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Proposals to Amend the Civil Rights Act, 42 U.S.C. 1983

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> There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. . . . The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction.***

I. INTRODUCTION

One hundred and twenty-five years ago, Congress passed the controversial Civil Rights Act of 1871.[1] It lay moribund for nearly 100 years.[2] Then, in 1961 the Supreme Court breathed life into the statute's key phrase "under color of any [state law]" by extending its reach to actions by government officials who violate state law.[3] Ever since, the courts have been swamped with civil rights cases.[4] Presently, tens of thousands flood the judicial systems.[5]

The statute itself paints with a broad brush, much as constitutional amendments do. Interpretative problems abound, and the courts have struggled to find the meaning of the statute and the scope of the constitutional guarantees that it embraces. The Supreme Court alone has issued more than a score of major opinions interpreting the statute in light of the intent of the 42nd Congress. Lower federal

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*** Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 116-17 (1921). Justice Frankfurter echoed this sentiment: "In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947).

1. For the legislative history of the Act, see 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS 591 (1970).

2. 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 (1985).

3. *See* Monroe v. Pape, 365 U.S. 167 (1961) (holding that a city policeman acting contrary to state law acts "under color" of state authority for purposes of § 1983).

4. In 1994, 29,636 non-prisoner civil rights cases were commenced in the federal district courts. Prisoner civil rights cases accounted for an additional 37,925 filings during the same period. HENRY HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (4th ed. 1996). Although there is no breakdown to determine the cases brought under 42 U.S.C. § 1983, we may properly assume that the bulk of the cases fall under this statute. *Id.*; *see also* Crawford-El v. Britton, 118 S. Ct. 1584, 1603 (1998) (Scalia, J., dissenting) (decrying the "tens of thousands of [civil rights] suits" filed in the federal courts each year).

5. Of the 250,233 civil cases pending in the district courts in 1996, 42,961 were civil rights actions and another 51,428 were prisoner petitions. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1997 216; HART & WECHSLER, *supra* note 4, at 49.

courts and state tribunals[6] disagree on significant questions regarding its scope and await direction by the Court that may not be forthcoming for years.[7] Even if the Court could resolve the conflicts among the lower courts, significant questions linger: Should the Court be tethered to the intent of the 42nd Congress? Can it truly discern that intention? Or instead, should it forthrightly expound federal common law principles and interpret the statute in light of contemporary values and policies?[8] More importantly, from the authors', as well as from Cardozo's perspective, would it not be preferable for Congress to set the judicial process in motion again, with a new and clarified point of departure, a new impetus and direction?[9]

Of course, congressional action is restricted to spheres that are properly within the legislative domain. Much of the law of § 1983 is based upon judicial interpretation of the Constitution not subject to direct congressional overrule.[10] Thus, Congress should accept constitutional doctrine pronounced by the Court and draft statutory amendments accordingly. In this way, the Court and Congress may interact in a meaningful rather than mutually destructive way.

An example of the need for clear congressional directives based upon contemporary values may illumine the point of the article: Under Eleventh Amendment jurisprudence, a state has immunity from suits in federal court for retrospective damage awards under the Civil Rights Act.[11] Indeed, under *Will v. Michigan*

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6. Although federal circuit court opinions bind the district courts within the circuit that issued them, state courts within that circuit are free to disregard them. HART & WECHSLER, *supra* note 4, at 507.

7. Even when that opportunity arises, the Court often aggravates the situation by issuing further opaque opinions. *See* Board of County Comm'rs of Bryan County v. Brown, 117 S. Ct. 1382, 1401 (1997) (Breyer, J., dissenting) (arguing that the body of interpretive law is so complex that the law has become difficult to apply).

8. *See* Smith v. Wade, 461 U.S. 30, 34 n.2 (1983) ("[I]f the prevailing view on some point of general tort law has been changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine."). Justice Scalia believes that the holding of *Monroe*, 365 U.S. at 167, is flatly wrong and that the Court created a cause of action bearing little resemblance to the intent of Congress a century earlier. *Crawford-El*, 118 S. Ct. at 1603. He believes that the application of common law rules to the statute created by *Monroe* would thwart any intention of any "sane" Congress. *Id.* Thus, he forthrightly asserts that the courts are engaged "in the essentially legislating activity of crafting a sensible scheme . . . [from this maze]." *Id.* Surely a more sensible solution would entail congressional rather than judicial crafting.

9. Although this article addresses the need to amend the Civil Rights Act of 1871, the implications for other areas of the law should not go unnoticed. For example, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and later cases, the Court implied remedies under the Constitution against federal officials for violations of constitutional rights. As stated by one authority, "*Bivens* created for federal officials a damages remedy directly analogous to that available against state and local officials under § 1983." PETER W. LOW & JOHN C. JEFFRIES, CIVIL RIGHTS ACTIONS 41 (1994). Not surprisingly, in several significant areas the Court has not distinguished between *Bivens*-type actions and suits under § 1983. Thus, in *Butz v. Economou*, 438 U.S. 478, 504 (1978), the Court concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." But if Congress amends § 1983, will those statutory directives spill over to *Bivens*-type actions? Should they?

10. *See, e.g.*, Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997) (holding that Congress lacks power to determine what constitutes a constitutional violation under the Free Exercise of Religion Clause of the First Amendment).

11. Edelman v. Jordan, 415 U.S. 651, 677 (1974); *see also* Quern v. Jordan, 440 U.S. 332, 339 (1979) ("[Section] 1983 did not override state immunity.").

Department of State Police,[12] a state is not even a person within the meaning of the Act.[13] Congress can change this result by amending the statute in clear and unmistakable language to include a state and its agencies within its definition of "person."[14] Such an amendment would not pose any confrontational problems with the Court. Indeed, Congress would merely be acting in accordance with the Court's explicit directives for implementing the congressional intent to make states accountable—in accordance with clear and unmistakable congressional language.[15] Should Congress not engage in the dialogue of state accountability for civil rights violations and legislate in light of twenty-first century values and norms? Are the intentions of the 42nd Congress, which legislated more than a century and a quarter ago, meaningful any longer?

Before proceeding to discuss the areas in which Congress may choose to legislate, we briefly allude to the dangers inherent in and benefits of the legislative process.

A. Dangers

Several dangers lurk in the legislative process. First, Congress may legislate in ways that have not been anticipated.[16] Recall that our own constitutional convention

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12. 491 U.S. 58 (1989).

13. Thus a § 1983 case cannot be brought against a consenting state, even in a state tribunal. Federal law controls which defendants may be sued under the Act. *See* Howlett v. Rose, 496 U.S. 356 (1990) (ruling unanimously that state courts are obliged to entertain a § 1983 suit against local school board).

14. *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223, 227 (1989) (recognizing that under section 5 of the Fourteenth Amendment Congress has the power to abrogate a State's Eleventh Amendment immunity); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

15. Congress may properly override Eleventh Amendment immunity by resorting to section 5 of the Fourteenth Amendment, which provides that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." It may not derogate from state immunity under the Indian Commerce Clause. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (overruling Pennsylvania v. Union Gas, 491 U.S. 1 (1989), which had held that the power to overrule Eleventh Amendment immunity existed under the Commerce Clause). Whether other provisions of the First Article of the Constitution repose power in Congress to override Eleventh Amendment immunity await explication by the Court. *See* Chavez v. Arte Publico Press, 139 F.3d 504 (5th Cir. 1998) (holding unconstitutional Congress' abrogation of State's immunity under the Copyright and Lanham Acts); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Bd., 148 F.3d 1343 (Fed. Cir. 1998) (determining that Congress can abrogate State's immunity in patent infringement suits).

16. During the debate on the 1964 Civil Rights bill, gender ("sex") was added as an amendment in order to *defeat* the bill. The course of civil rights law changed when the amended bill *passed*. For a discussion of this interpretation of the legislative history, see Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

Professor Hamilton notes,

> [a]t the beginning of President Reagan's second term in 1985 there was a brief flirtation with the idea that corporate income tax should be abolished; however, as the compromises that eventually became the Tax Reform Act of 1986 were hammered out, this idea was abandoned. Instead, there was increased reliance on the corporate income tax as a revenue raiser—investment tax credits, accelerated depreciation deductions, and similar revenue reducing items were either eliminated entirely or cut back. . . .

ROBERT W. HAMILTON, CORPORATIONS 139 (5th ed. 1994).

Unfortunately, at times the legislative response may compound the confusion. Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L. J.

was called for the limited purpose of proposing appropriate modifications to the Articles of Confederation.[17] What happened in the fateful weeks that followed could hardly have been anticipated. And had Louis XVI anticipated when he called the estates general to consider the problems besetting the state that their solution would end in his execution by guillotine—a rather dramatic and unanticipated turn of events—he most assuredly would not have called the meeting.[18]

Nevertheless, we believe that Congress has the duty, after 125 years, to reconsider the statutory basis for civil rights actions and give the statute the moral force and clear direction that it presently lacks when the courts supply its content.[19]

Second, the legislative process may focus too much on the costs to society of civil rights remedies and give too little weight to the social benefits derived. Since the costs of the remedy are more readily quantifiable than benefits, the result of the inquiry may be skewed toward abrogating or limiting the remedy.[20] We assume that Congress is aware of this potential danger and will not lose sight of the importance of remedying constitutional violations.[21] These remedies should not be lightly swept aside in the name of expediency.[22]

Third, congressional action or inaction[23] presents the possibility that the courts will rely upon the legislative process to resolve more than was intended. For example, in *Patsy v. Board of Regents*,[24] the Court buttressed its holding that the Act does not require exhaustion of administrative remedies by relying upon the Civil Rights of Institutionalized Persons Act of 1980,[25] which created a specific,

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445, 486 (1991).

17. *See* HART & WECHSLER, *supra* note 4, at 3 (stating that "[w]hen the Constitutional Convention met in Philadelphia with a charge to amend the Articles of Confederation, it agreed immediately to ignore the limits on its mandate and instead to draft an entirely new constitution").

18. WILL DURANT & ARIEL DURANT, 11 THE STORY OF CIVILIZATION: THE AGE OF NAPOLEON 11-12 (1975).

19. Badly fractured Supreme Court opinions based upon the supposed intent of the 42nd Congress exacerbate the bankruptcy of the opinions. Unfortunately, 5-4 decisions are now almost commonplace. For a recent example in the civil rights arena, see Crawford-El v. Britton, 118 S. Ct. 1584 (1998) (holding improper the lower court's fashioning of a heightened burden of proof).

20. One unanticipated turn of events that would dramatically alter civil rights litigation could occur if Congress were to reject the courts' prior interpretation of the phrase "under color of law" as including acts that violate state law. Of course, were Congress to reject *Monroe*'s premise, the Court might consider the issue of whether to imply a cause of action directly from the Fourteenth Amendment. Monell v. Department of Soc. Serv., 436 U.S. 658, 712 (1978) (Powell, J., concurring).

21. Section 1983 remedies may also reach certain statutory violations. Blessing v. Freestone, 117 S. Ct. 1353, 1359 (1997). Congressional activity in this statutory arena does not interfere with the appropriate role of the Court. *Id.*

22. *See* Mathews v. Eldridge, 424 U.S. 319, 347 (1976) (analyzing whether procedural due process requires a pre-deprivation hearing in light of the attendant "administrative burden and other societal costs").

23. The failure to legislate has, at times, led the Court to observe that Congress in the re-enactment process has acquiesced to common law interpretation of statutes. *See* Evans v. United States, 504 U.S. 255, 269 (1992); Flood v. Kuhn, 407 U.S. 258, 284 (1972). Justice Scalia has pointed out the silliness of analyzing "not legislative history, but the history of legislation-that-never-was." United States v. Estate of Romani, 118 S. Ct. 1478, 1489 (1998).

24. 457 U.S. 496 (1982).

25. 42 U.S.C. § 1997 (1994). This act was enacted primarily to give the United States Attorney General standing to enforce the constitutional and statutory rights of institutionalized persons.

limited exhaustion requirement for certain prisoner litigation under § 1983. The Court surprisingly stated the following:

> Congress understood that exhaustion is not generally required in § 1983 actions, and . . . decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.[26]

We recognize that Congress may not be successful in amending § 1983. It may reach an impasse regarding the proposed amendments, or the legislative process may prove impractical or unpopular. Many bills to amend § 1983 have been introduced and have failed.[27] For that reason, Congress may prefer to shift the responsibility of "law making" to an all-too-willing judiciary.[28] These concerns, however, should not deter discussion of these pressing civil rights issues. We need not be unduly pessimistic before the process begins.

B. Benefits

The benefits of congressional oversight and direction seem obvious. First, it responds directly to the many occasions on which the Court or individual justices have recognized the need for congressional action. There are many examples of this trumpet call,[29] and not all were sounded by dissenters. In *Patsy*,[30] the Court recognized the need for congressional action, as well as the inability of the judiciary, to resolve the policy considerations relating to the imposition of an exhaustion requirement.[31] Justice O'Connor, concurring in the result in *Patsy*,[32] mentioned that Congress' enactment of the Civil Rights of Institutionalized Persons Act might "prompt it to reconsider the possibility of requiring exhaustion in the

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26. *Patsy*, 457 U.S. at 508.

27. *E.g.*, S. 1983, 96th Cong. (1979); H.R. 721, 99th Cong. (1985); S. 325, 100th Cong. (1987).

28. In extraordinary situations, this shift of responsibility may even violate separation of power norms. *See* American Textile Mfrs.' Inst. v. Donovan (Cotton Dust Case), 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting) (expressing his belief that OSHA unconstitutionally delegated legislative power to the executive branch).

29. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 724 (1978) (Rehnquist, J., dissenting). In a recent case involving whether the false statement statute contains an "exculpatory no" exception, Justices Souter and Ginsberg sounded the need for congressional action. Brogan v. United States, 118 S. Ct. 805, 815 (1998).

30. *Patsy*, 457 U.S. at 515; *see* Crawford-El v. Britton, 118 S. Ct. 1584, 1595 (1998) (recognizing that procedural issues "are most frequently and most effectively resolved either by the rulemaking process or the legislative process").

31. In the opinion, the Court asserted that "[t]hese and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the Judiciary in the context of diverse constitutional claims relating to thousands of different state agencies." *Patsy*, 457 U.S. at 514. This essay does not rely on these reasons for congressional action since we advocate congressional consideration only in those areas in which the debate has been foreclosed, or virtually so, by Supreme Court rulings. Nevertheless, congressional action that does go further may be desired.

32. *Id.* at 516 (O'Connor, J., concurring).

remainder of section 1983 cases."[33] By calling for congressional oversight, the Court acknowledges its secondary role of construing statutes rather than creating them. The free-wheeling days of *Swift v. Tyson*[34] are over. Filling the statutory interstices is a judicial function that should take place only when the statutory language does not clearly direct the course. It is not the ideal to have the courts fill the gaps in the act, but rather a necessary interim measure. Moreover, having Congress clearly define its intentions will not impair the Court's creative role in constitutional adjudication in the slightest.[35]

Second, congressional direction adds moral force to the breadth and the limitations of the Civil Rights Act. After 125 years, Congress should definitively address questions concerning the statute's interpretation that the courts have addressed with solutions imposed by judicial fiat.[36] Even if Congress has significant problems in reaching a consensus, we may gain insight by forthright recognition of that stalemate. At the very least, the dialogue should begin.

Third, given the breadth of some of its rulings, the claim that the Court merely interprets the intent of the 42nd Congress is so unconvincing and disingenuous that it detracts from the moral force of its pronouncements. The legislative history surrounding § 1983 is sparse and, in many instances, inconclusive.[37] Yet the Court often searches for a clear answer from the legislative debates, even when it must know that the answer is not there. On occasion, the Court has even reached inconsistent results on issues of statutory analysis,[38] casting further doubt upon the assertion that the Court is merely interpreting congressional intent. Whether the Court adheres to its own precedent or deviates from it, the Court seems to depend upon its own conception of the need for stare decisis in the particular area being considered.[39] The Court has given no litmus test for determining when it will apply or reject stare decisis, leaving observers to wonder whether stare decisis is just a result-oriented doctrine applied for the Court's convenience without regard for

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33. *Id.* at 517 (O'Connor, J., concurring).

34. *See* Erie v. Tompkins, 304 U.S. 64, 78 (1938) (overruling Swift v. Tyson, 41 U.S. (1 Pet.) 1 (1842) by holding that there is no federal general common law).

35. Perhaps the Court might find more time to spend on constitutional and other pressing issues if it were not presented with so many intractable statutory issues.

36. In 1871, Congress could not have anticipated the myriad problems that the judiciary has confronted in interpreting the Act. Indeed, until *Monroe v. Pape*, 365 U.S. 167 (1961), interpretive issues were rarely encountered. But surely everyone interested in the law of § 1983—including Congress—appreciates that Court decisions have produced a maze of complexity shorn of solid foundational moorings. The civil rights law is a confusing melange. *See* Board of the County Comm'rs of Bryan County v. Brown, 117 S. Ct. 1382, 1401 (1997) (Breyer, J., dissenting).

37. For the legislative history, see SCHWARTZ, *supra* note 1, at 591.

38. *See, e.g.*, Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (overruling Monroe v. Pape, 365 U.S. 167 (1961), which held that cities are not persons for purposes of § 1983).

39. In *Monell*, Justice Brennan articulated for the Court four reasons why stare decisis should not be applied in overruling *Monroe's* holding that cities are not accountable under the Civil Rights Act. The four reasons are as follows: (1) *Monroe* was a departure from prior practice; (2) recent expressions of congressional intent indicated that *Monroe's* principle was unsound; (3) municipalities could assert no reliance claim; and (4) *Monroe's* statutory interpretation is flatly wrong. *Id.* at 695-701.

either the intent of the 42nd Congress or the purposes that prompted the development of the doctrine.[40]

A graphic illustration demonstrates this point. In *Monroe v. Pape*,[41] the Court unanimously held that Congress "did not undertake to bring municipal corporations within the ambit of [§ 1983]."[42] After a cursory review of the legislative history, the Court stated its clear belief that Congress did not intend municipal liability under § 1983: "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by . . . [a predecessor statute], was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."[43] The error was compounded years later in *Aldinger v. Howard*.[44] In that case, the plaintiff attempted to join his state law claim against a city to a § 1983 case against individuals pursuant to the pendent jurisdiction of the district court. The Court denied the joinder, finding that joinder would frustrate congressional intent to insulate municipalities from these types of suits.[45]

Just seventeen years after *Monroe*, the Court abruptly reversed itself. In deciding *Monell v. New York City Department of Social Services*,[46] the Court reviewed the legislative history anew and found that "analysis . . . compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[47] Justice Rehnquist dissented vigorously, strenuously calling for congressional accountability: "Only the Congress, which has the benefit of the advice of every segment of this diverse Nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision."[48] Congress apparently did not find it necessary to consider the Court's change in position.

Finally, in *Will v. Michigan Department of State Police*,[49] the Court reached the question left undecided in *Monell* of a state's accountability for violations of the Civil Rights Act. After canvassing the legislative history, a bare majority of the Court held that the word "person" does not include states or state officials acting in their official capacities, in part because the statute did not clearly reveal that

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40. The Court has recognized greater freedom in altering constitutional doctrine than in overruling decisions based upon statutory or common law. After all, Congress may overturn common law and decisions that interpret statutory provisions. On the other hand, constitutional change, short of Court overrule, may be accomplished only by constitutional amendment, a rather cumbersome process.

41. 365 U.S. 167 (1961).

42. *Monroe*, 365 U.S. at 187.

43. *Id.* at 191.

44. 427 U.S. 1 (1976).

45. *Aldinger*, 427 U.S. at 19.

46. 436 U.S. 658 (1978).

47. *Monell*, 436 U.S. at 690.

48. *Id.* at 724 (Rehnquist, J., dissenting).

49. 491 U.S. 58 (1989).

Congress intended to alter the "usual constitutional balance between the States and the Federal Government."[50]

We think that the time has come for Congress to provide who is and who is not a person within the meaning of § 1983. On an issue of such profound significance to the welfare and fabric of this country in the twenty-first century, the country should not be guided by guesses as to the meaning of nineteenth century legislation, supplemented by seemingly result-driven jurisprudence. Although the justices divided sharply on the issue of municipal liability in *Monell*,[51] it must be emphasized that each opinion treated the issue as a straightforward exercise in statutory construction.[52]

Fourth, the way matters now stand, the Court usually insists that it is merely divining the intent of the 42nd Congress.[53] One wonders whether it is true to this pledge. Even if it is, one also wonders whether it can or should be. Suppose congressional intent cannot be discerned. What is or should be the state of inertia?[54] How should the Court decide the concrete case before it? Should it use current standards and mores? Judge Calabresi forthrightly posits a new jurisprudential notion of the role of the judiciary in the construction of old statutes.[55] He would grant courts the authority to label a statute obsolete and to treat it as if it were merely a part of the common law—to be disregarded or rewritten by the judiciary if the court so chooses. Calabresi believes that "[t]he object in all cases would be to permit courts to keep anachronistic laws from governing us without thereby requiring them to do tasks for which they are not suited, or denying to the legislatures the decisive word in the making of constitutionally valid laws."[56] Even

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50. *Id.* at 65 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

51. 436 U.S. 658 (1978).

52. In addition to *Monroe*, *Monell*, and *Will*, see also, e.g., Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages may be awarded in a § 1983 action); Owen v. City of Independence, 445 U.S. 622, 635 (1980) (holding that the scope of municipality's immunity is essentially one of statutory construction).

53. *See Monell*, 436 U.S. at 718 (Rehnquist, J., dissenting) ("[O]ur only task is to discern the intent of the 42nd Congress.").

54. 42 U.S.C. § 1988(a) contains an interesting congressional direction to the judiciary in filling in the statutory interstices. It provides as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Often the Court purports to follow the guidelines. In other instances, it completely overlooks them. *See* Robertson v. Wegmann, 436 U.S. 584 (1978) (relying on 42 U.S.C. § 1988 to determine whether Louisiana survivorship statute governs). In dissent, Justice Blackmun noted the failure of the Court to rely on that statute in determining questions of damages and immunities under the Act. *Id.* at 596 (Blackmun, J., dissenting).

55. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

56. *Id.* at 2.

better than attempting to divine the intent of Congress during the last century or embracing a new jurisprudential approach would be for Congress to provide contemporary guidance on the civil rights issues that § 1983 was meant to address, issues that were not anticipated 125 years ago.

Fifth, Congress's recognition of its role in enacting legislation to resolve these knotty civil rights issues would help reduce "precedent reinforcement"—that is, the tendency to reinforce bad decisions by premising subsequent decisions on those bad decisions, such as we saw in the *Aldinger* case's fortification of the Court's position that municipalities were not covered by § 1983.[57] Once the Court errs, the error continues, compounds, and multiplies. Decisive congressional action would end the piling-on and allow the Court to write on a clean slate.

Finally, clear congressional directives also forestall the temptation to use § 1988(a)[58] as a general congressional directive to the Court to solve any civil rights issue as the Court thinks best. Although the Court has relied on this provision only occasionally,[59] even a cursory reading of the provision reveals its circularity and potential for abuse.

Let us examine how the Court has used § 1988 to resolve whether a cause of action survives the death of a plaintiff.[60] Section 1983 is silent on this issue. If the Court cannot discern the intent of the 42nd Congress,[61] then its jurisdiction cannot be "exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect"[62] because the meaning of the laws of the United States cannot be discerned. To that extent, the laws are "deficient" within the meaning of § 1988. In that event, the statute directs the courts to look to the "common law, as modified and changed by the constitution and statutes [of the forum state,] so far as the same is not inconsistent with the Constitution and laws of the United States."[63] If "laws" includes common law, then courts are provided sufficient statutory direction, albeit in a circular manner, to manufacture federal common law.

C. Matters Left for Later Resolution

As noted at the outset of this essay, the time is at hand for Congress to examine and reconsider several issues concerning § 1983. In doing so, it should review the

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57. Aldinger v. Howard, 427 U.S. 1, 19 (1976); *supra* notes 44-45 and accompanying text.

58. *Supra* note 54 and accompanying text.

59. *See, e.g.*, Robertson v. Wegmann, 436 U.S. 584, 590 (1978) (applying § 1988(a) to resolve whether Louisiana's survivorship statute applied to § 1983 action).

60. The issue confronted the Court in *Robertson*. *Id.* at 588-90.

61. Yet note that survival was a rarity in 1871. The Court could have discerned an intent that survival is not permissible. After all, Congress drafted the statute against the backdrop of the common law.

62. 42 U.S.C. § 1988(a) (1994).

63. *Id.*

landmark Supreme Court cases that have interpreted the Civil Rights Act.[64] The need for review is ripe, indeed overripe,[65] for several reasons. Many decisions probably incorrectly discerned the intent of the 42nd Congress and stare decisis makes these faulty opinions a weak foundation for other opinions, rendering the legal superstructure even weaker. However, even if the Court were correct in divining the congressional intent of the 42nd Congress, we question whether 125-year-old congressional thinking is relevant to determining or should determine the path of modern civil rights. Issues and attitudes have changed dramatically in a century and a quarter.

Although myriad areas may eventually need clarification, we do not propose a Code[66] to answer every conceivable question that has arisen or may arise in the future. We address only the significant issues about which the judicial and legislative dialogue has practically ceased. Of course, as the legislative hearings proceed, Congress may elect to examine some of these other areas. We have already discussed the dangers and benefits of this process.[67]

II. SUBJECT MATTER OF THE PROPOSED AMENDMENTS

Part A of this section lists several areas in which Congress may wish to consider amending § 1983. Part B will briefly consider and critique the Court decisions that have prompted the call for legislative review. It will allude to the kinds of evidence Congress may wish to consider during the debate. We do not spell out the language of any proposed amendment, preferring instead to await the outcome of the congressional debate, which may dictate the particular form a change should take. We would not wish to chill the process or discourage free and full debate until everyone has had the opportunity to participate in a full discussion.

As previously noted,[68] we do not question the soundness of constitutional adjudication, even though decided in the context of civil rights litigation. These constitutional doctrines must be taken into account in formulating any proposed amendments to the statute. Nor do we attempt to resolve conflicts among the circuits or state courts, preferring to await review and resolution by the Supreme Court.[69] Finally, we do not examine the equitable principles, some of which are prudential only, that support and restrict the injunctive power and discretion of the

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64. Conflict between the circuits does not pose these same problems. The dialogue continues until Supreme Court review. Unless there is an immediate need for uniformity, the extended opportunity for judicial dialogue may actually benefit the development of the law.

65. Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 115, 126 (1921).

66. *See id.* at 116-17 (arguing that a code, even if completed, would not dispense with mediation between the legislature and judges).

67. *Supra* Part I.A-B.

68. *Supra* note 35 and accompanying text.

69. *Supra* notes 6-7 and accompanying text.

lower courts, believing that the judiciary is the appropriate body to determine these guidelines.

A. *Starting Point*

Listed below are eight essential subject matter areas for congressional review, in no particular order of priority, together with a concise discussion of the Supreme Court cases that should inform the legislative dialogue—a dialogue on which the Supreme Court has closed the debate within the judiciary.

1. Whether state and local governments should be liable for money damages for civil rights violations by government actors who act under color of state or local statutes, rules, or policies.[70]

2. The scope of governmental liability, if liability is to be imposed.[71]

3. Consideration of absolute and qualified immunities, and the substantive test for the latter.[72]

4. The allowance of, and limitations on, punitive damage awards.[73]

5. A statute of limitations.[74]

6. Consideration of the application to civil rights litigation of the federalism and full faith and credit principles inherent in 28 U.S.C. § 1738.[75]

7. The meaning of the term "laws."[76]

8. Consideration of the "exhaustion of administrative remedies" doctrine.[77]

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70. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978) (finding that cities and other local municipalities are "persons" for purposes of § 1983, overruling Monroe v. Pape, 365 U.S. 167 (1961)); *see also* Howlett v. Rose, 496 U.S. 356, 376 (1990) (holding that a local school board is a "person" under § 1983); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that neither a State nor its officials acting in their official capacities are "persons" under § 1983).

71. *See* City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (holding that whether an employee has "final policy making authority" is a question of state law); Owen v. City of Independence, 445 U.S. 622 (1980) (refusing to recognize any immunity for municipalities).

72. *See* Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (discussing absolute immunity of prosecutors); Briscoe v. LaHue, 460 U.S. 325 (1983) (holding that witnesses have absolute immunity); Wood v. Strickland, 420 U.S. 308 (1975) (defining standards for qualified immunity for teachers).

73. *See* Smith v. Wade, 461 U.S. 30 (1983) (allowing punitive damages against individuals); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (disallowing punitive damages against cities).

74. *See* Wilson v. Garcia, 471 U.S. 261 (1985) (applying state personal injuries limitation period); *see also* Felder v. Casey, 487 U.S. 131 (1988) (holding that federal law preempts a state notice-of-claim statute).

75. *See* Migra v. Warren Sch. Dist., 465 U.S. 75 (1984) (giving claims preclusive effect to state court judgment); Allen v. McCurry, 449 U.S. 90 (1980) (giving issue preclusive effect to state court judgment).

76. *See* Blessing v. Freestone, 520 U.S. 329 (1997) (further defining the term "laws" as it is used in § 1983).

77. *See* Patsy v. Board of Regents, 457 U.S. 496 (1982) (not requiring exhaustion of administrative remedies); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (recognizing that principles of comity limit civil rights actions).

B. Brief Analysis of Supreme Court Opinions Subject to Congressional Reevaluation

1. Whether State and Local Governments Should be Liable for Money Damages

The Supreme Court cases clearly differentiate among the levels of government on the question of governmental accountability. States and state agencies are not "persons" within the meaning of the Act; therefore, state entities cannot render the state liable under § 1983, whereas counties, cities, and other local agencies are "persons" that can be subject to liability.[78] This disparate treatment may have made sense in 1871,[79] but as a matter of modern jurisprudence it is at best anomalous.

Justice Brennan, dissenting in *Will*, suggested that the differing treatment of states rests on the Court's transposition of Eleventh Amendment prohibitions against suits against states.[80] No majority opinion, however, has ostensibly relied upon Eleventh Amendment jurisprudence as a basis for finding that states are not "persons" for purposes of § 1983. The Court apparently recognizes that while the Eleventh Amendment does distinguish between states and other types of governmental bodies, it relates exclusively to the jurisdiction of the federal courts. Indeed, absent a valid excuse, state courts must open their courts to suits against the state and state agencies if Congress so legislates.[81] A preference not to hear § 1983 cases is not a valid excuse.[82]

Logic, consistency, and fairness indicate that all governmental agencies should be treated alike. Conceivably, none of them should be liable under the Civil Rights Act. On the other hand, though these matters should be thoroughly investigated by Congress, the trend has been to shrink the area of sovereign immunity from tort responsibility or, stated differently, to expand tort liability.[83] Just as tort liability has expanded, the expansion of civil rights liability to all governmental agencies seems logical. After all, congressional authorization for the enactment of the Civil Rights Act emanates from section five of the Fourteenth Amendment, the crux of which is that no state "shall . . . deprive any person of life, liberty, or property, without due process of law."[84] It seems at best anomalous that an individual state

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78. *Compare* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (holding cities accountable), *with* Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (finding states not accountable).

79. *Cf. Will*, 491 U.S. at 65-69 (relying on the historical distinctions between states and instrumentalities of states).

80. *Id.* at 71-72 (Brennan, J., dissenting).

81. This duty is imposed by the Supremacy Clause. *See* Howlett v. Rose, 496 U.S. 356 (1990) (ruling that state courts are obliged to entertain civil rights actions); *see also* Testa v. Katt, 330 U.S. 386 (1947) (forging the "valid excuse" doctrine).

82. *See* Howlett, 496 U.S. at 371 (requiring state courts to hear civil rights actions).

83. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1993) (Tucker Act); 28 U.S.C. § 1346(b) (1993 & Supp. 1998) (Tort Claims Act).

84. U.S. CONST. amend. XIV, § 1.

actor, acting under color of state law, may be held liable, but that the governmental body that acts through the actor and dictates the policy under which he acts may not. Moreover, it seems unwise to insulate the government body from liability if it in fact requires the state actor to do the act that causes the constitutional violation.

Congressional hearings may establish the downside of governmental liability. For example, have government bodies now subject to the Act gone bankrupt? Might they? Have they been unduly deterred in providing services for fear of liability? Have they had insufficient unencumbered funds to perform necessary services because civil rights judgments have depleted their coffers? A thorough investigation of these issues—a task that courts are ill-equipped to perform—may uncover some surprising evidence. It may also dispel some myths.

Even if the hearings reveal disadvantages to state liability,[85] remedies short of complete governmental immunity may mitigate the dangers. For example, perhaps governments should be given some qualified immunities, such as those that some individuals presently enjoy. Alternatively, Congress might cap compensatory damage amounts or preclude class action litigation against governments for money damages. Congress enjoys wide latitude in fashioning remedies to mitigate the impact of imposing governmental liability.

2. *The Scope of Governmental Liability*

In a series of cases, the Court has steadfastly rejected respondeat superior as a basis for governmental liability.[86] Instead, focusing on the Act's language, "statute, ordinance, regulation, custom, or usage,"[87] the Court has imposed liability for the more restricted function of enacting or condoning official policy. Courts have encountered little difficulty in connection with a "written policy" that causes injury.[88] The troublesome area that has besieged courts is determining when, if ever, an isolated act by a governmental officer should be considered "policy" for purposes of rendering the governmental body liable.[89]

Whether governmental bodies in 1871 were liable for acts of their employees cannot be answered with any degree of certainty. But regardless whether the cases of that era imposed responsibility, that dated jurisprudence should be reexamined in light of modern principles of tort liability. Congress may wish not to extend respondeat superior principles to civil rights litigation because of the effect that

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85. In the next section, we discuss the proper scope of governmental liability.

86. Board of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997); Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

87. 42 U.S.C. § 1983 (1996).

88. *See Monell*, 436 U.S. at 658 (discussing an official policy that compelled pregnant employees to take unpaid leave before leave was medically necessary).

89. *See, e.g.*, St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988) (stating that civil service commission or mayor is the policy maker for purpose of imposing civil rights liability on a municipality); Pembaur v. Cincinnati, 475 U.S. 469, 485 (1986) (finding the prosecutor, in certain circumstances, to be a final policy maker for the purposes of imposing liability on a governmental entity).

such an expansion may have on government treasuries.[90] That is a matter that our representatives should decide only after reviewing evidence, conducting hearings, and examining what Congress has done in other areas of the law, such as that surrounding the Federal Tort Claims Act, extending tort liability to the United States,[91] or under Title VII, rendering the federal government and states liable for employment discrimination.[92] Courts cannot summon the expertise, nor do they possess the resources, to make these policy decisions.

3. Consideration of the Official Immunities Doctrines

Civil rights litigation demands an understanding of the role of official immunities. The Court has unwaveringly recognized two types of immunity: absolute and qualified. Absolute immunity is rare, though by no means uncontroversial. Writing for the Court in *Imbler v. Pachtman*, Justice Powell asserted that although the statute "on its face admits of no immunities,"[93] previous cases had recognized absolute immunity "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."[94] Congress should decide, based on present mores and policies, who is entitled to absolute immunity, not the Court relying on jurisprudential notions from 1871. Specifically, Congress should determine whether witnesses, judges, and prosecutors need absolute immunity from civil rights liability.[95]

The default rule for government officials who are not entitled to absolute immunity is qualified immunity.[96] Over the decades, the Court has wavered on the test for qualified immunity. It started as a hybrid subjective/objective test,[97] but

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90. Ironically, and despite the refusal to recognize respondeat superior or state liability, many governments wind up bearing the cost of § 1983 liability, since many governments indemnify their employees for judgments under the Civil Rights Act. But, of course, that decision is based upon state law.

91. 28 U.S.C. § 1346(b) (1998).

92. Title VII, 42 U.S.C. § 2000e-16(a) (1994) (applying federal discrimination law to the federal government); Title VII, 42 U.S.C. § 2000e(b) (1994) (including states within the definition of employers subject to federal discrimination laws).

93. 424 U.S. 409, 417 (1976).

94. *Id.* at 421.

95. We recognize that separation of powers concerns may be implicated since Congress may be imposing civil liability on persons performing functions in the judicial process. But Congress already has rendered these individuals subject to the criminal laws. Therefore, while Congress should act with care and circumspection, its judgment should prevail.

96. Private persons performing governmental functions are not entitled to any immunities whatsoever. *See, e.g.*, Richardson v. McKnight, 117 S. Ct. 2100, 2107-08 (1997) (refusing to apply qualified immunity to private prison guards).

97. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974) (asserting that "[i]t is the existence of reasonable grounds for the belief . . . coupled with good-faith belief, that affords a basis for qualified immunity"); Pierson v. Ray, 386 U.S. 547 (1967) (holding "that the defense of good faith and probable cause" is not foreclosed to police officers in actions under § 1983).

recently seems to contain only objective elements.[98] Congress should address the standard of immunity in light of the overall scope and purpose of the civil rights laws.

Quite controversial is the opinion in *Owen v. City of Independence*,[99] in which the Court held that cities are not entitled to immunity from liability based upon the good faith of their officials. As the dissent points out, the ironic effect of the ruling is that a city may be liable for a violation of a constitutional right that was unknown and unknowable when the events occurred—even though the individual who actually did the act for which liability is imposed would be immunized.[100] An additional irony is that in a regimen of respondeat superior, the City would be exonerated.[101] Congress should be able to devise a more logical system.

4. Allowance of, and Limitations on, Punitive Damages

In yet another controversial opinion, the Court, after searching the judicial precedents of the 1870s, discerned a congressional intent to hold civil rights violators liable for punitive damages.[102] In his dissent, Chief Justice Rehnquist canvassed the writings of the same era and, not surprisingly, came to a different conclusion. Justice O'Connor's common sense dissent rejected the approach taken in both opinions and cautioned of the danger of attempting to discern and rely on

98. *See* Anderson v. Creighton, 483 U.S. 635 (1987) (declaring that "whether an official protected by qualified immunity may be . . . liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action"); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (defining "the limits of qualified immunity essentially in objective terms").

99. 445 U.S. 622 (1980) (5-4 decision).

100. *See Owen*, 445 U.S. at 665 (asserting that this holding "unreasonably subjects local governments to damages judgments for actions that were reasonable when performed").

101. This is especially so since many governmental entities reimburse employees found liable for § 1983 violations. *See supra* notes 86-87 and accompanying text.

102. Smith v. Wade, 461 U.S. 30 (1983).

the intent of Congress in 1871.[103] Any such search, she warned, is result-oriented.[104] Congress should make the determination using contemporary mores.

The modern clamor for tort reform has generated much discussion on limiting punitive damages.[105] The Court, however, has been reluctant to overturn awards of punitive damages on due process grounds, although it has done so.[106] But Congress need not await action by the Court. Congress is the appropriate body to set a ceiling on these awards if it becomes convinced that the awards have over-deterred or excessively punished.

5. Statute of Limitations

The Civil Rights Act does not contain a statute of limitations.[107] In *Wilson v. Garcia*,[108] the Court was asked to determine the appropriate period of limitations for actions brought under the Act. After determining that under 42 U.S.C. § 1988[109] a time period contained in the forum state's statutes of limitations should govern, the Court adopted the period contained in the state personal injury statute as the appropriate limitations period.[110] There are notable deficiencies in the Court's choice. First, importing each state's personal injury limitations period sacrifices national uniformity.[111] Second, it may even sacrifice uniformity within the state

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103. In her dissent, Justice O'Connor wrote the following:

> I write separately because I cannot agree with the approach taken by either the Court or Justice Rehnquist. Both opinions engage in exhaustive, but ultimately unilluminating, exegesis of the common law of the availability of punitive damages in 1871. Although both the Court and Justice Rehnquist display admirable skills in legal research and analysis of great numbers of musty cases, the results do not significantly further the goal of the inquiry: to establish the intent of the 42d Congress. In interpreting § 1983, we have often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. *See, e.g.*, Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981); Carey v. Piphus, 435 U.S. 247, 255 (1978). This approach makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split of authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly . . . in an area in which the courts of an earlier period frequently used inexact and contradictory language, we cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions. The battle of the string citations can have no winner.

Id. at 92-93 (O'Connor, J., dissenting) (internal cross-references omitted).

104. *Id.*

105. See the compilation of articles indexed under Punitive Damages in the Index to Legal Periodicals.

106. For a case that reached the breaking point and motivated the Court to overturn an excessive punitive damages award, see *BMW v. Gore*, 517 U.S. 559 (1996).

107. Indeed, several proposed bills to standardize the limitations period have failed enactment. *See* Wilson v. Garcia, 471 U.S. 261, 284 (1985) (O'Connor, J., dissenting).

108. 471 U.S. 261 (1985).

109. *Supra* note 54 and accompanying text.

110. Even if one particular state law limitations period should govern all civil rights actions, there were other available choices: the period provided in the State Tort Claims Act; that for actions founded on statute; or that for actions not otherwise provided for.

111. Forum shopping among the states to find the longest statute of limitations, though not a pressing problem in civil rights litigation, is a possibility. A uniform statute of limitations would, of course, obviate that potential abuse.

since several supplemental state claims may each fall under a different statute of limitations.[112] Third, the reference to the state personal injury statute is not logical, as in a § 1983 violation that results only in property damage. Congress should select a uniform limitations period such as the four-year period now contained in 28 U.S.C. § 1658.[113] We believe, however, that a two-year period is sufficient, especially since federal law presently controls when a cause of action accrues,[114] and should, under the proposed federal statute, also govern the tolling provisions.[115]

6. *Consideration of Full Faith and Credit Principles Inherent in 28 U.S.C. § 1738*

There is an obvious tension between the desire to grant deference to state findings and the belief that the federal courts are the primary guardians of federal constitutional rights.[116] The Court has tipped the balance heavily in favor of the principles of federalism,[117] stating that neither the language nor the legislative history of § 1983 indicates that Congress intended to repeal or modify the doctrine of preclusion.[118] Congress, however, may wish to determine whether it agrees with the policy choice the Court has made, or whether it wishes to steer in a new direction in vindicating civil rights violations.

The most noteworthy of the examples is *Allen v. McCurry*,[119] in which the Court affirmed the federal courts' according of full faith and credit to a state criminal court's finding that police officers had not violated the plaintiff's Fourth

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112. *Garcia*, 471 U.S. at 285-86 (O'Connor, J., dissenting).

113. 28 U.S.C. § 1658 provides as follows: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Unfortunately, this statute applies only to civil actions created by Congress after December 1, 1990. The reason for not making the statute retroactive to embrace *all* federal claims is that such a uniform period would apply to too many cases and would "disrupt the settled expectations of a great many parties." HOUSE COMM. ON THE JUDICIARY REP. 111-734, at 24. As David Siegel correctly points out, this justification is absurd. David Siegel, Commentary to 28 U.S.C. § 1658.

The absence of a uniform statute of limitations in *all* federal claims has been decried in many quarters. For example, the Seventh Circuit in *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986) noted the following:

> We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action.

114. Wilson v. Garcia, 471 U.S. 261 (1985).

115. California has a one-year period personal injury statute of limitations and the authors are unaware of any problems that have been encountered. Practitioners who sue governments are aware of the short notice of claim provisions and are aware that claims must be timely filed in order to proceed with state law claims—even though these provisions are preempted for actions brought under § 1983. Felder v. Casey, 487 U.S. 131 (1988).

116. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

117. *See* Migra v. Board of Educ., 465 U.S. 75 (1984) (giving claims preclusive effect to a state court judgment); Allen v. McCurry, 449 U.S. 90 (1980) (giving issue preclusive effect to state court judgment); Preiser v. Rodriguez, 411 U.S. 475 (1973) (subordinating civil rights remedy to the writ of habeas corpus).

118. *Allen*, 449 U.S. at 98.

119. *Id.* at 90.

Amendment rights.[120] This example is particularly stark, in view of the fact that the plaintiff in the civil rights suit—the defendant in the underlying criminal suit—did not choose the state court forum in which the facts were determined, and the police officers—strangers and mere witnesses to the criminal litigation—were able to affirmatively use the state court's favorable findings. The decision highlights the basic differences in approach among the Justices. Congress should now review and resolve the matter. Are the federal courts to be stripped of their preeminent position in the adjudication of constitutional violations because of principles of federalism? This decision involves the congressional accommodation of conflicting principles contained in two statutes.

Admittedly, the Civil Rights Act was motivated in part by distrust of the state court justice system.[121] Perhaps that distrust is no longer held. If so, perhaps deference should be given to state court findings. But this new federalism, reactivated 100 years after the Civil War and the enactment of the Civil Rights Act, should not be imposed by the judiciary. It is also paradoxical that a Court that reached to find the Civil Rights Act an *express* exception to the anti-injunction statute,[122] should defer so readily to state court findings. Further, Congress may wish to explore the possibility of preclusion in some areas and not in others. Obviously, these decisions are peculiarly subject to legislative choice.

7. Meaning of the Term "Laws"

The Civil Rights Act provides redress for violations of rights, privileges, and immunities secured by the Constitution and "laws." The meaning of the term "laws" is not unambiguous. First, even though the statute is written conjunctively, the Court has read it disjunctively;[123] violations of statutes alone may serve as the

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120. *Id.*

121. In *Mitchum*, 407 U.S. at 242, the Court stated that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or *judicial*.'" (emphasis added) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

122. The anti-injunction statute, having its roots in the 1790's, provides as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The *Mitchum* Court reasoned that in order to give effect to § 1983's intended scope, that statute is an express exception to the anti-injunction statute. *Mitchum*, 407 U.S. at 229.

123. Justice Powell observed as follows:

> The "plain meaning" of "and laws" may be more elusive than the Court admits. One might expect that a statute referring to all rights secured either by the Constitution or by the laws would employ the disjunctive "or."
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> . . . .
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> In contrast, a natural reading of the conjunctive "and" in § 1983 would require that the right at issue be secured both by the Constitution and by the laws. In 1874, this would have included the rights set out in the Civil Rights Act of 1866, which had been incorporated in the Fourteenth Amendment and re-enacted in the Civil Rights Act of 1870.

Maine v. Thiboutot, 448 U.S. 1, 13 n.1 (1980) (Powell, J., dissenting).

predicate for a civil rights violation. The real problem is to determine which statutes may form the predicate for a civil rights claim. Several Supreme Court cases have set the boundaries,[124] but we suggest that Congress should make this vital decision.

It seems clear that if a federal statute creates an express right of action, resort to § 1983 should not be permitted. Additionally, it may not be wise, productive, efficient, or effective to have entities that are subject to statutes that contain "unusually elaborate enforcement mechanisms"[125] to be subject to the additional judicial remedies that may be imposed to remedy § 1983 violations. And in an era during which it has become increasingly difficult to imply causes of action under statutes, should a clever pleader predicating liability under the Civil Rights Act be rewarded? The answer clearly belongs to Congress—not, by default, to the Court.[126]

8. Exhaustion of Remedies

Our final topic for a proposed amendment relates to the exhaustion doctrine. No barrier to litigation is more intractable or more within the ken of Congress. Many civil rights and other statutes contain detailed exhaustion requirements.[127] Arguments can be marshaled that Congress should require no less in the most important statute of this genre, the Civil Rights Act. In *Patsy v. Board of Regents*,[128] however, the Supreme Court held that exhaustion of state administrative remedies is not a prerequisite to an action under the Civil Rights Act. The majority opinion, discussing precedents for its "no exhaustion" rule, found congressional intent inconclusive.[129] It then relied, in part, upon the Civil Rights of Institutionalized Persons Act[130] to buttress its position that Congress has acceded to the no exhaustion rule. As noted earlier, this conclusion is farfetched.[131] Justices O'Connor and Rehnquist, concurring reluctantly, voiced the hope that Congress will "reconsider the possibility of requiring exhaustion in the remainder of § 1983 cases."[132] It has not yet done so. The time is ripe to act.

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124. For a recent case attempting to harmonize the precedents, see Blessing v. Freestone, 520 U.S. 329 (1997).

125. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). For a concise discussion of the persuasive reasons against private damage actions, see PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS 252-54 (1994).

126. Even the Court has remarked that the scope of the term "and laws" "can best be addressed to Congress." Maine v. Thiboutot, 448 U.S. 1, 8 (1980).

127. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

128. Patsy v. Board of Regents, 457 U.S. 496 (1982).

129. *Id.*

130. 42 U.S.C. § 1997 (1994).

131. *Supra* notes 25-26 and accompanying text.

132. *Patsy*, 457 U.S. at 517 (O'Connor, J., concurring).

III. CONCLUSION

Like Chief Justice Rehnquist and Justice O'Connor, we also conclude with the hope that Congress will take a fresh look at the Civil Rights Act and examine anew many of the Supreme Court's interpretations of fundamental terms and principles of law surrounding that Act. Although recognizing certain dangers inherent in any such review,[133] we believe it would serve the salutary purpose of keeping the law of civil rights current with the mores and social policies of the twenty-first century. We wish it understood that we truly embrace neutral principles.[134] Unlike some scholars in the field, we have no particular ax to grind and do not propose any particular changes until the entire landscape has been explored. We welcome the legislative dialogue, whatever the result.

133. *Supra* notes 16-28 and accompanying text.

134. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).