat them as governmental actors for purposes of constitutional scrutiny. Third, courts could respond to the critics' fear by applying a higher degree of constitutional scrutiny to the actions of private providers of governmental services than to the actions of the government itself.

In the recent Supreme Court case of *Richardson v. McKnight*, the Court chose the third option.[10] This Note will argue that the Court in *Richardson* chose wrongly. The Court should have applied

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6. *See* JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 3 (1996) (pointing to a 1978 California referendum as the beginning of a strong anti-government movement and trend towards privatization).

7. *See* David Wessel & John Harwood, *Selling Entire Stock! Capitalism is Giddy with Triumph; Is it Possible to Overdo it?*, WALL ST. J., May 14, 1998, at A1, A10 (discussing the growing popularity of privatization but also noting some dissent to the movement).

8 *See id.*

9. With the exception of the Thirteenth Amendment, the Constitution only protects private citizens from conduct by the state, not conduct by other citizens. *See* The Civil Rights Cases, 109 U.S. 3, 17 (1883) (holding that the Constitution's restrictions do not apply to private activity).

10. Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100, 2107-08 (1997) (implementing a higher degree of constitutional scrutiny for private providers of governmental services than for their governmental agency counterparts).

the same constitutional scrutiny to providers of governmental services in the private sector that it does to the government itself.

Part II places the legal argument of this Note in context by providing background on the privatization movement. Part II also demonstrates the political complexity of the privatization issue and argues that the matter should be resolved by the legislative, not the judicial, branch of government. Part III discusses the history of 42 U.S.C. § 1983 (the statute that creates a cause of action for constitutional violations by state actors) and its application to private parties. Part III also shows how the Supreme Court has greatly expanded § 1983 liability over the last forty years. State action doctrine and immunity doctrine are examined in Parts IV and V, respectively. Part IV explains how the Supreme Court treats some private parties as governmental actors for purposes of imposing § 1983 liability, while Part V shows how the Court has declined to treat those same private parties as governmental actors for purposes of limiting § 1983 liability. Part VI scrutinizes *Richardson v. McKight* and its effect on privatization. In *Richardson*, the Court considered the issue of privatization and again declined to grant private parties subject to § 1983 liability the same level of immunity from § 1983 liability that is enjoyed by the government. The Note concludes in Part VII with a suggestion for how Congress or the lower courts can mitigate the negative effects of *Richardson*.

II. THE PRIVATIZATION MOVEMENT

A. *Historical Context and the Present State of the Movement*

In the late 1970s, distrust of government and the "taxpayer's revolt" brought about the "Reagan Revolution" which stressed privatization as a way to get government out of the way.[11] President Reagan established the President's Commission on Privatization to "identify those government programs that are not properly the responsibility of the federal government or that can be performed more efficiently by the private sector."[12] The Commission recommended privatization in

11. *See* HANDLER, *supra* note 6, at 3-4 (discussing the origins of the privatization movement).

12. DAVID F. LINOWES ET AL., PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT: REPORT OF THE PRESIDENT'S COMMISSION ON PRIVATIZATION at xi (1988).

such diverse areas as low-income housing, air traffic control, education, the postal service, prisons, and medicare.[13]

While the Commission's dramatic recommendations have not yet been widely implemented, privatization has taken hold in many areas, and it has wide support for application in others. In 1982 the federal government privatized the National Consumer Cooperative Bank.[14] In 1987 the federal government used a public stock offering to completely divest itself of Conrail.[15] Even the judicial branch of government is being privatized somewhat through the growth of alternative dispute resolution ("ADR") systems.[16] The Republican party kept the movement towards privatization strong with their "Contract With America" which helped them win elections in 1994 with promises of a more decentralized and smaller federal government.[17] Republicans are currently pushing for the privatization of social security.[18]

But privatizing federal services is not just for Republicans. President Clinton signed an appropriations bill in 1995 that established a pilot program for privatized tax collection.[19] Currently the Clinton administration is preparing to privatize the production of the highly enriched uranium needed to make nuclear weapons by auctioning the United States Enrichment Corporation.[20]

Despite the strong federal support, most examples of privatization in the last twenty years have occurred at the state and local level.[21] Many local jurisdictions have privatized such services as solid waste collection, street repair, bus system operation, ambulance service, fire prevention, and hospital operation.[22] In light of deregulation, local governments have also been investigating the potential sale of

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13. *See id.* at xii-xvii.

14. *See id.* at 1.

15. *See id.*

16. *See* Savas, *supra* note 2, at 892 (defining ADR as arbitration and mediation services available from private sources); *see generally* Special Project, *Current Issues in Arbitration*, 51 VAND. L. REV. 681 (1998) (discussing the rise of arbitration and legal issues surrounding it).

17. *See* Chen, *supra* note 2, at 1253 (discussing how the Republicans' "Contract With America" helped spur the contemporary privatization movement).

18. *See* Christopher Georges, *Social-Security 'Privatization' Effort Makes Headway*, WALL ST. J., June 22, 1998, at A24.

19. *See* Christina N. Smith, Note, *The Limits of Privatization: Privacy in the Context of Tax Collection*, 47 CASE W. RES. L. REV. 627, 627 (1997) (discussing privatized tax collection).

20. *See* Joseph E. Stiglitz, *This Privatization Proposal is Radioactive*, WALL ST. J., June 2, 1998, at A22 (criticizing the proposal as bad national security and economic policy).

21. *See* LINOWES ET AL., *supra* note 12, at 2.

22. *See* E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 70-71 (1987) (displaying chart of percentage of municipalities that contract with private organizations to supply various types of services).

government-owned utility distributors,[23] and several state governments are seeking federal approval to experiment with private management of welfare and medicaid.[24]

Perhaps the most noteworthy example of the privatization movement is the rapid privatization of both state and federal prisons.[25] By 1991, private companies were operating over fifty state and federal prisons.[26] This number had increased to 100 by the end of 1996.[27] The nation's largest private prison company, Corrections Corporation of America ("CCA"), projects that this rapid growth in privatized prisons will continue.[28] In light of the huge and expanding prisoner population in the U.S., such growth is easily sustainable.[29]

B. Arguments For and Against Privatization

The most common argument for privatization is the efficiency created by private competition, evidenced most often by reduced costs. The President's Commission on Privatization cites examples in which privatization has saved local governments money without sacrificing quality.[30] One study has found that it costs a government up to fifty percent more to provide a service itself rather than to privatize.[31] Another source of support for privatization is purely ideological.[32] The notion that a smaller government is inherently better supports pri-

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23. *See* Tom Charlier, *Herenton Considers LGW Sale To Boost City Funds*, COM. APPEAL (Memphis), Dec. 3, 1997, at A1 (discussing city mayor's consideration of the sale of the local utility distributor).

24. *See* Wessel & Harwood, *supra* note 7, at A10.

25. A computer search on Lexis for the term "privatization" brings up a plurality of articles concerning privatized prisons. The trend towards privatized prisons is partly accounted for by the exploding prison population, which has resulted in 40 states being found in violation of the Constitution because of prison overcrowding. *See* ADRIAN JAMES ET AL., PRIVATIZING PRISONS: RHETORIC AND REALITY 5 (1997) (discussing the causes of the prison privatization movement).

26. *See id.* at 8; *see also* Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 373 n.8 (citing statutes of 25 states and the federal government that authorize private prisons).

27. *See* RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 4 (1997).

28. *See id.*

29. *See id.* (noting that as of 1996 privatized prisons only account for about 4.6 percent of the incarcerated population); *see also* Ratliff, *supra* note 26, at 372 (noting an estimated growth rate in private prisons of over 30 percent annually).

30. *See* LINOWES ET AL., *supra* note 12, at 2-3 (citing anecdotal evidence of savings from privatization with no decrease in quality of service). However, the cost savings of privatization is a disputed issue, with insufficient evidence to clearly support either side. *See* Savas, *supra* note 2, at 894 (presenting statistical survey data).

31. *See* Savas, *supra* note 2, at 895.

32. *See id.* at 895-96 (discussing advantages of privatization).

vatization as an end in itself rather than just as a means to cost reduction.[33]

On the other side of the political spectrum, critics argue that privatization comes at the expense of workers.[34] They view privatization as a transfer of wealth from individual governmental employees with good pay, benefits, job security, and good working conditions to the bottom line of a corporation that offers its employees less advantages and has little concern for the public welfare.[35] Critics assert that private companies' only motivation is profit and that governmental functions are better performed by governmental agencies that can work for the public good without the distraction of a profit motivation.

Critics also argue that many functions are so inherently governmental that they cannot ethically be delegated to the private sector.[36] In the case of privatized prisons, opponents of privatization assert that the government should not delegate out the responsibility and power of regulating the life of a citizen deprived of his freedom.[37] They view the power to take away a citizen's freedom as an inherently governmental responsibility that cannot be safely delegated to a for-profit corporation.[38] In the context of privatized tax collection, opponents argue that corporations should not be given the private information and the enforcement power necessary to collect taxes.[39]

The argument over privatization goes to the very heart of how one views the proper role of government. What services should government perform? What makes a function "inherently governmental" in nature? The answers to these questions depend on what one decides are the purposes of government. This Note will make no attempt to tackle these large questions or decide the merits of privatization, but will instead focus on what role the judiciary should play in the debate.

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33. *See id.*

34. *See* HANDLER, *supra* note 6, at 83-84, 86 (discussing the disadvantages of privatization).

35. *See id.* at 83 n.20 (questioning whether transferring wealth to privato city workers is worse than to private corporations).

36. *See* Joseph E. Field, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649, 669 (1987) (noting that privatization of prisons transfers an important element of governmental responsibility).

37. *See id.*

38. *See id.*

39. *See* Smith, *supra* note 19, at 639-640 (arguing that tax collection is an inherently governmental function that should not be privatized).

C. The Judicial Branch's Role in Deciding the Future of Privatization

This Note examines the extent of constitutional liability private parties assume when they peform a governmental function. Those opposed to privatization argue that private companies taking on governmental functions should be subject to more constitutional scrutiny than their governmental agency predecessors. They claim that a higher scrutiny is warranted because a company's mission is profit, not the public good, and a company is likely to cut corners on citizens' constitutional rights to increase profit.[40] Those in favor of privatization answer that a private company motivated to keep the state's business is less likely to infringe on constitutional rights than is a disorganized governmental bureaucracy under political pressure to cut costs.[41]

The arguments over how much constitutional scrutiny to apply reflect the arguments over the broader policy issue of whether to privatize. Correspondingly, the outcome of this constitutional issue may determine whether privatization is feasible. If private companies that take on governmental functions have more coustitutional liability than their governmental agency predecessors, this extra liability may outweigh any savings from increased efficiency.[42] Thus, the question becomes which branch of government should decide the fate of the privatization movement. Should the courts decide by applying increased constitutional scrutiny to private parties performing goverumental functions, or should courts apply the same constitutional scrutiny to all parties performing governmental functions, thereby deferring judgments regarding privatization to the other two branches of government?[43] This Note argues that the courts should provide a level legal playing field and allow the fate of privatization to be decided by

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40. *See* McKnight v. Rees, 88 F.3d 417, 424 n.4 (6th Cir. 1996), *aff'd sub nom.* Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100 (1997) ("private corporations . . . have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners").

41. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting) (suggesting that private corporations are less likely to infringe on constitutional rights than are governmental agencies because damages come out of their own pockets rather than the public purse).

42. *See* Edward Felsenthal, *Convict's Suit Threatens Privatized Jail Services*, WALL ST. J., May 21, 1997, at B1 (quoting a Harvard University professor who argues that imposing any extra constitutional liability on private companies performing governmental services could step privatization in its tracks).

43. Note that if the courts estimate that privatization would not be valuable for society and thus apply stricter constitutional scrutiny to private companies, the increased legal liability will help ensure that the courts' own estimation is correct by decreasing the savings from privatization. *See infra* Part VII.A.

the other branches of government, which are more qualified to balance the pros and cons of privatization.[44]

III. 42 U.S.C. § 1983

When a private party performs a state governmental function, the threat of constitutional liability comes from 42 U.S.C. § 1983.[45] It is in § 1983 cases that courts determine how much constitutional scrutiny to apply to private parties performing governmental functions. Section 1983 creates a cause of action against any person who, acting under color of state law, deprives someone of a right created by federal law as embodied in the U.S. Constitution or a federal statute.[46] Section 1983 does not create a new substantive right, but is instead an enforcement mechanism for rights already established by federal statutes or the Constitution.[47]

A. Original Meaning of § 1983

Section 1983 was originally adopted as section one of the Civil Rights Act of 1871 and was meant as a threat against southern states that were not adequately controlling violence against African-

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44. *Cf.* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 621-22 (1908) (arguing that courts are not equipped properly to make pelicy decisions and that policy choices are hetter made by legislatures after balancing complex political forces).

45. Section 1983 creates an action against unconstitutional behavior of state (not federal) actors. However, the Supreme Court has created a cause of action, commonly called a *Bivens* action, against federal actors that is substantially the same as a § 1983 action against a state actor. *See* Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (recognizing a cause of action for damages against federal agents for conducting a search in violation of the Fourth Amendment). This Note only analyzes § 1983 because *Richardson* and most other cases addressing privatization have involved the delegation of state (not federal) power to a private party. The argument in this Note applies equally to cases of *Bivens* actions against private parties taking on federal governmental functions, however.

46. 42 U.S.C. § 1983 (1994) provides in relevant part:

> 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.

47. *See* Parratt v. Taylor, 451 U.S. 527, 535 (1980) (noting that § 1983 provides a legal remedy for deprivations of preexisting legal rights found in the Constitution). Section 1983 is also a remedy for rights created by federal statutes that do not contain their own exclusive remedies and are not merely statements of pelicy. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.8 (1994). This Note, however, focuses on the impact of constitutional liability on the privatization movement, and thus is only concerned with § 1983 as a mechanism for the enforcement of constitutional rights.

Americans, primarily perpetrated by the Ku Klux Klan.[48] Several southern state courts and governors had policies of not protecting African-Americans from the violence of the Klan.[49] Section 1983 was enacted as a measure to allow the federal judiciary to protect citizens from the southern states' policies of indifference to violations of individual liberty.[50]

Compared to its current impact, § 1983 had a meager beginning. For fifty years after its enactment in 1871, only twenty-one cases were decided under the statute.[51] The initial sparsity of § 1983 cases was in part caused by the narrow manner in which the Supreme Court initially interpreted the statute. For ninety years the Court and commentators pronounced that § 1983 only applied to actions by state officials pursuant to official state policy.[52] This interpretation is consistent with the intent behind § 1983: to protect citizens from official state indifference to Klan violence. According to the Court, the phrase "under color of state law" meant that § 1983 was solely a protection for citizens against federal right violations that were officially sanctioned by one of the three branches of a state government.[53] The Court held that § 1983 was not a remedy for the wrongful acts of individuals acting contrary to state policy.[54] Thus, § 1983 originally was a weapon against state policies, not a weapon against actions by individual state officers.[55]

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48. *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985) (finding that the passage of the Act was a direct result of "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights"); Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 973-74 (1987) (discussing the legislative history of the Civil Rights Act of 1871 and noting that it was also known as the Ku Klux Act of 1871).

49. *See* Nichol, *supra* note 48, at 974-75 (noting the 1871 Congress' perception that southern state courts and executives were under the control of the Klan).

50. *See id.*

51. *See* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

52. *See* PETER W. LOW & JOHN C JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 970 (3d ed. 1994) (noting that there was a "long-standing assumption that § 1983 reached only misconduct either officially authorized or so widely tolerated as to amount to 'custom or usage' ").

53. *See id.* at 969-71.

54. In the *Civil Rights Cases of 1883*, the Court remarked that a statute such as § 1983 cannot be enforced against "the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." The Civil Rights Cases, 109 U.S. 3, 17 (1883).

55. *See* LOW & JEFFRIES, *supra* note 52, at 851 (explaining the original interpretation of § 1983).

B. The Changing Interpretation of § 1983

In *Monroe v. Pape*, decided in 1961, the Supreme Court greatly expanded the scope of § 1983.[56] *Monroe* held that § 1983 could reach actions of individual state officers even if their actions were not sanctioned by state policy.[57] Thus, the Court altered its interpretation of § 1983 from a relatively narrow statute protecting against state-sanctioned violations of federal law, to a statute protecting against violations of federal law by state officials even if the state officials were acting contrary te state law.[58]

Although the decision affected a radical change in § 1983's interpretation, the Court in *Monroe* grounded its decision in legislative history that had been created almost a century before.[59] The Court looked to statements of legislators in the 1871 Congress that the Court felt implied a broader interpretation of § 1983 than had yet been recognized by any court.[60] The *Monroe* dissent preferred to trust the prevailing interpretation of § 1983 at the time of its passage, which offered redress for an injury only when no redress was available under state law in state court.[61]

Thus, ninety years after its passage, *Monroe* gave § 1983 sharp teeth as an all-purpose cause of action against state officials who infringe on any federally-created right, even if the state officials are clearly acting against state policy. In contrast to the small number of

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56. Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).

57. *See Monroe*, 369 U.S. at 183; *see also* CHEMERINSKY, *supra* note 47, § 8.3 (explaining the holding in *Monroe*).

58. Congress passed § 1983 in 1871 because southern states were not offering a judicial remedy to individual rights violations by the Klan. The purpose of § 1983 was to fill any gaps in a state's laws against individual rights violations. Without the legislature amending § 1983, the Court almost 100 years later reinterpreted the statute to offer a remedy against individual rights violations even when the state already offers such a remedy. Thus, after *Monroe*, § 1983 offers a federal remedy in addition to, instead of just in lieu of, any state remedies for individual rights violations. With *Monroe*, § 1983 became a weapon against individual state officials in addition te its original function as a weapon against state policies.

59. *See Monroe*, 365 U.S. at 173-76 (citing legislative record of the 1871 Congress).

60. *See id.* The Court quoted an opponent of the legislation, who said, "This section gives to any person who may have been injured in any of his rights . . . a civil action for damages against the wrongdoer in the Federal courts." *Id.* at 178. The Court interpreted this statement to mean that a right of action arose upon a wrongdoing, even if in violation of state policy. *Id.* at 180.

61. *See* id. at 237 (Frankfurter, J., dissenting). The dissent found that, "all the evidence converges to the conclusion that Congress by § 1983 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of." *Id.* (Frankfurter, J., dissenting).

§ 1983 cases brought before *Monroe*, by 1977 over 20,000 § 1983 suits were filed per year.[62] Because of *Monroe*, § 1983 is now used for much broader purposes than its original goal of defending against state-sanctioned Klan violence. Prisoners taking advantage of § 1983's new power have brought almost half of all post-*Monroe* § 1983 actions.[63] Section 1983 is now described by some as the most important statute in contemporary America.[64]

IV. STATE ACTION DOCTRINE: EXPANDING 1983'S REACH

One-hundred years after the enactment of § 1983, the Supreme Court further reinterpreted the statute to reach certain private parties, instead of just governmental officials.[65] In *Adickes v. S.H. Kress & Co.*, decided by the Court in 1970, a restaurant denied service to a white school teacher because she was with six black students.[66] On her way out of the restaurant, a police officer arrested her for vagrancy.[67] The school teacher brought a § 1983 action against the private restaurant owner for conspiracy with the police officer to deny her of her Fourteenth Amendment rights.[68] The police officer's conduct was found to be a violation of the Constitution, and the Court imputed the police officer's "state action" to the private restaurant owner because it found a conspiracy between the two.[69]

The *Adickes* Court decided that the private party defendant's actions warranted treatment as governmental actions subject to the prohibitions of the Constitution.[70] The restaurant owner was found to

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62. *See* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 86 (2d ed. 1987) (citing statistics from the Administrative Office of the United States Courts).

63. *See* LOW & JEFFRIES, *supra* note 52, at 974 (citing the Annual Reports of the Directer, Administrative Office of the United States Courts).

64. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES 4 (2d ed. 1991) (declaring that "[n]o federal statute is more important in contemporary American law").

65. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (applying § 1983 liability to a private party for the first time).

66. *See id.* at 146.

67. *See id.*

68. *See id.*

69. *See id.* at 152.

70. *See id.* at 169-71. The school teacher had to demonstrate that the private restaurant owner was a "state acter" because the Fourteenth Amendment only prohibits discrimination by the government. *See id.* at 169. The Constitution does not protect against private misbehavior, no matter how egregious.

No matter what right is asserted under § 1983, however, the plaintiff must show that the defendant violated tbat right while acting "under color of state law." 42 U.S.C. § 1983 (1994); *see also Adickes*, 398 U.S. at 150. When a state official is the defendant, the Fourteenth Amendment's state action requirement and § 1983's "under color of state law" requirement are

have reached an understanding with the police officer to work together to deny the plaintiff her constitutional rights.[71] Although the restaurant owner was not a state official, he was a "willful participant in joint activity" with a state official, and thus he qualified as a state actor according to the Court.[72] Thus, the *Adickes* Court extended § 1983's reach to private-party activity by using a conspiracy theory of state action.

As originally interpreted, § 1983 only protected against individual rights violations by a state official when no state-provided remedy existed because the state official was carrying out state policy.[73] Yet, one hundred years after § 1983's passage, the Court in *Adickes* expanded the statute's reach to protect against wrongful action by a private party if the party is in willful joint participation with a state governmental officer, even if the action is against state policy and regardless of whether a state-provided remedy exists.[74]

The Court in *Adickes* did require that the private party have some conspiratorial intent before the unconstitutional conduct of a state officer would be imputed to him.[75] A private party's good faith behavior was not actionable under § 1983. In 1982, however, the Court broadened § 1983's reach even more in *Lugar v. Edmondson Oil Co.*[76] Edmondson Oil Company had sued Lugar in Virginia state court

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coexistent. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (stating that the statutory requirement of action "under the color of state law" and the "state action" requirement under the Fourteenth Amendment are identical). When a private party is the defendant, though, the two tests are separate although largely similar. *See id.* at 928-30. The "under color of state law" requirement will always be met when the state action requirement of the Fourteenth Amendment is met, but satisfaction of the "under color of state law" test does not necessarily imply satisfaction of the state action requirement. *See id.* at 935 n.18. Thus a private party could be acting "under color of state law" but not be acting closely enough with the state or a state official to be deemed a state actor. This distinction is only relevant when the plaintiff is resting his § 1983 claim against a private party on a federal statute that does not have a state action requirement. *See id.* at 934-35. In such a case, the plaintiff will have to show that the defendant violated the federal statute and that the defendant was acting "under color of state law." If the plaintiff in a § 1983 action shows a violation of the Constitution, then the "under color of state law" requirement of § 1983 is automatically met since a violation of the Constitution requires state action, and a showing of state action automatically satisfies the "under color of state law" test.

71. *See Adickes*, 398 U.S. at 152.

72. *Id.*

73 *See supra* Part III.A.

74. The Supreme Court affirmed the *Adickes* holding in *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980), in which a private party was held liable under § 1983 for conspiring with a judge to deny someone's constitutional rights. The private party was held liable even though the judge had judicial immunity from suit. *See id.* at 27-28.

75. *See Adickes*, 398 U.S. at 152 (stating that a private party involved in a conspiracy can be liable under § 1983, even though not an official of the state).

76. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

to recover a debt, and had asked the county clerk to attach and order the sheriff to seize a portion of Lugar's property under a Virginia prejudgment attachment statute that had been in use for more than 150 years.[77] The sheriff seized Lugar's property, and Lugar responded by bringing a § 1983 action against Edmondson for acting jointly with the clerk and the sheriff to deprive him of property without due process of law in violation of the Fourteenth Amendment.[78]

Although Edmondson had in good faith relied on a 150-year-old statute in asking the clerk to order the sheriff to seize Lugar's property, the Court held Edmondson liable under § 1983.[79] The Court abandoned the bad faith conspiracy requirement of *Adickes* and replaced it with a "fair attribution" test.[80] While *Adickes* held that a private party could be liable under § 1983 if that private party agreed to help a governmental official violate someone's constitutional rights, *Lugar* only required that the private party's conduct be "fairly attributable" to the state.[81]

Lugar is just one example of the Court's expansion of state action theory over the last forty years. The Court has, in fact, developed several tests to justify turning a private party's actions into constitutionally-restricted state actions. The "symbiosis test" looks to the mutual interdependence of the private party with the state.[82] The "nexus test" focuses on the state's involvement in the challenged ac-

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77. *See id.* at 924-25.

78. *See id.*

79. *See id.* at 942. The Court did not reach the question of the availability of a good faith defense. *See id.* at 942 n.23.

80. *See id.* at 937.

81. *Id. Lugar*'s fair attribution test is a two-part inquiry. First, the private party must have exercised a right that is created by the state but is unconstitutional. In *Lugar*, this prong was satisfied by Edmondson's use of a state statute that was later found to be unconstitutional. *See id.* at 939-41. Second, the private party must have acted together with or obtained significant aid from a state official. *See id.* at 941. Edmondson received significant aid from the clerk and sheriff in having Lugar's property seized, so the Court labeled Edmondson a state acter. *See id.* at 941-42.

The dissent in *Lugar* was not persuaded by the majority's interpretation of § 1983, which imposed liability on a private party who in good faith relied on a presumptively valid state statute. *See id.* at 944-56 (Powell, J., dissenting). According to the dissent, the majority in *Lugar* "undermines fundamental distinctions between the common-sense categories of state and private conduct." *Id.* at 946.

82. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). In *Burton*, the Court found that a privately-owned restaurant was a state actor subject te constitutional restrictions because it was located in and leased space from a municipal parking garage. *See id.* at 724-25. The Court focused on the financial arrangement between the city and the restaurant, and found that the restaurant was dependent on the state for its existence and thus should be treated as if it were the state. *See also* Perez v. Sugarman, 499 F.2d 761, 765-66 (2d Cir. 1974) (applying the symbiosis test to a private foster care agency that took care of children in the state's custody).

tivity of the private party.[83] Most relevant to privatization is the "public function test," which holds constitutionally accountable those private entities performing a function that has been traditionally the exclusive prerogative of the state.[84]

The existence of several state action "tests" may suggest that determining whether a defendant is a state actor is a precise, clear-cut process. On the contrary, state action doctrine is abstract and leads to unpredictable and arguably ad hoc decision making.[85] Some commentators have claimed that courts merely balance the facts to estimate the strength of the private party's relationship or resemblance to the state, and then apply one of the state action tests to justify their decision.[86]

The malleable nature of state action doctrine provides opportunities for courts to tread far into private conduct. Whenever the Court expands state action theory it is also extending the reach of § 1983 because it brings more behavior within the restraints of the Constitution, which § 1983 enforces. The *Lugar* Court recognized the

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83. Under the nexus test, a private party may be labeled a state acter only as to its activities that are heavily regulated by the state. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that if a nexus exists between the stato and the challenged action of the regulated private party, then the private party is treated as the state for purposes of constitutional liability). In *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944), the nexus test was used te characterize the Texas Democratic party as a state actor, and tbus force it te step excluding blacks from its election primaries. Since Texas heavily regulated the primaries of the political parties, the Democratic party, although a private organization, was subject to constitutional limitations when it held a primary. *See id.* at 663. According to the Court, "[t]he party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law [just] because they are performed by a political party." *Id.*

84. *See* Rendell-Baker v. Kobn, 457 U.S. 830, 842 (1982) (discussing the public function test but finding that a private school does not qualify as a state actor since scbools have never been the exclusive domain of government). In *Marsh v. Alabama*, 326 U.S. 501, 505-06 (1946), the Court applied the public function test and held that a private company could not restrict free speech on its own private property because its privato property so closely resembled a tewn that the Court thought it fair to treat the property as a public town and the company as the state. Other activities that courts have found te be public functions include: operation of a park, *see* Evans v. Newton, 382 U.S. 296, 302 (1966); process serving, *see* United States v. Wiseman, 445 F.2d 792, 796 (2d Cir. 1971); and care of foster children, *see* Perez v. Sugarman, 499 F.2d 761, 765-66 (2d Cir. 1974).

85. *See* Charles L. Black, *The Supreme Court, 1966 Term—Forward: 'State Action,' Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (calling the state action doctrine a "conceptual disaster area"); *see also* Duncan Kennedy, Note, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982) (claiming that no real distinction exists between wbat is public and what is private).

86. *See* Lugar, 457 U.S. at 939 (citing various state action tests and then noting that the tests may not be distinguishable in operation); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (boiling state action tests down to a balance of facts); *see also* Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 384 (1988) (arguing that courts' state action decisions vary based on the courts' evaluation of the substantive claim being made).

danger of subjecting private parties to constitutional liability and suggested the possibility of an affirmative defense for private party state actors.[87] *Lugar* hinted that this affirmative defense might protect good faith private party conduct and be similar to "the availability of a good-faith defense, or qualified immunity, to state officials."[88] The next Part addresses the affirmative defense to § 1983 actions available to state officials and the Court's refusal thus far to implement *Lugar*'s suggestion of a similar defense for private party state actors.

V. IMMUNITY DOCTRINE[89]

A. Development of Qualified Immunity from § 1983 Liability for State Officials

The first recognition of qualified immunity from a § 1983 action was in response to the increased constitutional liability placed on governmental officials in the wake of *Monroe*. *Pierson v. Ray*, decided six years after *Monroe*, involved a § 1983 suit against police officers for making an allegedly unconstitutional arrest.[90] Although the text of § 1983 does not confer any defenses or immunities, the *Pierson* Court decided that the original drafters of § 1983 did not mean to deny state officer defendants of any defenses or immunities that

87. *See Lugar*, 457 U.S. at 942 n.23 (suggesting the possibility of a good faith defense for private parties). Note that *Lugar* was the case that abandoned the element of conspiratorial intent that was previously required to subject a private party to § 1983 liability. *See supra* note 80 and accompanying text. Thus, *Lugar*'s suggestion of a good faith defense for private party defendants is really a suggestion to add back in the bad faith requirement it had abandoned, but to add it in as an affirmative defense instead of as a necessary element of the plaintiff's case. This shift would mean that instead of good faith private conduct being protected from constitutional liability by the state action doctrine, private parties would have to rely on their ability to affirmatively show good faith. Yet, since the Constitution would not guarantee the availability of a good faith defense, it could be abandoned and private parties acting in good faith could be subject to constitutional liability.

88. *Lugar*, 457 U.S. at 942 n.23.

89. This Part addresses the affirmative defenses created by the Supreme Court to counterbalance § 1983 constitutional liability. These affirmative defenses have names such as "qualified immunity," "good faith defense" and "qualified good faith immunity," but there is often no sharp distinction between these labels. This Note examines all affirmative defenses to § 1983 constitutional liability under the rubric of "immunity doctrine."

90. Pierson v. Ray, 386 U.S. 547 (1967). In *Pierson* several officers were sued under § 1983 for arresting several black clergymen who had entered the segregated area of a bus terminal. *Id.* at 549-50.

existed at the time of § 1983's enactment.[91] The Court looked at the common law of 1871 and determined that those performing law enforcement functions had a right to a "defense of good faith and probable cause" in actions for false arrest.[92] Thus, police officers would not be liable under § 1983 if they could show that they reasonably believed in good faith that the arrests were constitutional.[93]

Although the *Pierson* Court grounded its holding on statutory interpretation and the common law of 1871, the Court in *Scheuer v. Rhodes* based its grant of qualified immunity to public officers on policy reasons.[94] The Court stated that qualified immunity from § 1983 liability was necessary to prevent the injustice of subjecting an officer to liability for exercising in good faith the discretion his job requires.[95] The Court also noted that such unmitigated liability might deter a public officer from exercising the duties of his job with the decisiveness and judgment needed.[96]

In *Wood v. Strickland*, the Court clarified the components of the qualified immunity defense that it had created in *Pierson*, holding that the defense contained an objective and subjective good faith requirement.[97] Under this rule, to escape § 1983 liability, the defendant must show that he subjectively believed that he was acting constitutionally, and he must show that this belief was objectively reasonable.[98] A belief is not objectively reasonable, the Court explained, if it is against "settled, indisputable law."[99]

The objective component of the qualified immunity defense articulated in *Wood* was purely a legal question that could be resolved on a motion for summary judgment by the defendant. The subjective component, however, involved a question of fact that required a trial. Thus, a plaintiff with a frivolous claim was able to force an official to

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91. *See id.* at 554-55. The *Pierson* dissent criticized the majority for ignoring the plain language of § 1983, which does not contain any immunities or defenses. *See id.* at 558-59 (Douglas, J., dissenting).

92. *See id.* at 557. For criticism of the Court's historical approach to granting immunity, see Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 781-96 (1987).

93. *See Pierson*, 386 U.S. at 557 (defining the good faith defense and placing the burden of proof on the defendants to show good faith).

94. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (granting qualified immunity to a governor and other state officials).

95. *See id.*

96. *See id.*

97. Wood v. Strickland, 420 U.S. 308, 321 (1975).

98. *See id.* at 321-22.

99. *Id.* at 322.

face trial by merely alleging malicious intent. In *Harlow v. Fitgerald*, the Court acknowledged that the subjective component of the qualified immunity defense created the opportunity for frivolous claims to be tried, at great expense to the innocent defendant and society as a whole.[100] In abandoning the subjective component of the qualified immunity defense, the *Harlow* Court noted that one of the purposes for extending qualified immunity was to prevent frivolous lawsuits against public officials from going to trial.[101] Frivolous lawsuits diverted defendants' official energy away from public issues and deterred able citizens from becoming public servants.[102] In addition, the threat of frivolous lawsuits discouraged the unflinching discharge of public duties.[103]

Thus, after *Harlow* a defendant protected by the qualified immunity defense can avoid § 1983 liability if his actions did not violate a clearly established constitutional right of which a reasonable person would have known.[104] The defendant's subjective intent is no longer relevant. Not all defendants in § 1983 actions can assert the qualified immunity defense, however; the ability to assert qualified immunity depends on the type of functional role the defendant plays.[105] If the qualified immunity defense existed for the defendant's functional role in 1871 common law, or if current public policy reasons

100. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole.").

101. *Id.*

102. *See id.*

103. *See id.*

104. *Id.* at 818. For a criticism of *Harlow* that focuses on the question of how to decide what a reasonable person knows about the Constitution, see CHEMERINSKY, *supra* note 47, § 8.6 at 476-79.

105. *See Harlow*, 457 U.S. at 810 ("Moreoever, in general our cases have followed a 'functional' approach to immunity law."). Because the purpose of qualified immunity is to encourage the uninhibitod performance of governmental functions, to gain immunity a defendant must show that he or she was performing a governmental function at the time of the challenged action. *See* Forrester v. White, 484 U.S. 219, 224 (1988) (discussing the purpose of qualified immunity and stating that the functional approach to deciding whether to grant immunity requires the Court to "examine the nature of the functions with which a particnlar official or class of officials has been lawfully entrusted, and [to] seek to evaluato the effect that exposure to particnlar forms of liability would likely have on the appropriate exercise of those functions"); *see also* Clinton v. Jones, 117 S. Ct. 1636, 1644 (1997) (denying the President immunity from suit for actions not taken in the performance of a governmental function and stating that "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it' ") (quoting *Forrester*, 484 U.S. at 229); Cleavinger v. Saxner, 474 U.S. 193, 201 (1985) (stating that absolute immunity "flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official") (*quoting* Butz v. Economou, 438 U.S. 478, 511 (1978)).

justify extending the defense to that type of functional role, then the defendant will be entitled to the qualified immunity defense.[106]

B. Qualified Immunity Not Extended to Private Parties

The qualified immunity defense created by *Pierson* and strengthened in *Harlow* acts as a counterbalance to the increase in § 1983 liability on governmental officials brought by *Monroe*. In *Wyatt v. Cole*, the Court refused the opportunity to apply the new defense to limit the increase in constitutional liability on private parties brought by *Adickes* and *Lugar*.[107] In *Wyatt*, a private party was sued under § 1983 for invoking a state replevin statute, which was later held to be unconstitutional, to seize property in the possession of the plaintiff.[108] The defendant claimed the qualified immunity created in *Harlow*.[109]

While a majority of the *Wyatt* Court agreed that *Lugar* created too much constitutional liability for private parties, a majority also agreed that the qualified immunity doctrine of *Harlow* should not apply to a private party defendant.[110] The Court based its decision to deny qualified immunity to a private party on both historical and policy grounds. While a private party defendant of the type in *Wyatt* was entitled to a "good faith defense" at common law in 1871, this common law defense did not amount to the stronger "qualified immunity" created by *Harlow*.[111] Because the *Wyatt* Court did not think

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106. *See* Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100, 2103 (1997) (citing *Wyatt v. Cole*, 504 U.S. 158 (1992), as establishing that existence of qualified immunity defense depends on common law of 1871 or current public policy).

107. Wyatt v. Cole, 504 U.S. 158, 167 (1992).

108. *Id.* at 160.

109. *See id.*

110. Justice Kennedy, with whom Justice Scalia joined, wrote a concurring opinion that acknowledged the need to establish a "good faith defense" from § 1983 liability for private parties to counterbalance the amount of constitutional liability potentially left on private parties by *Lugar*. *See id.* at 169-75 (Kennedy, J., concurring). When the two concurring Justices' votes are added to the votes of the three dissenters who were in favor of giving private parties *Harlow*'s qualified immunity, a majority exists for mitigating the § 1983 liability left on private parties by *Lugar*. *See id.* at 177 (Rehnquist, C.J., dissenting). However, Justices Kennedy and Scalia believed that *Harlow's* "qualified immunity" was too powerful to give to private parties since it included no subjective good faith requirement. *See id.* at 169-75 (Kennedy, J., concurring). Kennedy's concurrence advocated giving private parties the two-part qualified immunity defense that existed before *Harlow*. *See supra* note 97 and accompanying text. The concurrence labeled this defense the "good faith defense" to distinguish it from the "qualified immunity" created by *Harlow*'s abandonment of the subjective good faith requirement. *See Wyatt*, 504 U.S. at 169-75.

111. *See id.* at 165. In *Pierson*, the Court transformed the common law good faith defense into a qualified immunity defense, but *Harlow* abandoned the subjective good faith requirement of that defense and left "qualified immunity" with only an objectively reasonable requirement.

that the policy behind the decision in *Harlow* applied to a private party defendant, the Court refused to extend this policy-based immunity.[112] The Court did expressly limit its holding to the issue of a private party faced with § 1983 liability for invoking a state replevin statute.[113] The Court also left open the possibility of a "good faith defense" for private parties.[114]

Thus, after *Wyatt* the Supreme Court left unresolved the question of how to deal with the extensive § 1983 constitutional liability potentially left upon private defendants by *Lugar*. Lower courts were free to respond in a variety of ways. They could rely on the express limitation of the *Wyatt* holding and grant *Harlow*'s qualified immunity to types of private defendants other than the type at issue in *Wyatt*.[115] Conversely, they could extend the reasoning of *Wyatt* and deny any affirmative defense to private parties.[116] As a compromise, courts could deny *Harlow*'s qualified immunity but grant another form of affirmative good faith defense.[117]

VI. *RICHARDSON V. MCKNIGHT*

A. Holding

The case of *Richardson v. McKnight* gave the Supreme Court the opportunity to resolve the split among the circuits regarding the extent of constitutional liability a private party accepts when taking on a governmental function.[118] However, a divided Court produced only a narrow holding that left many issues unresolved. The Court

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Harlow's new definition of qualified immunity makes transforming a common law good faith defense into qualified immunity a greater leap than what was performed in *Pierson*.

112. *See id.* at 167 (holding that "the rationales mandating [*Harlow*'s] qualified immunity for public officials are not applicable to private parties").

113. *See id.* at 168-69.

114. *See id.* at 169 ("In so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* . . . could be entitled to an affirmative defense based on good faith.").

115. *See, e.g.*, Sherman v. Four County Counseling Ctr., 987 F.2d 397, 406 (7th Cir. 1993) (granting qualified immunity); Warner v. Grand County, 57 F.3d 962, 964, 967 (10th Cir. 1995) (same).

116. *See, e.g.*, Manis v. Corrections Corp. of Am., 859 F. Supp. 302, 305 (M.D. Tenn. 1994) (denying qualified immunity).

117. *See* Duncan v. Peck, 844 F.2d 1261, 1266-67 (6th Cir. 1988) (suggesting an affirmative defense for private parties different from *Harlow*'s qualified immunity).

118. Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100, 2103 (1997) (defining the issue before them as whether privately-employed prison guards are entitled to qualified immunity from § 1983 liability).

held, in a five to four decision, that when a private company operating for profit in competition with other private companies and with little direct government supervision receives a contract to administer a "major lengthy" governmental function such as running a prison, that company's employees are not entitled to qualified immunity from § 1983 liability.[119] The Court limited its holding by noting that it had not decided whether the private defendants would be eligible for a "special" good faith defense from § 1983 actions.[120] Thus, the Court decided that the defendants would not be eligible for *Harlow*'s qualified immunity, but that they may be eligible for another type of good faith affirmative defense.

B. Facts

Ronnie McKnight was a prisoner at Tennessee's South Central Correctional Center ("SCCC") when he filed a § 1983 action in federal court against prison guards for violating his eighth amendment rights.[121] He alleged that the defendant prison guards inflicted serious physical injury upon him by subjecting him to overly tight restraints during his transport to another prison.[122] McKnight's complaint was not unusual in the sense that prisoners file many complaints every year in federal court alleging that prison guards have violated the prisoners' constitutional rights.[123] Most of these complaints are dismissed before discovery because the prison guards successfully raise the affirmative defense of qualified immunity as defined in *Harlow*.[124]

But the prison guards that McKnight sued were employed by Corrections Corporation of America ("CCA"), a private corporation, and the federal district court, citing *Wyatt*, held that privately-em-

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119. *See id.* at 2108.

120. *See id.* The Court also limited its holding by assuming without deciding that the defendants were state actors subject to constitutional prohibitions and § 1983 liability. Although the *Richardson* Court specifically declined to decide this issue, there is little question that the privately-owned prison and its employees would be considered state actors under a *Lugar* analysis. *See* McKnight v. Rees, 88 F.3d 417, 419 n.3 (6th Cir. 1996), *aff'd sub nom.* Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100 (1997) (noting that the prison guards do not dispute that they were state actors subject to § 1983 liability under a *Lugar* analysis and citing case law in support of a state action finding); Giron v. Corrections Corp. of Am., 14 F. Supp. 2d 1245, 1248-51 (D. N.M. 1998) (holding a private prison guard to be a state actor).

121. *See Richardson*, 117 S. Ct. at 2102.

122. *See McKnight*, 88 F.3d at 418-19.

123. *See supra* note 63 and accompanying text.

124. One purpose for the qualified immunity created in *Harlow* was to prevent the trial of frivolous § 1983 suits. *See supra* note 101 and accompanying text.

ployed prison guards were not entitled to the qualified immunity afforded their publicly-employed counterparts.[125] The prison guards filed an interlocutory appeal from the denial of their motion to dismiss, and it was this appeal that the Supreme Court addressed.

C. Critical Analysis of the Court's Reasoning

The Court in *Richardson* relied heavily on *Wyatt v. Cole* in reaching its decision. The majority opinion began by pointing out three important aspects of *Wyatt*.[126] First, *Wyatt* reaffirmed that private parties can be subject to constitutional liability if they act like or in cooperation with the state enough to be deemed state actors. Second, *Wyatt* specified that to extend qualified immunity to a defendant, a court had to find that a similarly-situated defendant was entitled to an immunity at common law in 1871, or that public policy concerns warranted such an immunity. Finally, the majority recognized that *Wyatt*'s holding of no qualified immunity only applied to private party defendants who have conspired with state officials in their challenged actions,[127] not to all private parties, and thus was not dispositive of the issue in *Richardson*.

1. Rejection of Functional Approach to Historical Analysis

After reviewing *Wyatt*, the Court examined at length the history of prisons in this country and in England to determine if the common law of 1871 provided an immunity for a defendant like the one in *Richardson*.[128] Instead of looking for historical evidence of an immunity provided for those who performed the governmental function of prison guard, however, the Court focused its historical search on whether an immunity was traditionally provided for prison guards employed by a private company.[129] The Court found no evidence of an immunity for privately-employed prison guards in 1871.[130]

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125. *See Richardson*, 117 S. Ct. at 2102.

126. *See id.* at 2103.

127. *Wyatt* only applied to private defendants "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." *Id.* (quoting Wyatt v. Cole, 504 U.S. 158, 168-69) (1992)).

128. *See id.* at 406.

129. The Court had previously extended § 1983 qualified immunity to state-employed prison guards. *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978). *Procunier*, however, relied on public policy and not historical availability of immunity. *See id.*

130. *See Richardson*, 117 S. Ct. at 2105.

Richardson's focus on who employs the defendant, instead of what function the defendant performs, contradicts the Court's previous reliance on a functional approach to granting qualified immunity.[131] In *Harlow*, the Court stated that determining whether a defendant would be entitled to assert the qualified immunity defense depended on what type of functional role the defendant played.[132] Similarly, in *Briscoe v. LaHue*, the Court stated, "our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."[133]

Richardson's rejection of a functional approach in determining the availability of qualified immunity is also inconsistent with the Court's reliance on a functional approach in determining which private parties are subject to § 1983 liability in the first place. The state action doctrine's "public function" test subjects a private party to § 1983 liability if the private party performs a traditional governmental function.[134] The premise of the public function test is that, although the Constitution does not apply to private activity, it is fair to treat a private party performing a traditional government function as if it were the government for purposes of constitutional liability. In *Richardson*, the Court apparently accepted this premise for purposes of assuming that the privately-employed prison guard defendants are subject to § 1983 liability, but then rejected this premise by not treating the defendants like state employees for purposes of immunity analysis.

The Court's failure to find any evidence of an immunity for privately-employed prison guards in 1871 is not surprising, because the Court was not able to find any case in or before 1871 that involved a privately-employed prison guard.[135] Indeed, no such cases exist, because running prisons has traditionally been the domain of government, which ironically is the same reason the Court is willing to subject the privately-employed prison guard to § 1983 liability. Thus, the Court's analysis places private parties performing traditionally governmental functions in a "Catch 22." A private party is subject to constitutional liability because it is performing a function

131. *See supra* note 105 and accompanying text.

132. Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982) ("Moreover, in general our cases have followed a 'functional' approach to immunity law."); *see also supra* note 105.

133. Briscoe v. LaHue, 460 U.S. 325, 342 (1983).

134. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (applying the public function test but finding that a private school does not qualify as a state actor since schools have never been the exclusive domain of government); *see also supra* note 84.

135. *Richardson*, 117 S. Ct. at 2104.

traditionally performed only by the government, but it will not be eligible for qualified immunity from this constitutional liability because there is no tradition of immunity for private parties performing such a function.

The Court was able to find three 19th-century cases after 1871 in which private prison contractors were defendants, but none discussed the issue of immunity,[136] and none involved § 1983, because the Court did not extend § 1983 liability to private parties until 1970.[137] Thus the Supreme Court was willing to impose § 1983 liability on private parties even though no tradition of such liability exists, but the Court was unwilling to extend immunity from § 1983 to private parties because the private parties have no tradition of such immunity.

2. Rejection of Functional Approach to Public Policy Analysis

Because the Court could not find a tradition of immunity for privately-employed prison guards, the Court next addressed the question of whether public policy justified the extension of qualified immunity to privately-employed prison guards. The Court acknowledged several purposes for granting qualified immunity, but found the most important purpose of qualified immunity to be the encouragement of the vigorous and uninhibited exercise of public duty.[138] According to the Court, qualified immunity allows public officials to perform their duty without the unwarranted timidity that the threat of too much constitutional liability would create.[139]

In contrast to governmental officials, the Court decided that privately-employed prison guards did not need the incentive of qualified immunity to ensure the bold performance of their job. The Court reasoned that the competitive market pressures present in the private sector, combined with profit motive, would prevent timid and ineffective job performance.[140] Private prison companies with overly timid guards would lose out to other companies, so these companies

136. *See id.*

137. *See supra* note 65 and accompanying text.

138. *See Richardson*, 117 S. Ct. at 2105-06. Other purposes for granting qualified immunity noted by the Court include: protecting the government's ability to perform its traditional functions; ensuring that talented candidates are not deterred from entering public service; protecting citizens from unwarranted timidity by public officials; contributing to principled and fearless decision making; and preventing officials from being distracted from their governmental duties by lawsuits. *See id.*

139. *See id.*

140. *See id.* at 2106-07.

have incentives to ensure vigorous job performance, the Court reasoned.[141]

A publicly-employed prison guard, the Court noted, operatos in a system where vigor and effectiveness are not subject to the same market checks. The publicly-employed prison guard operates in a "system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail."[142] Thus, the Court reasoned, a publicly-employed prison guard needs extra incentive to act boldly, while a privately-employed prison guard already has this incentive from market pressures.

Market pressures may induce a private prison to operate more effectively and efficiently than a government-run prison,[143] but market pressures are unlikely to ensure vigorous job performance by individual private prison guards who are subject to personal liability for constitutional violations. The Court did not consider that a § 1983 plaintiff is precluded from suing a company under a *respondeat superior* theory.[144] A § 1983 plaintiff must sue individual private employees who are less likely than their employer to take account of the market pressures that the Court discusses. An individual prison guard faced with potential personal liability for his actions is unlikely to be emboldened by the chance to improve the market position of his employer.

Even if market pressures were affecting the behavior of individual prison guards, the market is unlikely to encourage prison

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141. *See id.* at 2106.

142. *Id.* at 2107.

143. This point is controversial, however, as opponents of privatization believe private companies do not perform governmental services more efficiently. *See supra* note 30.

144. The defendants in *Richardson* were individual employees, so *Richardson* did not address the liability of the company itself for § 1983 violations. The case of *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978), precludes the possibility that any § 1983 defendant could be held liable under a *respondeat superior* theory, so a private company would have to have an official policy in violation of the Constitution te be subject to § 1983 liability. *See also* Sanders v. Sears Roebuck & Co., 984 F.2d 972, 975-76 (8th Cir. 1993) (applying *Monell*'s rule against § 1983 vicarious liability te a private defendant). *But see* Groom v. Safeway, Inc., No. C96-0417D, 1997 U.S. Dist. LEXIS 10999, at *10 n.4 (W.D. Wash. July 18, 1997) (arguing that there is no binding authority for the proposition that a private entity cannot be vicariously liable for the actions of its employees in violation of § 1983).

Still undecided, however, is the issue of when an unconstitutional action would be attributable directly to the corporation and not just to the individual corporate officer. Presumably, this issue would be decided by analogy to the cases outlining when a municipality is liable under § 1983. *Monell* held that a municipality is liable under § 1983 when the challenged action is an execution of official governmental policy or custom. *See Monell*, 436 U.S. at 694. How a court would determine what counts as official corporate policy or custom is unclear.

guards to perform their jobs more vigorously, unless more vigorous performance somehow lowers costs. More vigorous prison guard behavior is not likely to lower costs, but instead is likely to raise costs as it subjects the prison guard to potential legal liability.[145] Private prison guards have no more incentive to act vigorously than do public prison guards, and now that the law applies more scrutiny to the actions of private prison guards than to the actions of public prison guards, private prison guards are likely to be more hesitant in their job performance than public prison guards.

In addition, this rule inequitably subjects a privately-employed prison guard to more constitutional liability simply because the private prison that employs him has market incentives to operate more effectively. To an individual prison guard, it makes little difference whether his paycheck comes from the state directly or from a private company that the state pays to run the prison. A private prison guard works under the same conditions and performs the same public duties as a state-employed prison guard. The law should treat persons equally who are in like situations performing the same work, unless a good reason exists not to do so. The Court in *Richardson* did not suggest any distinction between a privately-employed prison guard and a state-employed prison guard that makes it fair to subject one to more liability than the other.

From the opposite perspective, it makes little difference to an individual prisoner what entity employs the guards. A prisoner who happens to be incarcerated in a privately-run prison should not have a legal advantage in § 1983 suits over a prisoner in a state-run prison. But after *Richardson*, a prisoner held in a privately-run prison may be able to recover damages in a § 1983 action, when under the exact same facts a prisoner held in a state-run prison would not even be able to proceed to discovery. All prisoners should have equal constitutional remedies.

The Court's reasoning may have been motivated by a belief that privately-employed prison guards are somehow more likely to violate a prisoner's individual rights than are state-employed guards.[146] Thus, the Court may have denied qualified immunity to

145. *See Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting) (questioning the majority's understanding of market forces).

146. The Court did not articulate this belief, but it did focus heavily on the increased "vigor" of a privately-employed guard. Since "vigor" implies "force," the Court may have been implying that a privately-employed prison guard is likely to sacrifice constitutional rights through the use of force with prisoners. *See id.* at 2112 (Scalia, J., dissenting) (citing this theory as a rationale behind the Court's decision that the Court "avoids mentioning").

counterbalance its perception of the privately-employed guard's increased tendency to violate the Constitution.[147] This reasoning may stem from a distrust of for-profit operations and a belief that governmental officials are more motivated by the public good than are private employees.[148] But in *Richardson*, the Court did not cite any evidence that individuals employed privately have reason to be less respectful of the Constitution than publicly-employed individuals; there is no evidence that constitutional violations increase profit.[149] More likely, prison guards who perform the same duties and face the same problems have the same tendency to respect or violate the Constitution.

3. Treating Private Parties Like the State for Liability But Not for Immunity

As further justification for its decision, the Court in *Richardson* posited that private prison guards are no more important than other privately-employed individuals who perform "publicly important tasks" but do not have qualified immunity.[150] Thus, the Court found no reason to differentiate between the defendants and other private parties for purposes of granting qualified immunity. But the Court failed to recognize that other privately-employed individuals do not need qualified immunity from constitutional liability, because they are not classified as state actors subject to constitutional liability in the first place. Privately-employed individuals who perform governmental functions are fundamentally different from other privately-employed individuals, because they are labeled state actors and are subjected to constitutional liability.

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147. The Court of Appeals decision affirmed by *Richardson* cited this theory as its primary reason for denying qualified immunity to the defendants. *See* McKnight v. Rees, 88 F.3d 417, 424 (6th Cir. 1996) ("We believe this increased threat of injury by violation of constitutional guarantees counsels against granting qualified immunity to correctional officers employed by a private corporation.").

148. *See id.* (noting that "[t]he balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook").

149. *See* Citrano v. Allen Correctional Ctr., 891 F. Supp. 312, 319 (W.D. La. 1995), in which the court reasoned:

> [T]here does not seem to be any basis for concluding that prison workers employed by government contractors have any less interest than government employed prison workers in the good of the public or in civil rights. It seems more reasonable to conclude that because they perform the same functions and face the same problems on a day to day basis that their subjective attitudes about their jobs are more alike than different.

150. *See Richardson*, 117 S. Ct. at 2107. The Court did not provide further examples of publicly important tasks.

The Court in *Richardson* rejected a functional approach in deciding whether to grant private parties qualified immunity, noting that such an approach "bristles with difficulty" because government and private industry engage in "fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery."[151] But the Court already uses such a functional approach when deciding whether to treat private parties like governmental officers under the state action doctrine.[152] Thus, the Court uses a functional approach to justify turning private parties into state actors subject to constitutional restraints, but then the Court shuns that same functional approach when determining the level of immunity these private parties should have.

VII. CONCLUSION

A. Richardson's *Effect on the Privatization Movement*

Over the last thirty years the Supreme Court has greatly expanded the scope of § 1983 liability. Although nothing in § 1983's legislative history suggests that it was intended to impose coustitutional liability on private parties, § 1983 is now a powerful weapon against private parties who are labeled state actors under the state action doctrine. The Court has interpreted history liberally in its reading of § 1983; however, the Court in *Richardson* applied a strict historical analysis for determining the availability of qualified

151. *Id.* at 2106.

152. *See supra* note 84 and accompanying text for a discussion of the public function state action test. In *Richardson*'s attempt to distinguish private prison guards from governmental prison guards, the Court noted that "correctional functions have never been exclusively public." 117 S. Ct. at 2104. This finding calls into question the Court's assumption that the private prison guards are state actors. Both *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), and *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982), focused on an "exclusivity" test, which holds that a private party is not a state acter under the public function test unless that public function had been traditionally the exclusive prerogative of the state. When applied te *Richardson*'s finding that prisons have not been the exclusive domain of government, these cases suggest that the Court would not find the private prison guards te be state actors. But in another case, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991), the Court used tlie public function tost without the exclusivity requirement. In *Edmonson*, the Court stated the test as "whether tlie actor is performing a traditional governmental function," notably leaving out the word "exclusive." *See id.; see also* Georgia v. McCollum, 505 U.S. 42, 52 (1992) (applying the *Edmonson* test and omitting "exclusive" in determining wliether a criminal defendant's exercise of peremptory challenges constitutes a state action). Thus, although it is tochnically an open question whether the private prison guards in *Richardson* are state actors, little doubt exists that they are. *See supra* note 120.

immunity for private parties. This contradiction in method inequitably subjects private parties performing state functions to more constitutional liability than the state itself.[153] The irony of this result is that the Constitution was designed to protect private parties from the state's power and was not meant to restrict private party behavior.

The Court's legal conclusions concerning the extent of § 1983 liability borne by a private party performing a governmental function may reflect an underlying political prejudice against privatization. This political prejudice, though unstated, is revealed by the Court's implication that employees of for-profit companies are more likely to violate an individual's constitutional rights.[154] But predicting whether a government or private employee is more likely to violato people's constitutional rights is a political decision about the merits of privatization that is better made by the political branches of government. A court is better suited to decide when a constitutional violation has occurred, not to predict who is more likely to commit violations in the future.

Even if the Court's analysis is not driven by its view of the political merits of privatization, though, the Court's decision in *Richardson* has the effect of unjustifiably handicapping the privatization movement.[155] When a state or local government is deciding between having its employees perform a function or delegating the function to a private organization, the decision should be made on the basis of which better serves the community. The decision is an inherently political choice involving many factors, including a determination of which method better protects people's rights. After *Richardson*, however, even if the function could be better performed by delegating to a private entity, the decision-making body may decide to have governmental employees perform the task so they will be eligible for the cover of qualified immunity.

By deciding to subject privately-employed individuals performing a governmental service to more constitutional liability than their state-employed counterparts, the Court has diminished the feasibility

153. *Cf.* Wyatt v. Cole, 504 U.S. 158, 180 (1992) (Rehnquist, C.J., dissenting) ("Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was 'to prevent *state officials* from using the cloak of their authority under stato law to violate rights protected against state infringement.' ").

154. *See supra* note 146 and accompanying toxt.

155. *See Richardson*, 117 S. Ct. at 2212-13 (Scalia, J., dissenting) ("The only sure effect of today's decision—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons.").

of privatization. By artificially raising the costs of privatization, the Court has effectively made a political choice about the future of privatization. The courts should leave the political question of privatization to the political branches of government. The pros and cons of privatization are complex and deserve a careful political balance before a decision is made on whether to privatize. The judicial branch should not weigh privatization's merits. Courts should instead provide a level legal playing field that allows the political branches to fairly assess the value of privatization without any artificial legal handicaps.

B. A Way to Level the Playing Field After Richardson

The only way to provide a level legal playing field for privatization is to overrule *Richardson*. Congress should pass legislation mandating that whether the government itself performs a function or the government delegates the function to the private sector, those individuals performing the same function will be subject to the same level of constitutional liability.[156] This legislation would put the issue of privatization back into the hands of the legislative and executive branches of federal, state, and local governments. These political branches of government could then decide whether to privatize based on the merits, instead of having to consider the costs of increased constitutional scrutiny applied to private providers of government services. For example, the legislation could state:

> A private party who is deemed to be a state actor for performing a function delegated by any branch of federal, state, or local government shall have the same immunities and defenses to a claim of constitutional liability as if such party were a part of the delegating governmental entity.

Such a statute would guide courts back to considering only functional categories when deciding whether to grant qualified immunity. Courts would decide to grant or not grant qualified immunity to a provider of a governmental service based on what function the individual performs, instead of who signs his paycheck. Such a statute would also resolve the inconsistency and unfairness of treating a private party as a state actor for purposes of imposing constitutional

156. Congress has the power to overrule *Richardson*, as *Richardson* is an interpretation of § 1983, not the Constitution. Thus legislation of the type proposed here would not overrule a constitutional decision, but rather would simply clarify a federal statute.

liability but not for purposes of granting immunity to consitutional liability.

C. A Way to Mitigate the Negative Effects of Richardson

In the absence of such a law from Congress, lower courts should attempt to ameliorate the negative effects of *Richardson* as much as possible. Fortunately, *Richardson*'s holding left open the possibility of a special "good faith" defense that could somewhat mitigate the extra constitutional liability imposed by *Richardson* on privately-employed persons performing governmental functions.[157] *Richardson* does not define this potential good faith defense, but Justice Kennedy's concurring opinion in *Wyatt v. Cole* does define such a defense.[158]

Justice Kennedy defines a good faith defense for private parties that replicates the qualified immunity a state official received under *Wood v. Strickland* before *Harlow* removed the subjective component from qualified immunity.[159] Thus, a private party defendant would escape constitutional liability if he were to show that he subjectively believed his acts to be constitutional and that his belief was objectively reasonable.[160] Under *Harlow*, a state officer can avoid constitutional liability simply by showing that his acts were objectively reasonable; his subjective intent is irrelevant. *Harlow* removed the subjective component of *Wood*'s qualified immunity because a plaintiff with an otherwise frivolous claim could too easily force a state officer to trial merely by alleging malicious intent. *Harlow*'s qualified immunity involves only an objective component that can usually be resolved by summary judgment at the pleadings stage.[161]

A private party good faith defense would, of course, suffer from the same limitations that qualified immunity did under *Wood* before

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157. *See id.* at 2108 (stating that its holding does not foreclose the possibility of a special good faith defense for private parties).

158. *See supra* note 110.

159. *See supra* notes 97-104 and accompanying text and note 110 and accompanying text. The Sixth Circuit, in a case decided before *Richardson* or *Wyatt*, defined a private party good faith defense very similar te that in Justice Kennedy's *Wyatt* concurrence. *See* Duncan v. Peck, 844 F.2d 1261, 1268 (6th Cir. 1988) (granting summary judgment to a private party defendant accused of violating the plaintiff's constitutional rights because there was no material question of fact as to the defendant's subjective good faith reliance on a reasonable interpretation of the Constitution).

160. *See supra* note 98 and accompanying text. According to *Wood*, a belief is not objectively reasonable if it is against "settled, indisputable law." *See supra* note 99 and accompanying text.

161. *See supra* notes 100-04 and accompanying text.

Harlow. A private party defendant accused of malicious intent would still have to go to trial in a case where a state officer defendant performing the same function could win on summary judgment by showing his acts to be objectively reasonable. Although not equal to *Harlow*'s qualified immunity, this good faith defense would, nevertheless, somewhat mitigate the negative effects of *Richardson*. A private provider of a governmental service would at least have some defense to constitutional liability based on his good faith behavior, even if he has to suffer through a lengthy trial to prove his good faith. In the absence of a law overturning *Richardson*, courts should adopt this good faith defense for private parties performing functions delegated by the government.

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