
**THE ROBERT L. LEVINE DISTINGUISHED
LECTURE SERIES**

**THE PARADOXICAL STRUCTURE OF
CONSTITUTIONAL LITIGATION**

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INTRODUCTION

In *The Paradoxes of Legal Science*, Benjamin Cardozo observed that courts had not provided a straightforward and comprehensive definition of the “due process” protected by the Fifth and Fourteenth Amendments. Instead, he said, “[w]e will leave it to be ‘pricked out’ by a process of inclusion and exclusion in individual cases.”¹ The question, he declared,

is how long we are to be satisfied with a series of *ad hoc* conclusions. It is all very well to go on pricking the lines, but the time must come when we shall do prudently to look them over, and see whether they make a pattern or a medley of scraps and patches.²

A similar point could be made about many of the clauses that shape the government’s interaction with individual citizens. The Fourth Amendment, the First Amendment, the Equal Protection Clause—all of these are continuously being “pricked out” by litigation. Constitutional provisions consisting of only a single sentence of text have flowered into elaborate codes of conduct.³

The central argument of this essay is that the process of constitutional litigation has *itself* become a medley of scraps and patches. The United States Supreme Court has pieced together a crazy quilt of constitutional

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1. Benjamin N. Cardozo, *The Paradoxes of Legal Science* 96 (1928) (footnote omitted).

2. *Id.*

3. For an extensive discussion of how this process involves institution- and situation-specific rules, see generally Symposium, *Constitutional “Niches”: The Role of Institutional Context in Constitutional Law*, 54 *UCLA L. Rev.* (forthcoming 2007).

doctrines that undercut its central goal of intelligently and efficiently refining broad constitutional commands. Constitutional law is primarily a way of regulating governments. With respect to those constitutional provisions that confer rights on specific individuals,⁴ one need not insist that these rights must inevitably trump countervailing governmental interests⁵ to recognize that they should generally be protected by more than mere “liability rules” under which the government is entitled to “destroy the initial entitlement if [it] is willing to pay an objectively determined value for it.”⁶ Put differently, the overarching purpose of constitutional law is to deter or prevent deprivations of individuals’ rights, and not simply to induce the government to internalize their costs or to compensate individuals who suffer them after the fact.⁷

Constitutional litigation is paradoxical in at least two important ways. First, the litigation system contains gaps between the incentives and

4. Some constitutional provisions are entirely structural and do not give rise to justiciable individual claims at all. For example, the Guarantee Clause provides that “[t]he United States shall grant to every State in this Union a Republican Form of Government.” U.S. Const. art. IV, § 4. The Supreme Court has consistently held that the Clause confers no justiciable right on individual citizens who wish to challenge their states’ form of government. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). By contrast, other constitutional provisions contain explicit “rights creating” language. (For an explanation of this term in the context of statutory interpretation, see *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001).) For example, the First Amendment refers to “the right of the people peaceably to assemble,” U.S. Const. amend. I, the Fourth Amendment refers to the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” U.S. Const. amend. IV, and the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments refer to the right of citizens of the United States to vote, U.S. Const. amends. XV, XIX, XXIV, XXVI. Others use slightly less explicit language whose rights creation is nonetheless clear. For example, the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law” or “deny[ing] to any person . . . the equal protection of the laws,” thereby clearly conferring an enforceable entitlement on individual citizens.

5. This is the position taken in Ronald Dworkin’s influential work. *See* Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 153 (Jeremy Waldron ed., 1984). For a persuasive critique of this position, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 *J. Legal Stud.* 725 (1998).

6. This terminology comes from Guido Calabresi and A. Douglas Melamed’s classic article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1092 (1972). Calabresi and Melamed contrast “liability rules” for protecting rights with “property rules” under which “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.” *Id.* In the case of constitutional rights, this means that the government must induce the rights holder to voluntarily and intelligently waive his rights. *See, e.g.*, *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (explaining that “[w]aiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances” (internal quotation marks omitted)); *Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (permitting waiver of the statutory right to attorney’s fees in § 1983 cases because a voluntary and intelligent waiver may be part of a party’s bargaining strategy).

7. The Takings Clause of the Fifth Amendment is exceptional precisely because it permits the government to take private property for public use as long as it provides “just compensation.” U.S. Const. amend. V.

abilities of individual litigants to pursue constitutional claims on the one hand and the need for constitutional refinement on the other. Second, although constitutional law is intended to regulate the government prospectively, a variety of doctrines have channeled much of the process of constitutional refinement into retrospective damages lawsuits against individual government officials. This litigation itself is hedged about by a series of doctrines that undercut the processes of constitutional refinement.

I. CONSTITUTIONAL SHIELDS AND CONSTITUTIONAL SWORDS: WHEN DO INDIVIDUALS EVEN LITIGATE THEIR CONSTITUTIONAL CLAIMS?

Much of constitutional law—particularly the provisions that govern things like law enforcement, public employment, and education—involves the refinement of broad constitutional commands into essentially regulatory codes of conduct. Precisely because governmental bodies, such as school boards, police departments, municipalities, state agencies, and the like, are bureaucratic repeat players, they often operate by setting policies designed to ensure that their employees comply with the latest constitutional commands.

While governments' articulation of policies may be subject to a variety of processes ranging from formalized administrative notice-and-comment rulemaking to various forms of institutionalized citizen participation, the underlying constitutional commands that prompt a government to articulate these policies often have their genesis in judicial decisions. The kinds of cases that *can* or are *likely* to be litigated thus powerfully affect which areas of constitutional law get full elaboration and which are left only loosely construed.

Certain pieces of constitutional doctrine are articulated largely as defenses within lawsuits initiated for reasons independent of any desire to make constitutional law. The government initiates criminal prosecutions not for the purpose of refining the contours of constitutional doctrines governing police practices, but for the purpose of convicting and punishing criminal behavior. But in the course of defending themselves against criminal charges, individuals often assert constitutional claims under the Fourth, Fifth, and Sixth Amendments. These claims are *shields*: In their most common form, they involve a defendant's argument that the government cannot use a particular piece of evidence because it was obtained in violation of the Constitution.

We see a lot of this form of constitutional litigation for three major reasons. First, there is a powerful motivation for individuals to raise these claims; they may be the only way of avoiding a criminal conviction and the disastrous consequences that follow. Second, the Sixth Amendment guarantee of appointed counsel, which provides upwards of eighty percent

of criminal defendants with a free lawyer,⁸ makes it relatively costless for most defendants to litigate their constitutional criminal procedure claims.⁹ Third, these claims are decided by judges, during suppression hearings, rather than by juries; since unconstitutional conduct often targets unpopular groups or individuals, victims are likely to fare better before judges than juries.

The interaction of these factors, however, means that law enforcement behavior that does not directly undergird criminal prosecutions—such as the harassment of innocent citizens or even the use of substantial physical force to arrest criminal suspects—is less likely to be litigated. The effort of finding a lawyer and bringing a lawsuit can be substantial. The potential relief may be either diffuse, in the case of equitable remedies, or relatively small, in the case of damages lawsuits by unpopular plaintiffs. The result is that we have a far better code of conduct governing the conditions for police searches than for police uses of force.¹⁰ There are relatively few clear lines in the use of force area—other than the rejection of the fleeing felon doctrine in *Tennessee v. Garner*,¹¹ I am hard pressed to think of one—while search and seizure doctrine is marbled with such rules.

It is not entirely clear to me that if we were starting from scratch in trying to think about how to refine constitutional constraints on police conduct we would choose this allocation. We might prefer that more judicial attention be given to police uses of force, or more general police treatment of civilians during encounters. Exclusion of evidence is a powerful remedy, but it vindicates the rights only of defendants against whom evidence was seized. Individuals who are searched fruitlessly, even if maliciously, benefit only indirectly from our current Fourth Amendment regime.

A second set of cases treats the Constitution not as a shield protecting defendants, but as a sword to be used in seeking prospective relief. In these cases, plaintiffs attack government policies, arguing that the policies are unconstitutional and should be enjoined. Structural reform litigation under the Eighth Amendment challenging prison conditions and under the Equal

8. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (construing the Sixth Amendment to require appointed counsel for indigent defendants in felony cases); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 32 (1997) (stating that roughly eighty percent of defendants receive appointed counsel).

9. Professor Stuntz also points out that the structure of appointed counsel's practice tends to drive them toward raising relatively inexpensive-to-litigate constitutional claims rather than more time-intensive claims regarding factual innocence. Stuntz, *supra* note 8, at 39-42.

10. For elaboration of this point, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363, 402; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1068 (1995).

11. 471 U.S. 1 (1985) (rejecting the common-law rule that permitted police to use deadly force to capture a fleeing felon without regard to whether the suspect posed a threat).

Protection Clause challenging racial segregation in public schools are paradigmatic examples of this kind of litigation.¹²

But here we come upon a phenomenon that is captured in a backhanded way by the Supreme Court's restrictive standing decision in *City of Los Angeles v. Lyons*.¹³ In that case, Adolph Lyons was injured by a Los Angeles police officer who subjected him to a choke hold after a traffic stop. Lyons alleged, and the district court ultimately found, that the use of the choke hold was consistent with police department policy.¹⁴ Lyons sued, seeking both damages for the injuries he had suffered as a result of the choke hold and an injunction forcing the city to change its policies regarding the use of choke holds. The Supreme Court ultimately held that he lacked standing to seek injunctive relief because Lyons could not show a reasonable probability that he personally faced any risk of a future choke hold that injunctive relief might prevent.¹⁵

Seen in one light, *Lyons* is a flawed decision. The only reason, as we shall see in a moment, why Lyons could even sue the city for injuries he had already suffered was because the city had a *policy* that permitted the choke hold to which he had been subjected.¹⁶ It was almost a dead certainty, literally, that there would be future injurious choke holds. The only question was *who* would be victimized. If Lyons could not seek injunctive relief, then no one could. And so the city could go on choke holding individuals in violation of the Fourth Amendment as long as it was willing to pay damages at the back end—damages that were not likely to capture the full measure of the constitutional injury, and were thus unlikely to fully deter unconstitutional conduct, precisely because the city's policy was politically popular.¹⁷ Thus, to the extent that constitutional litigation is intended not only to compensate past victims but to change future practices, the *Lyons* standing rule is counterproductive.

But *Lyons* does reflect a broader insight: Lyons's presence in court seeking injunctive relief was a fortuitous consequence of his past injury. It is unclear why *he* should be authorized, or even trusted, to represent the interests of an unnamed and unknowable class of other potential victims. Suppose, for example, that individuals in Lyons's position were entitled to seek both monetary and injunctive relief. Having sought both kinds of remedy, should there be any restriction on their right to trade off one for the other? If Lyons can get a higher monetary settlement by abandoning his claim for injunctive relief, then is that not because he is sacrificing other

12. We discuss these examples and provide citations to the voluminous literature in John C. Jeffries, Jr., Pamela S. Karlan, Peter W. Low, & George A. Rutherglen, *Civil Rights Actions: Enforcing the Constitution* 745-897 (2000).

13. 461 U.S. 95 (1983).

14. *See id.* at 99.

15. *See id.* at 105-10.

16. *See infra* text accompanying notes 34-41.

17. For a discussion of *Lyons* and its constriction of structural relief in police brutality cases, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *Geo. Wash. L. Rev.* 453, 490-93 (2004).

individuals' rights? Even if Lyons is certified as the representative of all persons who might face future unconstitutional choke holds, recent experiences in class action litigation suggest at least some caution in assuming that he has the correct incentives to litigate the injunctive claim vigorously.¹⁸

In any event, injunctive relief alone would often be an incomplete remedy for the injuries suffered by a victim of unconstitutional conduct. People like Lyons experience physical pain and suffering, incur medical expenses, and lose wages. Public employees wrongfully terminated from their jobs for political or free expression reasons may lose wages, experience mental anguish, or suffer impairment of their reputations.¹⁹ Simply reforming departmental practices or giving people their jobs back does not fully compensate them for the losses they have suffered.

II. CONSTITUTIONAL CHANNELING: THE CENTRALITY OF § 1983

Damages litigation offers an opportunity not only to compensate individuals who have been injured by unconstitutional conduct, but to refine constitutional law as well. As one of the elements of a plaintiff's case, he must prove that the defendant violated the Constitution. That holding serves as a precedent, providing future guidance to governmental entities regarding the scope of constitutional constraints. The prospect of future damages can induce the government to change its policies to avoid further liability.

But there are three critical limitations on constitutional damages litigation. The first is itself constitutional, and stems from the Eleventh Amendment. The pertinent text provides only that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State."²⁰ Nevertheless, the Eleventh Amendment has been construed to preclude suits against non-consenting states by their own citizens, either in federal or state court.²¹

18. See, e.g., *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997) (finding a fatal conflict of interest between the named class representatives and some members of the class); see also Lee Anderson, Comment, *Preserving Adequacy of Representation When Dropping Claims in Class Actions*, 74 U. Mo. K.C. L. Rev. 105 (2005) (discussing when it is appropriate for a class representative to drop some of the claims class members might otherwise have).

19. For a comprehensive treatment of the damages available in cases brought under 42 U.S.C. § 1983—the most wide-ranging federal statute authorizing individual lawsuits for constitutional violations—see 1B Martin A. Schwartz & John E. Kirkin, Section 1983 Litigation: Claims and Defenses §§ 16.7-.15 (3d ed. 1997).

20. U.S. Const. amend. XI.

21. See *Alden v. Maine*, 527 U.S. 706, 735-40 (1999) (extending the Eleventh Amendment's principle of sovereign immunity to lawsuits against non-consenting states in their own courts); *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that states cannot be sued without their consent in federal court). My colleague Larry Marshall has argued that the amendment was in fact carefully crafted to take account of the fact that "[t]he vast majority of state [constitutional] violations affecting individuals involve in-state citizens," whose

But as Maria says in *The Sound of Music*, when God closes a door, He opens a window. The Supreme Court has taken an expansive, but formal, view of the Eleventh Amendment.²² So it has construed the Amendment to bar litigation against the state and state-level entities such as the state police²³ in their own names, but not against state officials or local governments,²⁴ even if those officials or governments are carrying out entirely nondiscretionary state-level policies.²⁵ The Supreme Court needed this safety valve to strike down de jure segregation,²⁶ Alabama's use of hitching posts,²⁷ and that worst-of-all constitutional violation, favoritism for in-state wineries.²⁸ And so we have doctrines like the *Ex parte Young* fiction:²⁹ Although the only reason the individual defendant *can* be sued is because he's acting under color of state law,³⁰ when he acts unconstitutionally, the official will be "stripped of his official or representative character" and treated as an individual.³¹

claims do not fall within the literal terms of the amendment. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342, 1368 (1989).

22. For a more extensive discussion of this point, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 49 (1998) (observing that the scathing criticism of the Supreme Court's Eleventh Amendment jurisprudence "neglects a crucial fact: The Eleventh Amendment almost never matters" and that "[m]ost discussions proceed on the (often unstated) assumption that Eleventh Amendment immunity, when applicable, categorically forbids actions against states," which is "formally true but substantively misleading").

23. See, e.g., *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (holding that the Alabama Board of Corrections is entitled to Eleventh Amendment immunity). See generally Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243 (1992) (exploring which governments fall within the definition of "states" for purposes of Eleventh Amendment immunity).

24. In *Lincoln County v. Luning*, 133 U.S. 529 (1890), decided the same day as *Hans*, the Supreme Court held that counties are not entitled to invoke Eleventh Amendment sovereign immunity. The Court has made clear that this amenability to suit extends to other political subunits as well. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (school boards); *Workman v. City of New York*, 179 U.S. 552 (1900) (cities).

25. See, e.g., *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991) (holding that state officers may be held liable in their personal capacity for actions undertaken in their official capacity).

26. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (in a lawsuit against a city board of education, holding that a state segregation statute violates the Equal Protection Clause).

27. See *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002) (in a lawsuit against individual prison officials, holding that the use of the hitching post to punish prisoners violates the Eighth Amendment).

28. See *Granholtz v. Heald*, 544 U.S. 460 (2005) (in a lawsuit against the Governor of Michigan, holding that the state's policies with regard to the interstate shipment of wine violated the dormant Commerce Clause).

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

30. The constitutional provisions at issue in *Ex parte Young*—the Due Process and Equal Protection Clauses of the Fourteenth Amendment, see *id.* at 144-45—apply only to state action. See *Civil Rights Cases*, 109 U.S. 3 (1883). So unless the individual defendants were acting under color of state law, they would not be amenable to suit under the fourteenth amendment at all.

31. *Ex parte Young*, 209 U.S. at 160.

Thus, the main effect of the Eleventh Amendment is not, standing alone, to foreclose all challenge to state policies, but rather to rechannel such litigation into other forms, principally individual officer suits or suits against lower-level governments that actually implement state law.³²

A second barrier comes into play in lawsuits involving municipal governments. Although counties, school boards, municipal governments, and their departments can be sued for violating individuals' rights, the Supreme Court has placed a substantial limitation on when such governments will be liable for constitutional violations committed by their employees. The statutory handle for bringing damages lawsuits for constitutional violations is 42 U.S.C. § 1983.³³ In *Monell v. Department of Social Services of New York*,³⁴ the Court held that the language of § 1983 that imposes liability on any actor that "cause[s]" the "deprivation" of constitutional rights does not embody a theory of respondeat superior;³⁵ a government entity causes a deprivation only when the deprivation occurs pursuant to its official policy.³⁶ Sometimes, of course, it is easy to show policy: When a city enacts an unconstitutional ordinance, for example, any ensuing injury falls within the scope of *Monell* liability.³⁷ But there are many areas where it is exceptionally difficult to show that the challenged action involves an unwritten policy.³⁸ Although governments are repeat players, plaintiffs are not: Even if a particular violation occurs sufficiently often that a fact finder aware of the government's behavior over time could infer that there is an unconstitutional "custom" sufficient to trigger entity-level liability,³⁹ individual plaintiffs may be unlikely to have sufficient

32. See Jeffries, *supra* note 22, at 50-51.

33. That section provides, in pertinent part, that

[e]very 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

42 U.S.C. § 1983 (2000). The Supreme Court has explained that § 1983 creates a cause of action for constitutional violations. See *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

34. 436 U.S. 658 (1978).

35. *Id.* at 691-95.

36. See *id.* at 694.

37. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (explaining that under *Monell*, a municipality may "be sued directly if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers'" (quoting *Monell*, 436 U.S. at 690)).

38. For an extensive treatment of this issue, see chapter 7 of Schwartz & Kirklin, *supra* note 19.

39. For discussions of cases finding municipal customs sufficient to trigger § 1983 liability, see Karen Blum, *The Theory of Municipal Custom and Practice*, 16 *Touro L. Rev.* 825, 830-39 (2000); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 *B.U. L. Rev.* 17 (2000). For a discussion of the meaning of "custom" at the time § 1983 was enacted, see George A. Rutherglen, *The*

information to plead, let alone to prove without substantial discovery, such a de facto policy.⁴⁰ Often, the “policy,” if there is one, is simply not to devote sufficient resources to preventing the problem, by, for example, training line-level employees to comply with constitutional commands. While the Supreme Court has recognized the theoretical availability of so-called “failure to train claims,”⁴¹ in practice, such claims are seldom successful.⁴²

This leaves lawsuits against individual officers, seeking damages, as a key forum for refining constitutional law. But here, a third doctrine plays a critical role. Precisely because constitutional litigation is an arena for constitutional refinement, many cases arise where the unconstitutionality of the official’s act was not entirely clear at the time of the underlying events.⁴³ Perhaps because the Court has come to believe the fiction that the defendants in §1983 suits against individual officers are actually being sued as individuals, rather than as faithful agents of the government,⁴⁴ the Court worries that imposing liability will be unfair. After all, the defendant had no reason to know when he acted that he would be held liable, and it is not as if he can capture all the benefits of his unconstitutional act in the first place.⁴⁵ The Court is also concerned about undercutting government operations; individual officers face an incentive to do nothing, since inaction will not present the risk of a lawsuit, whereas an affirmative act may pose such a threat.⁴⁶ Consider the teacher faced with an unruly student. If the teacher suspends the student, she may face suit under the Due Process Clause or the Equal Protection Clause or the First

Improbable History of Section 1981: Clio Still Bemused and Confused, 2003 Sup. Ct. Rev. 303, 332-34.

40. For a discussion of discovery in *Monell* cases, see G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DePaul L. Rev. 747 (1999).

41. See *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (holding that “it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need,” and that “[i]n that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury”).

42. See Armacost, *supra* note 17, at 472.

43. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 95-98 (1999) (discussing the prevalence of constitutional innovation and the recognition of new constraints on government action).

44. See Jeffries, *supra* note 22, at 50 (stating that, with the exceptions of “flamboyantly bad actors” and officials “who become targets of criminal prosecution” for their unconstitutional conduct, “the state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on government defense and indemnification”); Cornelia T. L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 Geo. L.J. 65, 76-77 (1999) (pointing out that in constitutional tort cases brought against federal officials, indemnification is a virtual certainty).

45. See Jeffries, Karlan, Low & Rutherglen, *supra* note 12, at 89.

46. See *id.* at 90.

Amendment.⁴⁷ If she does nothing, this may undermine the education of all the other students in the room, but they will have no constitutional cause of action.

And so the Court has developed—legislated, indeed—the doctrine of qualified immunity. An individual government official will be held liable for unconstitutional conduct only if the unconstitutionality of the conduct was already “clearly established” at the time he acted.⁴⁸ That standard thus raises two questions: First, was the defendant’s conduct unconstitutional? Second, was that unconstitutionality clearly established at the time? A plaintiff can win only if the answer to both questions is “yes.”

Often, it will be easier to answer the second question.⁴⁹ If there are no cases directly on point, it might be quicker to simply conclude that the law is unclear, rather than spend time and effort trying to determine how the law ought to be clarified. But here is another paradox: If courts are systematically drawn to answering the second question first, the law will *never* be clarified; every court will simply duck reaching a constitutional conclusion. In areas where litigation posture, the Eleventh Amendment, and *Monell* combine to relegate constitutional refinement to individual damages litigation, refinement will never occur.

And so, in *Wilson v. Layne*⁵⁰ and *Saucier v. Katz*,⁵¹ the Supreme Court refined the qualified immunity inquiry. The Court directed courts faced with a claim of immunity to consider a “threshold question”:

Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court

47. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 250-51 (1978) (describing the unconstitutional suspension of one plaintiff for wearing an earring to school).

48. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (“[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action . . . assessed in light of the legal rules that were ‘clearly established’ at the time it was taken” (citations omitted)).

49. See *Brosseau v. Haugen*, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring) (pointing out that it is often “easier” to determine qualified immunity than to decide “difficult constitutional” questions); *Kalka v. Hawk*, 215 F.3d 90, 94-98 (D.C. Cir. 2000) (holding that when resolution of the constitutional question involved an extensive factual investigation but qualified immunity was clearly available, a court was permitted to bypass the substantive constitutional question); Eric H. Zagrans, ‘*Under Color of*’ What Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 585 (1985) (noting that “[b]ecause the immunity is likely to be easier to determine than the plaintiff’s constitutional claim, the courts will prefer to dispose of the affirmative defense first”).

50. 526 U.S. 603 (1999).

51. 533 U.S. 194 (2001).

simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.⁵²

Wilson v. Layne itself illustrates an important point. Defendants may often still win: Having decided unanimously that the Fourth Amendment is violated when media ride-alongs permit the press to enter an individual's home when the police execute a warrant,⁵³ the Court then determined 8-1 in the next section of its opinion that the rule would not have been clear to a reasonable police officer before it had announced it.⁵⁴ But although the individual officer wins, and the plaintiff thus takes nothing, the law has been refined and government officials—and more importantly, the agencies that employ them (and that actually pay the costs of defending them even in these refining lawsuits)—are on notice that they must change their conduct. That is probably why car chase shows have replaced *COPS* episodes involving police confronting shady characters inside their homes. A critical assumption of the *Wilson-Saucier* framework, of course, is that the law is actually being laid down in stage one of the qualified immunity inquiry, in a fashion that parallels declaratory judgments. The Court's goals would not be furthered if the first-stage answer were treated simply as dicta.⁵⁵ But this gives rise to a paradoxical pair of pyrrhic victories. Because the individual official has won the case—judgment is entered for him on grounds of qualified immunity—he has neither the incentive nor the right to appeal.⁵⁶ While the plaintiff of course has the right to appeal, he may have little incentive or ability to do so.⁵⁷ If the case ends at the district court, the

52. *Id.* at 201 (citations omitted).

53. *See Wilson*, 526 U.S. at 612-14.

54. *See id.* at 615-16.

55. Prior to the Supreme Court's decisions in *Wilson* and *Saucier*, the Second Circuit had taken the position that the analysis performed in the first stage of the qualified immunity inquiry produced only dicta:

[W]here there is qualified immunity, a court's assertion that a constitutional right exists would be pure dictum. It would play no role in supporting the action taken by the court—the dismissal of the case by reason of qualified immunity. Such dictum would, of course, not be binding in future cases.

Horne v. Coughlin, 191 F.3d 244, 247 (2d Cir. 1999) (citations omitted).

56. In *California v. Rooney*, 483 U.S. 307 (1987) (per curiam), the Supreme Court dismissed the writ of certiorari as improvidently granted and refused to review a state court's determination that the police could not use a search of the defendant's trash to support their application for a search warrant because the state court had upheld the warrant on the basis of the other evidence used to obtain it. The Court explained,

This Court "reviews judgments, not statements in opinions." Here, the judgment of the Court of Appeal was entirely in the State's favor—the search warrant which was the sole focus of the litigation was deemed valid. The fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request us to review it.

Id. at 311 (citations omitted).

57. For example, civil rights lawyers may enter into retainer agreements where they agree to represent the client only at trial without agreeing also to handle appeals. *See Symposium, Ethical Issues Panel*, 25 *Fordham Urb. L.J.* 357, 365 (1998); *see also* Restatement (Third) of the Law Governing Lawyers § 19 cmt. c (2000) ("Clients and

process of constitutional refinement or elaboration that motivated the *Wilson-Saucier* sequencing requirement will be undermined. Decisions by district courts do not constitute binding precedent.⁵⁸ While the Supreme Court has not decided if determining whether the law was “clearly established” at the time of the underlying events “should be evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court[s],”⁵⁹ several courts of appeals have held that district court decisions cannot “clearly establish” constitutional law for purposes of § 1983 liability.⁶⁰

Yet, if the plaintiff does not appeal—thereby enabling the defendant to argue the alternative ground of no constitutional violation in support of affirmance—the defendant may have achieved a pyrrhic victory. As an effective matter, he and the government have been warned to change their practices in the future. They may quite reasonably decide that the risk in future litigation that the law *will* be held to have been clearly established is not worth taking and thus abandon the challenged practices.

Moreover, if the defendant wins at the court of appeals, where the finding of a constitutional violation at the first stage of the *Wilson-Saucier* analysis does create “clearly established law”—certainly within the particular circuit and perhaps more broadly—his victory may be even more pyrrhic. Precisely because many constitutional decisions involve relatively incremental refinements of broad constitutional principles, the decisions may be highly fact bound. Such decisions may be unattractive candidates for review by the Supreme Court.⁶¹

This problem is illustrated by *Bunting v. Mellen*.⁶² The case involved a § 1983 damages lawsuit by two cadets at the Virginia Military Institute (VMI) challenging VMI’s practice of predinner prayers. The district court and the court of appeals agreed that the practice violated the First

lawyers may define in reasonable ways the services a lawyer is to provide . . . , for example to handle a trial but not any appeal . . .”).

58. *See, e.g.*, *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457-58 (7th Cir. 2005); 18 James Wm. Moore et al., *Moore’s Federal Practice* § 134.02(1)(d) (3d. ed. 2006) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”).

59. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (quoting *Procurier v. Navarette*, 434 U.S. 555, 565 (1978)).

60. *See, e.g.*, *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995); *Richardson v. Selsky*, 5 F.3d 616, 623 (2d Cir. 1993). Indeed, some circuits have refused to find the law to be clearly established based on decisions from other circuits. *See* Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 *Ariz. L. Rev.* 1031, 1044-50 (2005) (surveying the courts of appeals’ various standards).

61. *See* Diane P. Wood, *Justice Harry A. Blackmun and the Responsibility of Judging*, 26 *Hastings Const. L.Q.* 11, 13 (1998) (“I am sure that every person here who clerked for Justice Blackmun (or any other member of the Court, for that matter) evaluated many a petition for a writ of certiorari with the words ‘lower court wrong, but nothing certworthy here.’”).

62. 541 U.S. 1019 (2004).

Amendment's Establishment Clause.⁶³ However, they held that the law regarding this issue had not been clearly established by prior decisions.⁶⁴ Thus, while the district court granted the plaintiffs declaratory and injunctive relief forbidding the practice in the future, it entered judgment for the defendant Superintendent of VMI on their claim for damages.⁶⁵ The cadets and the Superintendent both appealed—the cadets seeking reinstatement of their claim for damages and the Superintendent challenging the issuance of declaratory and injunctive relief. The Fourth Circuit vacated the district court's grant of declaratory and injunctive relief because the cadets had graduated in the meantime and those claims had become moot.⁶⁶ It affirmed both parts of the district court's holding with respect to the cadets' damages claims, agreeing that the school-sponsored and -administered prayers violated the Establishment Clause, but holding that the law had not been clearly established by prior decisions.⁶⁷

Although judgment had been entered in his favor on all claims, the Superintendent nonetheless sought review in the Supreme Court. The Court denied certiorari.⁶⁸ Justice Antonin Scalia, joined by Chief Justice William Rehnquist, dissented from the denial of certiorari. He noted the Court's "settled refusal" to entertain an appeal by a party on an issue as to which the party prevailed,⁶⁹ but argued for a relaxation of that rule in qualified immunity cases: "I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination."⁷⁰ While they voted to deny the petition for certiorari, Justice John Paul Stevens (joined by Justices Ruth Bader Ginsburg and Stephen Breyer) termed the problem identified by Justice Scalia the "byproduct of an unwise judge-made rule"⁷¹—a rule that all of them had embraced only five years earlier.⁷² The next year, in *Brosseau v. Haugen*,⁷³ the Court summarily reversed a Ninth Circuit excessive-use-of-force decision on the grounds that the law was not clearly

63. See *Mellen v. Bunting*, 181 F. Supp. 2d 619, 621, 637 (W.D. Va. 2002), *aff'd*, 341 F.3d 312 (4th Cir. 2003).

64. See *id.* at 637.

65. See *id.* at 638.

66. *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003).

67. See *id.* at 375-76.

68. *Bunting v. Mellen*, 541 U.S. 1019 (2004).

69. *Id.* at 1023 (Scalia, J., dissenting) (citation omitted).

70. *Id.*

71. *Id.* at 1019.

72. The Court cited Justice John Paul Stevens's concurrence from another case stating that he and Justice Stephen Breyer had "questioned the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues when the Court adopted it." *Id.* (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998) (Breyer, J., concurring); *id.* at 859 (Stevens, J., concurring in the judgment)). While that is certainly true, both of them subsequently joined the Court's opinion in *Wilson* laying out the sequencing requirement.

73. 543 U.S. 194 (2004).

established, while “express[ing] no view as to the correctness of the Court of Appeals’ decision” that the force was in fact unreasonable.⁷⁴ Justices Breyer, Scalia, and Ginsburg filed a concurrence expressing their concern

that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts’ dockets are crowded, a rigid “order of battle” makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review.⁷⁵

So the *Wilson-Saucier* sequencing requirement may turn out to be short-lived.

If the problem with *Wilson* and *Saucier* is the possibility of unreviewable constitutional decisions, rather than docket congestion—and the analysis Chief Justice Rehnquist offered in *Wilson*, and Justice Kennedy reiterated in *Saucier*, strongly embraces the importance of constitutional refinement—the question arises whether it is somehow possible to provide review—not so much for the individual officer, who may well be indifferent to the basis for his victory, but rather for the governmental body whose policies or training programs must change.

The difficulty, as I have already suggested, is the potential lack of an appellee to defend the constitutional judgment below. One solution might involve formalizing the *Wilson-Saucier* structure to separate its two elements. Perhaps the qualified immunity doctrine should be recast so that defendants would continue to be shielded from compensatory and punitive damages, but not from nominal damages or declaratory relief. The award of nominal damages or declaratory relief would often entitle the plaintiffs to attorney’s fees as prevailing parties.⁷⁶ The presence of potential attorney’s fees could create an incentive for plaintiffs and their lawyers to continue to litigate and to appeal the judgment in the defendant’s favor on the qualified immunity issue. Plaintiffs might be far more willing to defend constitutional holdings, even if the probability of obtaining money damages is somewhat diminished, if they were essentially provided an attorney to do so.

74. *Id.* at 198.

75. *Id.* at 201-02 (Breyer, J., concurring).

76. In any § 1983 suit, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988(b) (2000). The Supreme Court has held that plaintiffs who recover nominal damages in a constitutional torts case can be prevailing parties under § 1988. *See Carey v. Phipps*, 435 U.S. 247, 266-67 (1978). The Court limited the entitlement to attorney’s fees in nominal damages cases somewhat in *Farrar v. Hobby*, 506 U.S. 103 (1992). But the Court’s analysis there, which focused on the fact that nominal damages can “highlight[] the plaintiff’s failure to prove actual, compensable injury,” *id.* at 115, is inapposite to cases where there is no question that the plaintiff suffered a substantial actual injury as a result of the defendant’s conduct, but is barred from recovery because the law was not previously clearly established.

While such a solution has obvious advantages in enhancing the opportunity for constitutional refinement, the Court may in fact be heading in the opposite direction. As I have pointed out elsewhere, in recent years a variety of doctrines have undermined the concept of the “private attorney general” who brings suit to vindicate both her own claims and the broader public interest.⁷⁷ One aspect of this attack has been a limitation on attorney’s fees.⁷⁸ This Term, the Court will decide whether preliminary relief can entitle a party to attorney’s fees.⁷⁹ It seems unlikely in light of the Court’s other recent attorney’s fees decisions that it will approve the awarding of fees to plaintiffs who do not obtain a final judgment in their favor. But whatever may be true for plaintiffs who obtain only temporary relief, plaintiffs who prevail on the first prong of the qualified immunity inquiry have actually obtained important, lasting relief: They have vindicated their claim that the government acted unconstitutionally.

III. A WHOLE ‘NOTHER CRAZY QUILT: THE EMERGENCE OF THE ELEVENTEENTH AMENDMENT

As we saw earlier, the Supreme Court revived § 1983 at least in part to circumvent the barriers to constitutional refinement and victim compensation posed by the Eleventh Amendment, substituting individual officer lawsuits for the foreclosed lawsuits against the states. The Court’s recent revival of a robust Eleventh Amendment has added another layer of paradox to the already jumbled medley of doctrines governing constitutional litigation.

When Congress wants to regulate activities such as government employment or government programs, it has two broad sources of authority on which to draw: its enumerated powers under Article I, § 8 (particularly the commerce and spending powers) and its Enforcement Clause powers under the Fourteenth Amendment.⁸⁰ For present purposes, the difference between these two sources of congressional power can be summed up this way: While the Commerce Clause permits Congress to *regulate* a wider array of conduct than the Equal Protection or Due Process Clauses would, Congress’s *enforcement* authority under the Commerce Clause is decisively shallower than its authority under the Fourteenth Amendment. In *Seminole Tribe v. Florida*, the Supreme Court held that Article I does not empower Congress to abrogate states’ sovereign immunity and authorize individual victims of illegal conduct to sue state governments.⁸¹ As *Seminole Tribe*

77. See generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183.

78. See *id.* at 205-08.

79. See *Struhs v. Wyner*, 127 S. Ct. 1055 (2007) (granting certiorari to review *Wyner v. Struhs*, 179 Fed. Appx. 566 (11th Cir. 2006) (per curiam) (holding that a plaintiff who obtained a preliminary injunction but later lost at the summary judgment stage was nonetheless a prevailing party for purposes of fees under § 1988(b)).

80. See U.S. Const. art. I, § 8; *id.* amend. XIV, § 5.

81. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

itself recognized, however, Congress can abrogate states' sovereign immunity when it is acting to enforce the Fourteenth Amendment.⁸²

A centerpiece of the later Rehnquist Court's "federalism revival" was its articulation of what I have termed the "Eleventeenth Amendment."⁸³ In a series of cases, the Court sharply limited Congress's authority to abrogate states' sovereign immunity in situations where the congressional prohibition went beyond the self-executing commands of the Equal Protection and Due Process Clauses.⁸⁴

In its last years, the Rehnquist Court backed off a bit. In *Nevada Department of Human Resources v. Hibbs*⁸⁵ and *Tennessee v. Lane*,⁸⁶ the Court upheld congressional abrogations involving the protection of groups (in *Hibbs*, women) and rights (in *Lane*, access to the courts) to which the Court had already accorded heightened scrutiny.

Last Term, in *United States v. Georgia*,⁸⁷ the Court, in a surprisingly unanimous opinion by Justice Scalia, took the analysis one step further. The case involved a prison inmate, Tony Goodman, who was a paraplegic and who argued that the state's treatment (which allegedly included leaving him in his wheelchair for hours where he was unable to turn around or to use the toilet) violated both the provisions of title II of the Americans with Disabilities Act (ADA) and the Eighth Amendment. Goodman sued the state of Georgia for damages under title II. The Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."⁸⁸ Thus, to the extent that the challenged conduct violated the Eighth Amendment (which was incorporated against the states through the Due Process Clause of the Fourteenth Amendment), Congress could abrogate the state's sovereign immunity. Accordingly, the Supreme Court directed the lower courts on remand to determine on a claim-by-claim basis whether Goodman could maintain a damages action.⁸⁹

Like a number of the Court's other recent constitutional rulings, *Goodman* may have paradoxical consequences. The Court's position seems to require that courts decide constitutional issues of potentially great complexity—the kinds of issues that a number of the Justices have expressed reluctance to address in the context of § 1983 lawsuits—before applying a statute that is quite a bit clearer with respect to constraints on

82. *Id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

83. Karlan, *supra* note 77, at 189.

84. *See, e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

85. 538 U.S. 721 (2003).

86. 541 U.S. 509 (2004).

87. 126 S. Ct. 877 (2006).

88. *Id.* at 882.

89. *Id.*

state actions.⁹⁰ If courts have to adjudicate an inmate's Eighth, First, or Fourteenth Amendment claim before they get to the damages claim afforded by the Americans with Disabilities Act, then the ADA is really only achieving the elimination of qualified immunity, since it provides damages against the governmental entity without respect to whether the law was clearly established at the time. If this is wise and constitutionally prudent policy with respect to ADA claims, then perhaps Congress should take the Court's hint and amend § 1983 itself, both to abrogate expressly states' sovereign immunity (thereby overturning the Supreme Court's construction of § 1983 in *Will v. Michigan Department of State Police*,⁹¹ which had held that states (unlike municipalities) are not "persons" who can be sued under § 1983) and to overrule *Monell's* rejection of respondeat superior liability.

CONCLUSION

The law governing constitutional refinement is itself in dire need of refinement. It rests on a series of fictions, ranging from *Ex parte Young's* claim that government officials are not really the government when they act unconstitutionally, so sovereign immunity does not protect them, to the qualified immunity cases' assumption that individual officers bear the costs of their defense and the risk of liability. It calls on district courts to engage in a potentially valuable process of elaborating constitutional doctrine, but also undermines the likelihood that that doctrine will receive appellate review. To return to Justice Cardozo's metaphor, it is time to fashion a new constitutional garment out of the scraps we are given—one with cleaner, more elegant lines. Returning constitutional refinement to a process in which the government to be regulated is a formal participant in the litigation would be an important first step.

90. Under the so-called "*Ashwander* doctrine," the Supreme Court prefers that cases be decided on statutory rather than constitutional grounds when possible. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Of course, the Court's Eleventh Amendment jurisprudence requires reaching the constitutional issues.

91. 491 U.S. 58 (1989).