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Section 1983 and Constitutional Torts

CHARLES F. ABERNATHY*

We have long recognized that the resurrection of § 1983 converted the fourteenth amendment from a shield into a sword by providing a civil action for vindication of constitutional rights1 and, to the extent that damages have gradually become the authorized remedy for § 1983 violations,2 we have easily come to think of such actions as constitutional torts—civil damage remedies for violations of constitutionally defined rights.3 There is, however, a subtler and greater reality to what has transpired, for the mere procedural vehicle of constitutional enforcement has, in retrospect, changed the substance of constitutional law itself. Section 1983 has not merely served as a vehicle for enforcing constitutional law, it has led to the making of a new constitutional law as the Court has adjusted constitutional norms to permit their enforcement under § 1983.

Courts have been slow to recognize this new reality because it appears inconsistent with the accepted lore about § 1983, that it has no substance of its own, creates no rights, and merely enforces those rights already found in the Constitution.4 That remains true, courts having decisively rejected pro-

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2. See City of Los Angeles v. Lyons, 461 U.S. 95, 111-12 (1983) (no equitable relief shall be given in § 1983 case unless remedies at law are inadequate; damages are adequate remedy even against widely enforced government policy authorizing police to use chokeholds to subdue suspects); Whitman, Constitutional Torts, 79 MICH. L. REV. 5, 41-67 (1980) (criticizing developing emphasis on damage remedies under § 1983 and offering alternative approach that was not cited, but was implicitly rejected in Lyons).


4. See infra note 117 and accompanying text (discussing cases confirming Court's view that
fessorial suggestions that statutory liability should be tied to the common law of 1871 or to some notion of evolving federal common law. The constitutional law that is read into § 1983 is, however, not static, and one of the factors that has affected the development of constitutional law is § 1983 litigation. The primary effect has been the expression of constitutional law in tort-like phrases, a substantial departure from the structural constitutional law emphasized by the Warren and Burger Courts.

The definition of standards of care for § 1983's constitutional torts, sometimes incompletely labeled as state-of-mind requirements, is the primary area in which this new development has occurred. The original Supreme Court decision reinvigorating § 1983, Monroe v. Pape, signaled that this would be an important topic, but the Monroe Court's perception that mental elements would be critical in distinguishing civil from criminal violations proved insufficiently insightful, for choice of state-of-mind requirements even more greatly implicates traditional concerns about federalism and the proper relationship between federal and state courts.

§ 1983 creates no substantive rights). Section 1983 also enforces some rights found in other federal statutes. See Wright v. City of Roanoke Redevelopment & Housing Auth., 107 S. Ct. 766, 770-74 (1987) (rights under federal housing act enforceable under "and laws" language of § 1983 because no evident congressional intent to preclude remedy). This non-constitutional aspect of § 1983 is not discussed in this Article.


6. See infra note 171 and accompanying text (discussing predominant method of constitutional adjudication—the balancing of individual rights against state interests as expressed by legislative intent).


9. See id. at 187 (distinguishing § 242's criminal provision, which contains an explicit "wilfullness" requirement, from § 1983's civil standard).

10. See Brower v. Inyo County, 109 S. Ct. 1378, 1381 (1989) (distinguishing between concerns implicated by constitutional law and those implicated by state tort law and using intent requirement
remedies and intrusive injunctions under § 1983 heightened these traditional concerns,11 and the post-*Monroe* prospect of wholesale creation of new state-of-mind requirements for § 1983 transformed concern to anxiety, especially as some courts indicated that the requirements should be developed by incorporating ordinary common-law tort standards into federal law.12

The movement for direct incorporation of state tort elements into § 1983 soon came to a halt, not only because of increasing appreciation of the federalism concerns,13 but also because of basic manageability problems with the
to distance the two concerns from one another). Compare Paul v. Davis, 424 U.S. 693, 700-01 (1976) (federal courts should avoid reading state tort standards into § 1983 so as not to upset federal system that places states in control of most torts) with *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873) (fourteenth amendment should not be so broadly construed as to inaugurate "[radical] changes [in] the whole theory of the relations of the state and federal governments").


12. See infra Part III.A (discussing problem of disembodied state of mind requirements).

13. Increasing concern that the problem lay in § 1983 as a statute manifested itself in a variety of ways: (1) creation of defenses that limit damage relief but not all liability, see *Pulliam* v. *Allen*, 466 U.S. 522, 541-44 (1984) (immunity defenses do not bar attorneys fees awards or declaratory and injunctive relief in § 1983 cases); *Pierson* v. *Ray*, 386 U.S. 547, 553-55 (1967) (judicial immunity is available defense to section 1983 claim; (2) narrow construction of ancillary relief, such as attorneys' fees, so that constitutional rights may remain vindicated but the incentive to use § 1983 as the vehicle for vindication will be reduced, see *Hewitt* v. *Helms*, 482 U.S. 755, 759-60 (1987) (no attorneys' fee award when plaintiff has won favorable ruling of law unless plaintiff also ultimately secures civil relief); and (3) creation of special interpretations, although sometimes abortive, that try to make the scope of § 1983 narrower than constitutional law, compare *Polk County v. Dodson*, 454 U.S. 312, 317-25 (1981) (public defenders not acting "under color of" law, with strong implication that statutory language may be narrower than constitutional state-action doctrine) with *Tower v. Glover*, 467 U.S. 914, 923 (1984) (public defender may be sued for conspiring with state officials to deprive another of federal right) and *West v. Atkins*, 108 S. Ct. 2250, 2255 (1988) (statutory "under color of" law element is coterminous with constitutional state-action doctrine). Yet it is difficult to make the argument that these concerns have eviscerated the statute or hampered the enforcement of constitutional law through § 1983. See *Felder* v. *Casey*, 108 S. Ct. 2302, 2308 (1988) (restrictive state notice-of-claim provision cannot be applied to § 1983 action even when it is brought in state...
concept itself. However, the language of torts continued in use, the Court explaining that the state-of-mind requirements it was adopting had grown from constitutional law rather than state tort law, and that the particular requirement in any given § 1983 case would turn on what right the plaintiff sought to enforce. Part I of this Article traces this development.

The Court’s recognition that it was creating § 1983’s standards from constitutional law came a full twenty-five years after Monroe—and after it already had accreted a sizeable number of cases constructing such mental elements without the benefit of an explanatory theory. These cases, moreover, differ strikingly from the predominant constitutional law of the period, because they concentrate on dispositive individual states-of-mind rather than strict scrutiny, ends/means tests, and the other structured approaches traditionally associated with modern constitutional law. Part II of this Article explains why § 1983 has affected constitutional lawmaking in this way. The responsible factors are largely a function of two profound policy choices—personal liability of officials regardless of the legality of their actions under state law and the practical need to instruct juries.

Part III discusses a derivative but nevertheless equally important matter, the problem of discussing state-of-mind requirements alone without specifying full standards of care that designate constitutional duties on which the state-of-mind elements should focus. These constitutional considerations must ultimately rein in tort phrases to provide a constitutionally based focus for the Court’s state-of-mind requirements so that juries are not free to make their own constitutional law.

The impact of these factors on constitutional law has not yet been fully appreciated by teachers of constitutional law, and few constitutional law casebooks deal with cases in this area. There are some aspects of older

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14. See infra note 48 and accompanying text (noting number of potential state law torts with which one constitutional violation might overlap).
15. See infra Part I.c.2 (discussing Court’s decisions in 1986). At least one student author has seen creative potential in constructing constitutional rather than common-law standards of care for § 1983. See Note, A Theory of Negligence, supra note 3, at 687 (arguing that constitutional norms should, more than under common law, lead to increased findings of municipal liability).
16. See infra note 115 (cataloguing such cases).
17. See infra Section II.b.1.a (discussing state of mind requirements and comparing them to structured constitutional law).
18. The major exception is Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1987), which applies the intent test to equal protection violations. Id. at 265.
unstructured constitutional law that share some of the concerns with individuation that are seen in this area of constitutional law, and therefore it is difficult to make the claim that this is an entirely new constitutional phenomenon. Nevertheless, the developments in this area have had such an extraordinary impact on the lower federal courts, where constitutional torts dominate the civil caseload of constitutional cases, that perhaps it is time for us to consider constitutional torts as more than a procedure for enforcing constitutional law, and instead as the next step beyond separation of powers (Constitutional Law I) and structured protection of individual rights (Constitutional Law II)—to consider it Constitutional Law III, the new constitutional standards of care influenced by § 1983.

I. SECTION 1983 AND THE SEARCH FOR STANDARDS OF CARE

A. MONROE V. PAPE AND THE LEGACY OF “DUAL COVERAGE”

When Chicago police officers in Monroe v. Pape faced a § 1983 complaint that they had broken into a house, ransacked its contents, searched the family naked, held the father without charge, and subsequently released him without apology, they proposed a simple defense: their acts were not done “under color of” law as required by § 1983 because they were in violation of state law. Thus, they argued, the plaintiff’s appropriate remedy was to file a state-law claim in state court. It was the Court’s rejection of this Brer Rabbit defense that created the modern § 1983 suit for constitutional torts. But even here most casebooks place the case in the context of structured review under equal protection. See, e.g., G. Gunther, Constitutional Law 698 (11th ed. 1985) (placing intent in context of high-level scrutiny and using it as transition to affirmative action issues); W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 1288 (5th ed. 1980) (discussing intent in context of high-level scrutiny given to race); Stone & Seidman, supra note 13, at 553 (indicating that intentional racial discrimination receives high-level scrutiny but unintended version receives low-level scrutiny); cf. L. Tribe, American Constitutional Law 824, 1504, 1512 (2d ed. 1988) (repeatedly discussing Arlington Heights in institutional terms—e.g., as disguising a remedies issue or reflecting “institutional concerns”).

19. See infra Part II.B.1.c (discussing “definitional balancing” cases).


21. Id. at 169.

22. Id. at 172.


24. See J. Harris, How Mr. Rabbit Was Too Sharp for Mr. Fox, in The Complete Tales of Uncle Remus 12-14 (1972). Brer Rabbit, like the defendants in Monroe, assured the fox that throwing him into the briar patch would be a painful punishment, although, of course, it actually placed Brer Rabbit on his home ground where he could escape the fox.

25. See Shapo, supra note 1, at 323-24 (inaugurating phrase “constitutional tort” to describe claims allowed under Monroe). A predecessor decision under the criminal counterpart to § 1983,
Prior to *Monroe*, it had been possible to file § 1983 suits in federal court challenging the constitutionality of state legislation or other official policy,\(^{26}\) but lower courts had rarely permitted § 1983-based attacks against official misconduct violating state law.\(^{27}\) Indeed, a set of judicially created principles had directed to state court many cases that alleged violations of both state and federal law.\(^{28}\) When *Monroe* permitted such claims to be brought under § 1983,\(^ {29}\) it created a "dual-coverage" statute,\(^ {30}\) one that plaintiffs could use not only to attack the constitutionality of statutes and official policy but also to attack action by officials that simultaneously violated state statutes or official state policies and the Constitution.

The tort-like aspects that this expansion introduced into § 1983 were reinforced by another part of the *Monroe* holding, that part that exempted local
governments from paying the damage judgments that flow from § 1983 actions. Combined with the long-established sovereign immunity doctrine, which protected state-level governments from monetary liability, Monroe created a regime in which constitutional enforcement (or restitution) would depend upon holding individuals responsible. Thus, constitutional adjudication under § 1983 not only covered officials who acted outside their state-law authority, it also framed both dual-coverage topics in terms of individual responsibility.

This transformation of § 1983 into a tort-like statute would later generate an even more fundamental discussion, phrased in terms straight from the vocabulary of torts, about the standards of care imposed on state officials by § 1983.

Monroe had a bit to say about that topic as well, though it is doubtful that the Court understood the full ramifications of its observations. When Justice Douglas wrote in Monroe that § 1983 “should be read against the background of tort liability that makes a [person] responsible for the natural consequences of his actions,” he had a limited agenda in mind. He intended only to note that § 1983, unlike its criminal-law counterpart, did not contain a statutory “willfulness” requirement. Even if the remark had

32. Ex Parte Young, 209 U.S. 123, 154 (1908) (under eleventh amendment, a federal suit may be brought against individual officer to enjoin constitutional violation, but not against state itself); Hans v. Louisiana, 134 U.S. 1, 10 (1890) (eleventh amendment bars federal suits against a state, whether brought by its own citizens or citizens of another state); cf. Edelman v. Jordan, 415 U.S. 651, 663 (1974) (even when officer may be sued, no monetary relief against state treasury may be awarded by federal court).
33. The Court would later develop the official immunity doctrine to protect officers from personal liability in some cases. See Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (recognizing absolute and qualified immunities, varying with officer’s duties); P. Schuck, SUING GOVERNMENT 89-99 (1983) (discussing absolute and qualified officer immunity).
34. Even following reversal of the portion of the Monroe holding that exempts local governments from paying damages for its officials’ wrongdoings, see supra note 31, the Court continued to frame even municipal liability in terms of individual wrongdoing, see City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (necessary predicate for finding of municipal liability is finding of individual constitutional violation by officer). But see City of Canton v. Harris, 109 S. Ct. 1197, 1205-06 (1989) (liability for failure to train; issue discussed in terms of disembodied decision that Court ascribed to no particular city official).
35. See Paul v. Davis, 424 U.S. 693, 698 (1976) (observing that “survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle” would not have claim because § 1983’s standards are not synonymous with state torts); Kirkpatrick, supra note 7, at 70 (ultimate liability depends upon state-of-mind issues raised by defenses as well as constitutional amendment at issue); Kreimer, supra note 5, at 619 (arguing that federal common law modeled on long-rejected doctrine of Swift v. Tyson should guide § 1983); Note, A Theory of Negligence, supra note 3 (1983) (arguing that negligence should be standard governing supervisory liability).
36. 365 U.S. at 187.
37. Justice Douglas’ opinion had relied upon precedent interpreting “under color of” law in § 1983’s criminal counterpart. Id. at 187. Since the unrelated willfulness requirement had dominated discussion in the cited precedent, see Screws v. United States, 325 U.S. 91 (1945) (sharp
not led lower courts on a fool’s errand, however, courts still would have been faced with the same important issue after Monroe—what state-of-mind, if any, would a plaintiff need to prove in order to establish a claim under this newly discovered constitutional tort?

The issue was not exactly a new one. Actually, the Court had faced many occasions in its creation of constitutional law when it discussed the relevance of state-of-mind issues. It was usually with respect to motive or intent, and Justice Douglas must have been aware of the long-running debate about motive in both active and dormant commerce clause cases, as well as in equal protection and due process litigation. But in those cases the search for motive, when relevant, was usually for legislative motive. The issue that was to arise after Monroe was the relevance of the state-of-mind of individual governmental officials who allegedly had violated their own state's law as well as the Constitution.

B. THE SEARCH FOR STANDARDS: ABORTIVE EARLY APPROACHES AND THEIR RELICS

When faced with this new situation, early courts resorted to two quite different solutions, one for due process cases and the other for equal-protection-based racial discrimination cases. In due process cases, courts sought refuge in the law that had previously dealt with similar problems of individual responsibility, the law of torts. The most widely emulated decision,
Whirl v. Kern,\(^{41}\) came from the Fifth Circuit and involved a sheriff "accused of wrongfully overextending to an inmate of his jail the hospitality of his hostelry and the pleasure of his cuisine."\(^{42}\) Upon being released, the inmate sued the jailor under § 1983, claiming that he had been deprived of his liberty without due process of law. Faced with a defense argument that these things happen and no ill will was intended,\(^{43}\) the court held that the state-of-mind requirement in any given § 1983 case should be determined by analogizing the wrong to its most similar state-law tort:

Under well established principles of tort law, when an essential element of the wrong itself includes the demonstration of an improper motive, as in malicious prosecution, then such principle becomes a part of sec. 1983. But the origin of such a requirement is in the common law of torts, not in the [1871] Civil Rights Act.\(^{44}\)

Whirl's incorporation of state tort law standards of care into § 1983 led it to hold, on the facts before it, that virtual strict liability applied to such false imprisonment situations.\(^{45}\) Other courts adopted the Fifth Circuit's state-tort-analogy approach in a number of other situations in which due process claims were at issue.\(^{46}\) Indeed, the thought process seemed so natural that virtually to this day courts, attorneys, and law professors often speak of the § 1983 cases before them as "false arrest," "malicious abuse of process," or "assault and battery" claims.\(^{47}\)

As natural as it might have seemed, this idea of searching for state tort analogues was a cracked vase, one internally lit so as to disclose its defect. Its serious flaw was that it created the risk of forcing § 1983 into a mold that completely overlapped with state tort law, rendering it—or the state law—superfluous. This would have come about because constitutional principles at least superficially overlap with a host of state torts.\(^{48}\) Creation of a federal

\(^{41}\) 407 F.2d 781 (5th Cir. 1969).
\(^{42}\) Id. at 785.
\(^{43}\) Id. at 786.
\(^{44}\) Id. at 787-88.
\(^{45}\) Id. at 791.
\(^{46}\) See infra notes 67-69 & 77 and accompanying text (discussing cases adopting Whirl v. Kern's approach in response to § 1983 due process claims).
\(^{47}\) See Kirkpatrick, supra note 7, at 54 (listing possible § 1983 claims by reference to similar state-law torts); Kreimer, supra note 5, at 618-28 (arguing that use of general federal common law grown from old common law and supplemented by state law is precisely what Congress wanted for § 1983). For a discussion of cases, see infra notes 67-69 and accompanying text (discussing § 1983 cases which refer to state tort law analogues).
\(^{48}\) An illegal search under the fourth amendment might also comprise the state tort of trespass. See Bivens, 403 U.S. at 390. Other possibilities include: an unconstitutional seizure and state-law battery or wrongful death; an unconstitutional uncompensated taking and state-law claim for inverse condemnation or common law taking; unconstitutional excessive use of force and state-law battery; procedural due process and state-law libel and contract claims. Cf. Owens v. Okure, 109 S. Ct. 573, 582 (1989) (when state has specific and general personal injury statutes, the statute of
tort law that might displace state law had been a constitutional taboo since at least the time of the *Slaughter-House Cases*, a taboo reinforced by the diversity-law revolution of the 1930s, a taboo reiterated in a related context when the Supreme Court warned against creating statutory sources of federal tort law. The internal light disclosing this flaw was evident in *Whirl* itself. When the court undertook the process of searching for tort analogues, it first looked broadly to decisions of courts around the country as well as to traditional sources of common law. Yet, at the dispositive moment in the case, it turned to the law of Texas, the state in which the claim arose. If § 1983 were to adopt state law, was it to be the law of a particular state or the general common law? Rationales could be finessed to support either approach, but both seemed wildly improbable because of the results they produced. If the forum’s law were adopted, federal rights under § 1983 would change as the state’s law changed; if general state common law were adopted, federal rights would change as the mystic “majority rule” changed, a perverse form of national lawmakers. These problems could be avoided by adopting the general common law of 1871, the year of § 1983’s adoption, but this approach—never considered in *Whirl*—would have tied

limitations of the residual or general one applies in § 1983 action); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (in legal issue in which tort law is applied—statutes of limitation—Court lists possible analogues and finds list so extensive as to warrant conclusion that all § 1983 claims should be analogized to generic “personal injury” actions).

49. 83 U.S. (16 Wall.) 36, 78 (1873) (newly adopted fourteenth amendment should not be read so as to “radically change” federalism and thereby allow central government to displace states’ “ordinary and fundamental” powers).

50. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[t]here is no federal general common law,” and federal courts’ pretense that there was violates Constitution).

51. See *Collins v. Hardyman*, 341 U.S. 651, 660-61 (1951) (conspiracy by private persons does not give rise to claim under § 1985(3); decision dictated by need to avoid constitutional problems inherent in creating federal torts in such situations).


53. Id. at 791 & n.10 (since Texas law deems warrants “functus officio,” jailor could rely on nothing to justify his holding of plaintiff and was therefore guilty of false imprisonment rather than false arrest).


55. The deference to majority rules seen in the practice of defining appropriate official immunities relies upon the common law as it existed at the time of passage of § 1983, and does not confer on the states the power of change. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (prosecutors receive absolute immunity under old common law). The sole suggestion that I have found of any delegation of collective decisionmaking to state common law is the argument that the right to jury trial “at common law” may have been intended to have a changing meaning over time. *See Wolf­ram, The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 744-45 (1973) (“the term ‘common law’ in the seventh amendment was probably intended to refer to a process of legal development, rather than to an immutable and changeless state of the law”).

56. Cf. supra note 33 (discussing official immunity doctrine, which uses this approach).
§ 1983 to hundred-year-old notions, itself an unlikely option. 57

To note this illuminated flaw in Whirl's analysis is not to take a pro-plaintiff or pro-government position, as demonstrated by the cases that followed the Fifth Circuit's approach. It is true that plaintiffs were helped in the sense that state tort standards, developed largely with private relationships in mind, usually omitted the separate consideration of any independent state interests that might have changed the public policy balance and altered the state-of-mind element deemed appropriate for the § 1983 suit. Moreover, to the extent that the approach simply referred to the law of torts, it focused on law more easily made by courts because it could be made as common law, without the constraints that accompanied the interpretation of the Constitution. 58 Yet the incorporation of state law also shortchanged those favoring federal protection of human rights by simultaneously limiting constitutional commands under § 1983 to state-law levels and by turning decisionmaking authority over to the states. 59

In § 1983 cases presenting race-based equal protection claims, courts did not turn to state law as a source for finding standards of care, probably because in the most active circuit there were no such analogues: states in the Fifth Circuit virtually required racial discrimination. 60 Therefore, it was not

57. See Eisenberg, supra note 5, at 517 (1980) (tying § 1983 to old general common law would cause courts to use "rules of a different era to govern modern problems for which those rules will only fortuitously supply suitable answers"). Professor Kreimer has argued that the framers of § 1983 did in fact intend to adopt the old common law, albeit the Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), spurious federal version of that law. Kreimer, supra note 5, at 618-28. Yet even Professor Kreimer appears to contemplate that this federal common law would have continued to evolve, id. at 628, probably producing under the heading "common law" what the Court today calls constitutional law. Most damaging to Professor Kreimer's thesis, however, is the Supreme Court's rejection of the statutory vehicle that would accomplish his result. Although one opinion pre-dating Kreimer's article suggests that 42 U.S.C. § 1988 requires resort to the general federal common law, see Robertson v. Wegmann, 436 U.S. 584, 589 n.5 (1978), later cases quite distinctly construe the statute to require selective adoption of state law, particularly the law of the state in which the district court sits. See Owens v. Okure, 109 S. Ct. 573, 576 (1989) (section 1988 requires courts to adopt analogous state statute of limitation of forum); Felder v. Casey, 108 S. Ct. 2302, 2307 (1988) (section 1988 normally requires resort to law of forum state); Wilson v. Garcia, 471 U.S. 261, 276 (1985) (section 1983 requires use of forum's statute of limitations); cf. Felder, 108 S. Ct. at 2313-14 (this choice-of-law problem should be analogized to Erie, not Swift).


59. See Tennessee v. Garner, 471 U.S. 1, 12-13 (1985) (Tennessee law authorizing shooting of fleeing felon consistent with common law tradition but nevertheless unconstitutional), and Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) (breach of peace under common law unconstitutional under free speech principles), which provide illustrative examples of the distinction between common law and constitutional norms. If common law dictated the content of constitutional torts, then by definition common law norms could not violate the Constitution or give rise to § 1983 actions.

60. See generally J. PELTASON, FIFTY-EIGHT LONELY MEN (1961) (chronicling experiences of federal judges who enforced desegregation decrees in southern states).
so much a matter of logic as one of necessity that forced the circuit court to an alternate source of law—the Constitution itself. In its en banc decision in Hawkins v. Town of Shaw, the court faced a somewhat typical problem of the post-Brown era: a town had developed and provided municipal services to its white neighborhoods, but had done virtually nothing for its black neighborhoods. Local officials, of course, claimed that racism had not motivated their decisions, that the visible divide in the town was the product of neutral decisionmaking or, at worst, mere inattentiveness. Rather than basing its opinion on readily available language in Monroe, the court turned directly to constitutional norms, with the following conclusion:

[Actual] intent, motive, or purpose to discriminate [need not be directly proved,] . . . for “‘equal protection of the laws’ means more than merely the absence of governmental action designed to discriminate; . . . ‘we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme.’”

The cases cited by the Hawkins court were of a similar nature. All involved supposedly neutral decisions in social settings dominated by decades of entrenched segregation. What is intriguing about these cases is that none, not even those presenting due process claims, invoked the language of Monroe. Rather, all developed the applicable law from available constitutional sources, principally the two limited areas in which the Supreme Court had long rejected the separate-but-equal doctrine, voting and jury service. One other widely respected case from the period, not cited in Hawkins but relied on by other courts, developed the same principle from a combination of constitutional materials, chiefly those concerning legislative redistricting.

61. 461 F.2d 1171 (5th Cir. 1972) (en banc), aff’d 437 F.2d 1286 (1971).
62. See Monroe, 365 U.S. 167, 180 (1961) (Congress intended § 1983 to provide a remedy when “by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced” to protect citizens’ rights). This statement, appearing in the middle of a discussion of legislative history that contained lengthy quotations from the legislative debate, contained no citation to authority. Id.
64. See id. (citing Norwalk, 395 F.2d at 931) (blacks displaced under urban renewal program and suffering long discrimination in private housing market need not prove intent to discriminate; relocation plan having “‘accidental’” impact on blacks violates equal protection); Kennedy Park Homes Ass’n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970) (dictum) (“thoughtlessness rather than a purposeful scheme” to discriminate racially nevertheless violates equal protection when it imposes severe disadvantage on community long isolated and denied services); United States ex rel. Seals v. Wiman, 304 F.2d 53, 65 (5th Cir. 1962) (federal courts in Alabama, where there exists long history of intentional discrimination against black jurors, discern racial discrimination in juror selection by looking at “objective results” rather than proof of “ill will [or] evil motive”).
65. See supra notes 26 & 39 (citing voting and jury service cases).
While the *Hawkins* approach dominated the Fifth Circuit as a consequence of its heavy caseload of racial problems, the state-tort-incorporation doctrine of *Whirl* offered the better long-term enticement to courts because it held out great hope of providing standards for the myriad due process claims that could arise under § 1983 after *Monroe*. Some cases were notable because they presented factual situations that the Supreme Court would later resolve in another way, using Constitution-based standards. In *Madison v. Manter* the First Circuit analogized to the common law in holding that negligence in seeking a search warrant would not support a claim of constitutional deprivation; rather "Massachusetts common law" required a showing of maliciousness. *Aldridge v. Mullins* involved a police officer in Tennessee who shot a fleeing suspect and sought to excuse his acts as within his discretion. Citing Tennessee common law, which the court held applicable under § 1983, the judge ruled that the officer's conduct constituted at least the "gross negligence" that was actionable under common law.

That these and other courts should have focused so single-mindedly on state law should not have been surprising. The Supreme Court had seemingly encouraged it with its own use of the approach in three areas that were integral parts of the civil rights territory. First, in *Pieri son v. Ray*, the Court found state law pertinent in the development of the official immunity defense. Freedom riders in that case sued police officers and a local Mississippi judge for falsely charging them with a breach of the peace. In creating an immunity for the defendants, the Court reasoned that the legislative history and language of § 1983 gave no "clear indication" that Congress intended to abrogate immunities long-established in American common law, including one that provided police officers with a defense of "good faith and probable cause." The Supreme Court had further reinforced this line of reasoning in a series of cases that held that drafting deficiencies in civil rights statutes should be cured by referring to state law. Finally, beginning in the early
1970s, the Court created a law of procedural due process that turned to state law for the very definition of the liberties that would be protected by that version of the due process clause.\(^74\)

The courts in *Whirl*, *Madison*, and *Aldridge* formed a perfectly logical judgment: if the overall standard of care or mental element applicable to a given situation is the combination of the state-of-mind that the plaintiff must prove discounted by any mental elements that would provide a defense;\(^75\) and if the mental elements relevant to the immunity defense are found by resort to state tort law; then surely the plaintiff’s elements should be found in the same source—state tort law. Similarly, an experienced judge might have thought that if the very definition of rights under procedural due process depends at times on state law, then state law can play a role in ascertaining the standard of care imposed by constitutional law.\(^76\)

Indeed, the reasoning appears to be so logical that courts still find it seductive. Only four years ago, in *Conway v. Village of Mount Kisco*\(^77\) the Second Circuit imitated *Whirl* in a case presenting claims the court characterized as “in the nature of those for arrest without probable cause, false imprisonment, malicious prosecution, and conspiracy.”\(^78\) The mental elements—in fact all the elements—of the plaintiff’s case were found by referring to state law:

Because there are no federal rules of decision for adjudicating section 1983 actions that are based upon claims of malicious prosecution, we are required . . . to turn to state law . . . . In doing so, we find that New York law permits recovery on a claim of malicious prosecution only where plaintiff . . .

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\(^74\) See Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972) (plaintiff’s due process protections stem from his state property interest in his employment contract and not from any constitutional property rights); Perry v. Sindermann, 408 U.S. 593, 602-03 (1972) (“existence of rules and understandings, promulgated and fostered by state officials,” gives plaintiff opportunity to prove legitimacy of his claim, proof of which would obligate officials to grant hearing at plaintiff’s request); see generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

\(^75\) *Cf.* Kirkpatrick, *supra* note 7, at 68 (adopting view that final state-of-mind requirement will be standard of care necessary for plaintiff to prove, subject to “good faith” defense available as of writing of article).

\(^76\) *Cf.* Dollar v. Haralson County, 704 F.2d 1540, 1544 (11th Cir. 1983) (court’s citations indicate influence of procedural due process notions that depend on state law; ultimate decision, however, turns on constitutional norms).


\(^78\) *Id.* at 207.
has established four elements . . . , [including] that the criminal proceeding was instituted in actual malice.\textsuperscript{79}

There followed a two-page discussion of the New York law of malicious prosecution as applied to Ms. Conway's claim.\textsuperscript{80}

While few other recent cases are so overt in their adoption of state tort law, some can be found that see state law as persuasive or at least instructive. In \textit{Dollar v. Haralson County},\textsuperscript{81} for example, the court faced the issue of whether a county that had failed to build a bridge over a creek violated the constitutional rights of children who were subsequently killed in a car swept away at a ford in the creek. The issue in the \textsection 1983 action was whether the county had a legal duty to construct the bridge. In answering the question the Eleventh Circuit observed that

\begin{quote}
[our conclusion in this case is informed, though not controlled, by Georgia law. . . . Georgia cases draw a clear line between a discretionary nonfeasance and the negligent maintenance of something erected by the local government in its discretion. . . . Since the county was under no duty to build the bridge, [the plaintiff’s loss] . . . is not compensable under section 1983.\textsuperscript{82}
\end{quote}

In an area in which thoughtful law professors, until very recently, pressed arguments about the necessity of applying common law,\textsuperscript{83} one can understand how courts became confused by the Supreme Court’s apparently conflicting signals.\textsuperscript{84}

\section*{C. THE SEARCH FOR STANDARDS: THE SUPREME COURT’S NEW APPROACH}

1. The Road to \textit{Daniels} and \textit{Davidson}

The Supreme Court expressed dissatisfaction with the \textit{Whirl} approach as early as 1976. A short opinion authored by Justice Rehnquist in \textit{Paul v. Davis}\textsuperscript{85} rejected the contention that “the Due Process Clause of the Fourteenth Amendment and section 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise

\footnotesize{\textsuperscript{79. Id. at 214 (citations and footnote omitted).}\textsuperscript{80. See id. at 214-15 (discussing New York common law of malicious prosecution).}\textsuperscript{81. 704 F.2d 1540 (11th Cir. 1983).}\textsuperscript{82. Id. at 1544.}\textsuperscript{83. See supra note 57 (citing articles that argue for use of common law).}\textsuperscript{84. Although the Supreme Court has now decided that \textsection 1983’s standards of care are to be found by reference to constitutional norms, see infra Part II.c.2, the Court itself continues occasionally to refer uncritically to common law as dictating the liability rules for \textsection 1983. See Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) (dictum) (causation issues under \textsection 1983 are decided by reference to common law).}\textsuperscript{85. 424 U.S. 693 (1976).}}
only to state-law tort claims."  

Justice Marshall’s opinion in *Estelle v. Gamble,*  

handed down the same year, at least implicitly rejected *Whirl.* In it the Court rebuffed a prisoner who claimed an eighth amendment right to be free from medical malpractice while incarcerated. It concluded that the state law of negligence was irrelevant to such eighth amendment claims and that only "deliberate indifference to a prisoner’s serious illness or injury states a cause of action under section 1983."  

*Baker v. McCollan* also appeared to contradict *Whirl* on very similar facts, holding that a person arrested due to misidentification had suffered no due process loss.  

Yet the line to a new position was not a straight one. *Parratt v. Taylor* rejected a prisoner’s claim for constitutional protection for his $23 hobby kit, but in a most curious fashion. Justice Rehnquist, this time for a virtually unanimous Court, again stated his theme from *Paul* of the different sources of federal constitutional and state common law, and for the first time he explicitly framed the relevant issue as one related to federal constitutional law. The Court’s remaining statements tended, however, to nullify the clarity of its initial thrust. The opinion noted that section 1983, as a matter of statutory construction, “has never been found by this Court to contain a state-of-mind requirement” — an important holding, but one perfectly consistent with *Whirl.* Moreover, in making its constitutional inquiry, the Court construed the case as presenting a procedural due process claim and proceeded to craft a rule that reinforced the habit of looking to state-court causes of action to determine adequacy of remedies. Finally, and almost without discussion, the Court mentioned the dreaded “N” word, “negligence,” holding that negligent deprivations are covered by the right to procedural due process.  

While astute judges learned to live with *Parratt,* the

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86. *Id.* at 699.
88. *Id.* at 105.
89. 443 U.S. 137 (1979).
90. *Id.* at 143-44. *But see Whirl,* 407 F.2d at 792 (court allows jailor time to learn his mistake; no “instant tort”). *Baker’s* overall approach significantly paralleled the position that the Court would later clarify, that the issue was one of constitutional, not state tort, law.
92. *Id.* at 534-35.
93. *Id.* at 534.
94. *See supra* text accompanying note 44 (*Whirl* found no single standard for § 1983; supplied content by analogy to state tort law).
95. 451 U.S. at 543-44; *see Ingraham v. Wright,* 430 U.S. 651, 682 (1977) (progenitor of *Parratt*). This doubly focuses procedural due process on state law, since the identification of protected liberty and property rights also turns on state law. *See supra* note 74 (citing cases looking to state law for liberty and property interests); *see also Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 466-67 (1981) (state law creates no liberty interest for prisoner; decided same term as *Parratt*).
97. *See Gilmere v. City of Atlanta,* 774 F.2d 1495, 1499-1500 (11th Cir. 1985) (en banc) (*Parratt*’s concern with adequacy of state remedy relates to procedural due process claims, not substan-
prior confusion became chaos for many others.  

2. Daniels, Cannon, and Davidson and the Rise of Constitution-Based Standards of Care

Three years ago, in the companion cases of Daniels v. Williams and Davidson v. Cannon, the Supreme Court finally introduced an order to this universe. Both cases involved plaintiffs who had suffered injuries in prison, Davidson in a prison brawl (of the type portrayed on late-night television programs) and Daniels in a classic slip-and-fall case (beloved by lawyers who advertise on late-night television programs). Justice Rehnquist, writing for the majority in Daniels, first refined his statement from Paul, carefully stating that § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." Then the Court added the coup de grace for Whirl: "in any given section 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." 

The Court then demonstrated its approach in a way that eliminated all ambiguity: it first couched in constitutional terms its concerns about displacing state tort law; then it articulated the concerns that specifically underlie the due process clause (reversing Parratt’s unreasoned holding regarding negligence); and finally, it reinforced its point by holding that the prisoners’ claims were “remote from the [constitutional] concerns just discussed.” Justice Rehnquist closed by reiterating his opening idea:

That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. It is no reflection

tive due process cases); Roberts v. City of Troy, 773 F.2d 720, 724 (6th Cir. 1985) (same); O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985) (same); see generally Daniels v. Williams, 474 U.S. 327, 336-40 (1986) (Stevens, J., concurring) (distinguishing between incorporated due process and substantive due process as opposed to procedural due process).

98. See Mann v. City of Tuscon, 782 F.2d 790, 797-98 (9th Cir. 1986) (concurrence suggests Parratt reverses Monroe's rule against exhaustion of state judicial remedies).


100. 474 U.S. 344 (1986).

101. Id. at 345-46 (following threat from another inmate, reported to authorities, inmate attacked Davidson with fork).

102. Daniels, 474 U.S. at 328 (Daniels allegedly slipped on pillow negligently left on stairs and fell).

103. Id. at 329-30 (emphasis added).

104. Id. (emphasis added).

105. Id. at 330-31.

106. Id. at 332.
on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.107

Section 1983, of course, is nothing but a statute, and the underlying problem from *Whirl* to *Daniels* and *Davidson* has been the same: what does the statute mean when it creates an action against an official who "subjects" a person, or "causes [a person] to be subjected," to a "deprivation of any rights . . . secured by the Constitution"?108 There are surely enough words present in the statute to justify whatever state-of-mind requirements the Court wishes to find. Intellectually, there are at least three possibilities: *Whirl*'s incorporation of state tort norms, *Daniels*' reference to constitutional norms, and the never-discussed option of finding norms in § 1983 itself.

The *Whirl* option lost support based on the Court's wariness about creating federal statutory law that would significantly overlap with state law, at least state law concerning state officials.109 But why not choose the second option and use statutory law—§ 1983 itself—rather than constitutional law as the source for the standards of care? Apparently, this option never occurred to members of the Court, probably because the statutory language on its face refers to constitutionally created rights110 and because the Court had already solved related problems by adopting the view that § 1983 itself creates no substantive rights.111 If the Justices had considered this option, they would probably have rightly rejected it. A purely statutory approach to developing standards of care would have faced at best a dearth of sources in the legislative history,112 or at worst either a set of standards tied to long-dead

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107. *Id.* at 333 (footnote omitted). Significantly, the dissenters in the companion cases did not disagree with the majority's approach, only its result. Justice Brennan rejected mere negligence as a constitutional standard of care, but would have covered official recklessness. *Davidson*, 474 U.S. at 349 (Brennan, J., dissenting). Justices Blackmun and Marshall agreed that the Constitution, not common law, governed, although they thought that in the prison context some forms of negligence might offend due process. *Id.* at 353-54 (Blackmun, J., dissenting and Marshall, J., joining).


111. *See infra* note 117 and accompanying text.

112. The legislative materials are admittedly vast and often explicit, but specific references to the section that would become § 1983 are few. *See generally* J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTIONS 1-320 (1986) (collecting sources). Moreover, since § 1983 was originally adopted as part of a larger effort to suppress the Ku Klux Klan and guarantee rights for blacks, *see id.* §§ 1-318 to -320, 1-333 to -335; *Griffin v. Breckenridge*, 403 U.S. 88, 97-102 (1971) (discussing background of § 1983's cohort, § 1985(3)); *Monroe v. Pape*, 365 U.S. 167, 174 (1961), the debates are directed toward a more outrageous and topically limited set of issues than § 1983 has come to cover. Under
legislators who never foresaw the Constitution's growth or a set of standards admittedly articulated as judge-made common law. As nebulous and manipulable as constitutional law has become, it at least provides a coherent basis for discussion.

The Court's new approach to defining standards of care for § 1983—finding them not in the statute, but in the Constitution, and recognizing that they vary with the constitutional right asserted—serves as an extraordinarily strong organizing principle. In retrospect, it explains a great number of cases, whether based on equal protection, incorporated rights, or general substantive due process, in which the Court never thought it relevant to explain the basis for the constitutional claim at issue. These cases demonstrate the full richness and variety of standards that the Court has developed in the name of constitutional law. The Daniels approach leaves each intact for use under § 1983.

these circumstances the precise examples given in legislative discussion cannot properly give meaning to the general scheme. See Eskridge, Overruling Statutory Precedents, 76 GEO. L.J. 1361, 1394 (1988) (discussing unanticipated consequences of evolving line of interpretation).

113. See supra note 57 (discussing commentators who argue for alternative readings of § 1988 that would import common law into § 1983).

114. Professor Kirkpatrick's 1977 article concerning state-of-mind requirements presciently foresaw some of these issues. Written at a time when the qualified immunity defense still contained an element of good faith, see Wood v. Strickland, 420 U.S. 308, 315 (1975) (official immunity standard contains subjective element), rev'd, Harlow v. Fitzgerald, 457 U.S. 800 (1982), Kirkpatrick focused much of his attention on the now-irrelevant net mental element applicable under § 1983. See supra note 75 and accompanying text (referring to standard of care imposed discounted by good-faith immunity). He correctly predicted that the Supreme Court would find relevant state-of-mind requirements in the specific constitutional right sought to be enforced. Kirkpatrick, supra note 7, at 49. But his attempt to place each constitutional right into a predetermined category of torts, with an appropriate mental element ranging from intent to strict liability, unfortunately redirected his thesis toward tort law rather than constitutional law. See infra PART III (discussing uses and limitations of tort analysis in § 1983 cases).

115. They include: office searches under the fourth amendment, O'Conner v. Ortega, 480 U.S. 709, 725-26 (1987) ("reasonableness" if work-related); prison disturbances and the eighth amendment, Whitey v. Albers, 475 U.S. 312, 320-21 (1986) (intent to harm); procedural due process, Daniels, 474 U.S. at 330-31 (more than negligence, probably "deliberate decisions"); establishment of religion, Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985) (purpose or primary effect of promoting religion, or unnecessary entanglement between state and religious institutions); fourth amendment claim of seizure by use of deadly force, Garner, 471 U.S. at 7-9 (probable cause and "reasonableness"; per se rule); due process liberty interest of pretrial detainees, Block v. Rutherford, 468 U.S. 576, 584 (1984) ("intent" to punish); vagueness of statutes, Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (statute unconstitutional if vaguely written; intent to harm through vagueness not discussed); Personnel Adm'r v. Feeney, 442 U.S. 256, 278-79 (1979) (intent not to be measured by reasonable foreseeability); prison medical care and the eighth amendment, Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("deliberate indifference" to serious medical needs); racial and sex-based discrimination, Village of Arlington Heights, 429 U.S. at 264-68 ("intent" to discriminate). The list is illustrative rather than exhaustive.

116. As I shall make clear in Part III, the list in the preceding footnote is highly misleading because it may leave the impression that all that is at issue here is compiling a list of state-of-mind
II. CREATING THE NEW CONSTITUTIONAL LAW: HOW AND WHY SECTION 1983 AFFECTS CONSTITUTIONAL LAW

A. A MISLEADING TRUISM AND TWO PATTERNS IN IDENTIFYING STANDARDS OF CARE

1. The Truism that Section 1983 Lacks Content

Even prior to Daniels and Davidson the Supreme Court created a truism that would make those decisions possible. In cases dealing with separate but parallel issues, the Court repeatedly described both § 1983 and a closely related conspiracy statute as purely procedural vehicles having no substantive content of their own.\(^1\) It was this fundamental truism that opened the way to reading Constitution-based standards of care into § 1983.

Yet the Court's newly recognized principle of referring to constitutional law to identify standards of care for § 1983 actions has one enormous initial flaw: the Constitution contains not one single reference to such tort-like standards of care. It is only partly facetious to say that the Court has discovered these standards in the same way that it generally discovers constitutional norms—it has made them up. What I propose to show here is that the constitutional law created in this area substantially differs from traditional constitutional law and that it is § 1983 itself that makes the law different. In short, the fundamental truism noted above is quite misleading, for while § 1983 may in some technical sense possess no substantive content of its own, it definitely colors the constitutional content that the Court pours back into the statute.

The Supreme Court has accumulated a number of decisions that create Constitution-based standards of care for § 1983 actions. All share one striking feature: in them the Court uses tort concepts in defining constitutional law.\(^2\) The cases, however, follow two distinct patterns. One reflects the need to charge juries in § 1983 actions and defines constitutional interests requirements. See Kirkpatrick, supra note 7, at 50-70 (compiling such a list). It is equally important to identify constitutional duties against which the mental elements are measured.

\(^1\) See Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (in evaluating scope of jurisdictional statute Court held that § 1983 does "not provide for any substantive rights" but "'only gives a remedy'" (citations omitted)); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979) (holding that § 1985(3), a conspiracy statute having its source in same act as § 1983, "creates no rights," but rather "is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right . . . is breached" (emphasis in original)). The approach was continued in the cases arising under the "and laws" language of § 1983, Maine v. Thiboutot, 448 U.S. 1, 4-7 (1980) (section 1983 provides remedy for Social Security Act violation); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 19 (1981) (section 1983 provides no remedy for Federal Water Pollution Control Act violations); Wright v. City of Roanoake Redevelop. & Hous. Auth., 479 U.S. 418, 429 (1987) (section 1983 provides remedy for violation of rights established in Housing Act of 1937). All of these cases consider § 1983 to be a remedial provision that finds its substantive content in other sources.

\(^2\) See generally supra note 115 (noting torts language employed in a variety of § 1983 cases).
with words and phrases taken directly from tort law. The other, reflecting the dominant history of federal judicial control over constitutional law, relies upon words and phrases taken from constitutional law, although apparently altered to display tort-like behavior and to serve a tort-like role.

2. Standards that Adopt Phrases from Tort Law: The Individuation of Constitutional Norms

The line of cases that uses tort phrases to define constitutional standards is illustrated by a pair of prisoners' rights cases in which the plaintiffs claimed rights under the eighth amendment. In Estelle v. Gamble,119 perhaps the earliest case to consider the independent creation of constitutional standards of care,120 an inmate argued that the prison doctors negligently cared for him after a bale of cotton fell on him during a work detail.121 He claimed that the doctors' negligence violated his eighth amendment right, as applied to the states through the fourteenth, to be free from cruel and unusual punishment.122 In rejecting a state-tort negligence standard for this claim, the Court noted that any adopted standard must grow from the "Amendments [invoked] and our decisions interpreting them."123 There followed a discussion of such eighth amendment standards, developed in criminal cases, with citations to the usual tests, "evolving standards of decency" and "wanton infliction of pain."124

Based on its review of these traditional tests, the Court created a constitutional standard to guide the provision of prison medical care. Only "deliber-
ate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,'" held the Court; mere "inadvertent failure to provide adequate medical care cannot be said to... offend 'evolving standards of decency' in violation of the Eighth Amendment." Estelle, therefore, remarkably resembles the great majority of cases that constitute the body of eighth amendment jurisprudence, cases in which the Court, in a particular context, defines what is constitutionally permissible punishment.

Estelle differs from most eighth amendment cases, however, in that its ruling seeks to do more than settle the very punishment issue before the Court or refine the generic word tests of the law; rather, it creates a rule that can be enforced by factfinders in the cases that follow. This development is matched in eighth amendment jurisprudence only by the radical procedural due process cases of the 1970s that require factfinders to carry out the individuation of constitutional norms in death-penalty cases. In the civil context this parallel individuation of constitutional law operates as tort law, and it is not surprising to see the Court adopt a phrase from torts, "deliberate indifference," to reflect constitutional norms and allow juries to enforce them.

Following Estelle, courts and commentators understood its standard to apply to all eighth amendment claims, but the Supreme Court disabused them of that notion in Whitley v. Albers, a § 1983 suit brought by a prisoner harmed by guards during the quelling of a prison disturbance. Justice O'Connor's majority opinion cleverly distinguished Estelle on grounds familiar to every constitutional lawyer: the earlier case rightly saw little state interest in allowing inadequate medical care, but the "balancing [of] competing

125. Id. at 104 (citation omitted).
126. Id. at 105-06 (footnote omitted).
127. See Coker v. Georgia, 433 U.S. 584, 592-96 (1977) (plurality opinion) (death sentence for rape grossly disproportionate to offense because outside consensual norms); supra note 124 (citing eighth amendment cases).
129. See supra note 124 (citing eighth amendment cases).
131. See Partridge v. Two Unknown Police Officers, 751 F.2d 1448, 1452 (5th Cir. 1985) (applying Estelle to prison suicide case); Withers v. Levine, 615 F.2d 158, 162-63 (4th Cir. 1980) (protection of prisoners from sexual assault); see also S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 69 (1st ed. 1979) (opining in early years following Estelle that its standard is applicable generally to eighth amendment claims).
132. 475 U.S. 312 (1986).
institutional concerns” would require a different result when restoration of prison order was at stake.\textsuperscript{133} The prison’s interest in order was “undoubtedly” strong, non-rioting prisoners shared that interest, and the Court mentioned no cognizable riotous interests of the rioting prisoners.\textsuperscript{134} In this context, the Court held, the \textit{Estelle} standard would have allowed too much judicial second-guessing of prison personnel.\textsuperscript{135}

Given the balance of competing interests, the rights of inmates must be defined at a lower level of judicial protection, said O'Connor, a level captured by an alternate standard of care. To capture the constitutional idea of prohibiting wanton infliction of pain would require inquiry into “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”\textsuperscript{136} The Court later described the state-of-mind showing in terms of intent, an “intent to punish.”\textsuperscript{137}

A variation on \textit{Whitley}’s standard has since been applied to a series of other cases in which prisoners have claimed rights violations but the Court has seen no rights,\textsuperscript{138} thus confirming that there are at least two standards of care that may apply to eighth amendment claims. Despite the different rule created in \textit{Whitley}, however, the rulemaking process employed in that case closely resembles that used in \textit{Estelle} in that the Court refers to traditional constitutional norms for the amendment at issue and then proceeds to choose a familiar phrase from tort law that factfinders can then apply to all future situations in the genre. A tort-based phrase is chosen to individuate constitutional interests by focusing on the state of mind of the defendant governmental official.\textsuperscript{139}

3. Standards that Use Phrases Taken from Constitutional Law: Individuation, Yet Also Institutionally Oriented Inquiries

The cases that adopt torts phrases contrast with a second, short line of

\textsuperscript{133.} \textit{Id.} at 320.

\textsuperscript{134.} \textit{Id.} at 320-21.

\textsuperscript{135.} \textit{Id.} at 320. This theme continued with much greater force when Justice O'Connor applied her proposed standard to the facts of the case. See \textit{id.} at 1086-88 (“neither judge nor jury [may] freely substitute their judgment for that of officials,” and all plaintiff’s evidence deemed unpersuasive of officials' states of mind).

\textsuperscript{136.} \textit{Id.} at 1085 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).

\textsuperscript{137.} \textit{Id.; cf.} \textit{id.} at 320 (“wanton willingness”).

\textsuperscript{138.} \textit{See infra} text accompanying notes 157-59.

\textsuperscript{139.} For other examples of the use of tort-like phrases to identify state actors who behave unconstitutionally, see \textit{Daniels}, 474 U.S. at 330-31 (more than negligence, probably a “deliberate” decision); \textit{Wallace}, 472 U.S. at 55-56 (purpose in establishment clause inquiry); \textit{Village of Arlington Heights}, 429 U.S. at 264-66 (intentional racial discrimination); Mount Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-86 (1977) (intent to discharge employee for content of speech).
decisions in which the Court has created constitutional tort standards of care. In this second line the Court has captured constitutional ideas by adopting familiar constitutional words and phrases. The best example of this type is *Tennessee v. Garner*, a § 1983 action brought by the parent of a young man killed by a police officer exercising statutorily authorized discretion to use deadly force against fleeing felons.* Justice White’s majority opinion began by asserting, without citation, that “there can be no question that apprehension by the use of deadly force is a seizure” within the meaning of the fourth amendment. Following the pattern of turning to constitutional law to find § 1983 standards of care, the Court then focused its attention on traditional fourth amendment concerns.

The dominant concerns of fourth amendment jurisprudence, probable cause and reasonableness, led the Court to an extended discussion of the “balancing” of individual and governmental interests and an inquiry into the “totality of the circumstances,” in order to decide the constitutionality of the shooting. Pointedly noting that the authorizing statute was not unconstitutional on its face, the Court set out its standard to guide future factfinders: when the shooting officer has “probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”

While *Garner*’s standard provides some individuation by calling for inquiry into the particular police officer’s informational basis for inferring probable cause, the very use of traditional constitutional law phrases raises the specter that direct judicial balancing, rather than jury determination of the defendant’s state-of-mind, will determine the outcome of the case. The Court has apparently suppressed this possibility in *Garner* itself by adding a per se quality to the “reasonableness” inquiry: using deadly force against a fleeing felon without the requisite probable cause is per se unreasonable. But with such a strong tradition of judicial determination of probable cause, it is quite possible that courts may intrude on the jury and determine that any given quantum of evidence does or does not establish probable cause as a matter of law. Similarly, once the issue moves from use of deadly force to

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141. *Id.* at 4-5.
142. *Id.* at 7.
143. *Id.* at 7-8.
144. *Id.* at 8-11.
145. *Id.* at 11.
146. *Id.*
use of excessive force, Garner's per se rule presumably collapses.\textsuperscript{148} Will courts that apply fourth amendment analysis to excessive force cases allow juries to determine whether force was "reasonable" under the circumstances?\textsuperscript{149} The individuation visible on the surface of such cases appears to mask a traditional constitutional approach that can permit institutional balancing to overshadow determinations of individual culpability.

Garner's use of familiar constitutional phrases to create a standard of care for § 1983 does not stand alone. The other cases, however, seem even less individuated in their inquiries and more oriented toward testing the legitimacy of institutionalized concerns. In a series of prisoners' rights cases, presenting claims that would receive strict scrutiny if brought against government by private citizens, the Court has developed a similar "reasonableness" test that also resembles and builds on low-level scrutiny.\textsuperscript{150} Parts of the Court's first amendment and takings clause case law also call for traditional constitutional law phrases to be read directly into the § 1983 case.\textsuperscript{151}

I should emphasize that these two patterns of creating constitutional standards represent tendencies and do not appear to be entirely distinct categories. This point can be illustrated by allusion to the cases that define rights of pre-trial detainees. Since such persons have not yet been convicted, and may never be, they have no rights under the eighth amendment.\textsuperscript{152} The Court has nevertheless recognized a general due process right to freedom from the infliction of punishment before conviction, a right that the Court in \textit{Bell v. Wolfish}\textsuperscript{153} held to be implicated only when restrictions on such detainees

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\textsuperscript{148.} See Garner, 471 U.S. at 14-15 (it is deadliness of force in context of crimes not punishable by death that leads to per se rule of unreasonableness).

\textsuperscript{149.} Cf. Lester v. City of Chicago, 830 F.2d. 706, 711 (7th Cir. 1987) (adopting Garner's reasonableness phrase for excessive force cases).


\textsuperscript{151.} See Lynch v. Donnelly, 465 U.S. 668, 681 & n.7 (1984) (emphasizing possible secular purpose as opposed to actual purpose, thus paralleling low-level scrutiny; rejecting less-drastic-means test of high-level scrutiny); see also Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3147 & n.3, 3150 (1987) (adopting "substantial relationship" test for measuring governmental regulations). While \textit{Nollan} was not a § 1983 case, it presented a federal constitutional claim to state courts that would have been equally cognizable as a § 1983 case. See Herrington v. County of Sonoma, 834 F.2d 1488, 1494-99 (9th Cir. 1987) (when special exhaustion requirements for takings claims have been met, claim may be presented to federal court under § 1983).

\textsuperscript{152.} See Ingraham v. Wright, 430 U.S. 651, 664-71 (1977) (school child cannot use eighth amendment to challenge excessive use of force in paddling because amendment applies only to criminal punishments).

\textsuperscript{153.} 441 U.S. 520 (1979).
were so onerous as to be considered punishment. In characterizing the appropriate constitutional inquiry, the Court chose two countervailing tests, one using a phrase from tort law—"intent to punish"—the other a phrase adapted from constitutional law—"reasonably related to a legitimate governmental objective."

Yet, if the two identified patterns are not entirely distinct, neither are they, as the Court sometimes perceives, entirely fungible. Bell v. Wolfish again demonstrates the point. The alternative inquiries proposed in that case are not in fact opposite ways to ask the same question. Using the tort-based "intent-to-punish" standard, for example, one might decide that a particular administrator has created a particular apparently reasonable rule for no other reason than to harm or beleaguer his charges, and therefore a fact-finder would find a constitutional violation under § 1983. Under the constitutionally influenced "reasonably related" test, however, the Court has often made it a practice to ignore actually intended goals and to look instead at hypothetical goals that decisionmakers might have had in mind. Under such an approach, acceptable goals and a reasonable relation between means and goals would be found, as indeed they were in Bell itself.

These observations about differences in standards also demonstrate how two cases that superficially appear similar are in fact quite different in focus. The Whitley case, for example, tests for the presence of malicious motive by permitting inquiry into its opposite—whether the prison official acted in good faith for a "legitimate purpose" that the official reasonably perceived to be present. That standard appears similar to the standard later adopted in another prisoners' rights case, Turner v. Safley, in which the Court adopted a test phrased as "reasonably related to a legitimate penological interest." While both use the "reasonableness" phrase of low-level equal

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154. Id. at 535.
155. Id. at 538-39.
157. Whitley, 475 U.S. at 320-21. The Court stated the issue in terms of "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Id. (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), cert. denied, 414 U.S. 1033 (1973)).
159. Id. at 2261; see also O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404 (1987) (similarly phrased standard). Both cases involved restriction on prisoners—mail, marriage, and religious observance regulations—that probably would have been unconstitutional had they been applied to ordinary citizens. See supra note 150 (noting standards applied in the two cases).
protection, they have entirely different objects in mind: *Whitley* focuses on the subjective intent of the individual officer exercising discretion, while *Turner* focuses on some impersonal governmental policy. In short, the *Whitley* case exemplifies the tendency to individuate constitutional norms through tort-like creations, while *Turner* exemplifies the process of adopting constitutional balancing concepts. It is not entirely satisfying, however, simply to note that there exist two patterns of decisionmaking and deem the matter closed. In the next part I try to identify what it is about § 1983 litigation that has led to these patterns.

B. ELEMENTS IN SECTION 1983 THAT AFFECT THE CREATION OF STANDARDS OF CARE: PROBLEMS AND SOLUTIONS IN THE PATTERNS

1. The “Dual Coverage” of Section 1983—Official Policy and Official Misconduct

   a. *Monroe and the Two Patterns.* The tendency of the Court to use two styles in creating constitutional standards of care—choosing tort phrases to reflect deeper constitutional norms and adapting constitutional phrases to reflect traditional constitutional norms—revivifies a long-standing schizophrenia in § 1983 and constitutional torts. The statute dually covers constitutional challenges to official government policy and constitutional challenges to officers’ acts that are in violation of official policy. This dual coverage formula, a significant factor affecting the creation of constitutional standards of care, can be traced back to the original decision in *Monroe*.

   The precise issue in *Monroe* was the proper construction § 1983’s “under color of” law language. The defendants’ construction would have held

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160. Admittedly the phrase “official policy” has created substantial definitional problems in the area of municipal liability under § 1983. See Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Geo. L.J. 1753, 1753-54 (1989) (discussing recent cases). My point has no specific relation to that discussion; I intend only to identify decisions reached through authorized local legal processes, those decisions that represent the collective governmental judgment that is in constitutional decisionmaking balanced against individual interests. I include judicial decisions from my post-*Erie* respect for state courts’ power to decide what is state law.

161. See supra text accompanying notes 20-29 (discussing *Monroe*’s holding on this issue). One might argue that there is a third relevant category, those acts that are not specifically authorized but nevertheless fall within the officer’s general authority. For purposes of the following discussion, such cases are considered in common with those in which official policy is at issue. Cf. Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 693 (1949) (acts within officer’s authorized discretion are considered acts desired by government for purposes of sovereign immunity analysis). The categories as framed here have no necessary correlation with similar phrases used to determine municipal liability.

162. See supra text accompanying notes 20-25 (discussing facts of *Monroe*).

163. This issue itself replicated in statutory form the same issue that the Court faced about fifty years earlier in interpreting the state action doctrine of the fourteenth amendment. See *Home Tel.*
official action to be under color of law only if it had been taken in accordance or compliance with state law, thus possibly requiring exhaustion of state judicial remedies before initiation of the § 1983 suit. The Court rejected the argument and instead held that action occurred under color of law even when taken in violation of state law. Power conferred by state law creates color of law, said the Court, and the federal § 1983 remedy is supplementary to any state-created remedy for state-created rights. Thus, § 1983 could be used to attack both official policy that violates the fourteenth amendment and officers' acts in violation of official policy, provided their acts also contravene the fourteenth amendment.

It would be easy at this stage to hypothesize a direct correlation between the two topics covered by and the two patterns followed by the Supreme Court in creating constitutional torts: tort-like phrases would appear in cases involving official misconduct, while Constitution-based phrases would be found in official policy cases. There is a bit of evidence to support the proposition, for in and in which tort phrases were used, the Court seemed to see the defendants as engaged in ad hoc decisionmaking rather than in following some prescribed legislative policy. In the case, on the other hand, in which official state policy was at issue, the Court used Constitution-based language to create the standard of care. The later prisoners' rights cases show an even more pronounced orientation toward impersonal inquiry into state policy, the Court displaying virtually no appreciation of the possibility that a warden might be acting outside the parameters of official policy. But psychoanalysis of the Justices is a dangerous game, and the precedents are simply too few to reach the conclusion that standards of care correlate with whether official policy is or is not at issue.

It is, moreover, unlikely that any such correlation should be developed. Section 1983 must apply nationwide, both in jurisdictions in which the proposed constitutional standard has been adopted and in others in which incon-

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164. 365 U.S. at 172.
165. See id. at 183 (rejecting argument because Congress intended § 1983 to be used without first exhausting state judicial remedies). But see id. at 245-46 (Frankfurter, J., dissenting) (adoption of defense position should not lead to exhaustion requirement; federal courts should consider whether defendant's actions are consistent with state law). See generally Patsy v. Board of Regents of Fla., 457 U.S. 496, 502-07 (1982) (discussing background and policy implications of exhaustion in considering administrative exhaustion).
166. 365 U.S. at 183.
167. See supra Part II.A.2 (discussing Court's holdings in and ).
168. See supra notes 140-46 and accompanying text (discussing Garner's constitutional standard of care language).
169. See supra notes 152-59 and accompanying text (distinguishing prisoners' rights cases employing individual officer state-of-mind analysis from those employing official policy analysis).
sistent local rules will become unconstitutional. In short, § 1983 may be the vehicle for challenging activity that is official misconduct in one locality and unconstitutional official policy in another. Any given standard of care—which whether phrased in terms familiar to torts or those familiar to constitutional law—must be capable of application in both contexts.

Although it is probably undesirable to make such a logical correlation, one can reach a more basic conclusion: the coverage under § 1983 of defendants who violate state policy has substantially altered the previous thrust of constitutional decisionmaking. It has done this by introducing more individualization into constitutional rules than was previously present.

b. The New Patterns and the Old Structured Constitutional Law.
Prior to Monroe, the predominant method of constitutional analysis balanced private rights against state interests as expressed in legislation (or through some other broadly legitimated decisionmaking process, such as common-law judicial edicts). The two most used methods of constitutional litigation tended to ensure that cases were presented as final resolvable issues that implicated such state authority. The first method, Supreme Court appellate review of a constitutional issue arising in state court, virtually guaranteed that only official policy could be attacked, if for no other reason than that the state court has approved the state official’s position. The second method, although it is probably undesirable to make such a logical correlation, one can reach a more basic conclusion: the coverage under § 1983 of defendants who violate state policy has substantially altered the previous thrust of constitutional decisionmaking. It has done this by introducing more individualization into constitutional rules than was previously present.

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constitutional challenge via a federal bill in equity, also structured litigation so as to produce attacks on state policy.


Young is widely remembered because of the supposed illogical "fiction" it inaugurated. C. Wright, Federal Courts 289 (4th ed. 1983). Read together with Home Telephone, 227 U.S. at 287-89 (official action in violation of state law is state action), Young's reasoning has been criticized as inconsistently holding that action qualifying as "state action for purposes of the fourteenth amendment [is] but merely [an] individual wrong . . . for purposes of the Eleventh Amendment." C. Wright, supra, at 289-90. Tribe tries to deal with the problem tautologically by arguing that an official may act beyond the scope of state law "without thereby forfeiting his state office," L. Tribe, supra note 18, at 1703, an argument that presumably shows that the officer remains a fourteenth amendment state actor under such circumstances. Tribe appears erroneously to assume that mere office-holding is sufficient to find state action, a view at odds with the law. See Polk County v. Dodson, 454 U.S. 312, 320-22 (1981) (state-paid public defender not state actor). More fundamentally, however, he misses the most critical intellectual issue: how can a decisionmaking process that balances governmental and individual interests work when the governmental interest is that of a misbehaving individual officer?

See Collins, supra note 173, at 1494-95. These cases followed a format in which plaintiffs alleged that a state official enforced an unconstitutional state law (i.e., that he conformed to state law), that because the state law was unconstitutional it could not be deemed true state policy, and that therefore the official would be required to answer personally for invasion of the plaintiff's rights. Id. at 1510-11. It is not altogether clear why these cases invariably attacked state statutes or official policy, for the format would appear to work equally well when the official also violated state policy. In Home Telephone, the Court had specifically rejected the idea that illegality of an act under a state's constitution ousted the federal courts of jurisdiction to hear federal constitutional claims, 227 U.S. at 282-96, so presumably the restriction of federal equity attacks to state statutes and policies was not dictated by jurisdictional considerations. The Court also expressly noted in Home Telephone that the fourteenth amendment extends to "state officers abusing the[r] power," even when the officers may "deny the power" given them under state law. Id. at 288; cf. C. Abernathy, Cases and Materials on Civil Rights 10 (1980) (asserting that Home Telephone and Monroe address the same issue, the former on constitutional grounds and the latter in its interpretation of § 1983). Although the assertion of illegality under state law arose in Home Telephone, as in Monroe, at the behest of defendants seeking to dismiss as opposed to a plaintiff actually seeking to enforce a combined claim of federal- and state-law illegality, the Court's ruling in Siler v. Louisville & Nashville R.R., 213 U.S. 175, 190-93 (1909) (joined claims may proceed even if federal question ultimately not decided), rendered the factor immaterial.

Perhaps the reason for the practice has simpler, but cumulatively more substantial, explanations. First, perhaps there was a broad (even if erroneous) assumption in the legal profession that federal courts were to hear constitutional claims against state officials enforcing state law, while state courts were to hear claims of violation of state law. See Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials, 40 Harv. L. Rev. 969, 969 & n.2 (1927) (documenting confusion among lower courts regarding their power to enjoin acts violative of state law). Second, perhaps the doctrine of exhaustion of administrative remedies, Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 451-55 (1916), would have particularly applied to allegations of illegality
Against this backdrop, the constitutional decisionmaking process was understandably dominated by consideration of official state policy rather than officers' misconduct.\textsuperscript{175} The constitutional law that grew from this process was highly structured and asked institutionally oriented questions.\textsuperscript{176} Within that structure, however, per se rules are anathema.\textsuperscript{177} Every case presents at least the possibility of a different result if some new more "substantial governmental interest"\textsuperscript{178} is at stake or some more appropriate means is used.\textsuperscript{179}

As this grand structure was building, § 1983 was invoking a procedure that would accentuate a different style of constitutional lawmaking. Specifically, \textit{Monroe}'s interpretation of § 1983 as authorizing suits against officials under state law. Finally, and perhaps most important, even when some claims attacking abuse of state power slipped through to the Court, they were simply overwhelmed in numbers by the vast majority of cases in which the Supreme Court wanted to make law in the early twentieth century, cases in which legislatures by official policy chose to regulate labor and welfare. \textit{See} \textit{STONE & SEIDMAN, supra} note 13, at 724-50 (discussing old substantive due process cases). By the time the Court turned its attention to non-economic rights and began to create a body of constitutional law binding on state and local discretionary officials, \textit{see} \textit{Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 YALE L.J. 319, 319-20 (1957) (noting slow buildup of due process protections), Monroe} was standing in the wings to make moot the issue of covering misconduct.

175. Even among those few § 1983 cases that were brought prior to \textit{Monroe}, most involved attacks on official policy because \textit{Home Telephone}'s constitutional construction of state action had not been extended as a matter of statutory construction to § 1983. \textit{Cf.} \textit{Collins, supra} note 173, at 1499-1500 (until the 1960s, Court did not construe § 1983's "under color of" state law requirement to include acts by state officials that violated state law). For an example, see \textit{Lane v. Wilson}, 307 U.S. 268, 269-72 (1939) (attack on voting law).

176. \textit{See} \textit{STONE & SEIDMAN, supra} note 13, at 495-543 (discussing high-level and low-level scrutiny under equal protection analysis); \textit{id.} at 610-65 (discussing middle-level scrutiny).


acting in violation of state law necessarily altered the constitutional lawmaking process. If § 1983 could be used to enforce constitutional rights against officers who specifically do not represent the governmental interest, how could the structured system's constitutional balancing of interests occur? One-half of the equation would be missing, or to put it very basically, perhaps the state’s interest when an official violates state law is not the same as or as strong as its interest when plaintiffs attack its laws and policies, if for no other reason than that the collective judgment of the citizens is not behind the erring defendant official.180

Some decisions, especially earlier ones, solved this problem by simply assuming, without great reflection, that the state actor represents the state’s interest.181 One view might characterize the resulting process as adjudication of hypothetical claims, with the hypothesis that the state supports the state-law violator, but that view would raise certain justiciability problems for the federal courts that were to hear these cases.182 Another view would recharacterize the scene in terms of responsibility: a state may not empower an official and then protect him from personal federal liability (or itself from injunctive liability) for the harms caused when he uses that power.183

Monroe itself appears to have adopted a somewhat different position—that power exercised in the name of the state and made possible by general authority conferred by the state is action by the state.184 But to recognize the force of the holding is only to restate the constitutional problem: how does the constitutional law balancing process work when one looks behind the


181. See Monroe, 365 U.S. at 170-71 (assuming that usual constitutional rules apply in case in which official misconduct alleged); id. at 192-202 (Harlan, J., concurring) (constitutional violations present same underlying problem regardless of whether official violated state law); id. at 208-11 (Frankfurter, J., dissenting) (constitutional analysis condemnatory regardless of whether official misconduct present); Screws v. United States, 325 U.S. 91, 108 (1945) (assuming that beating of suspect presents same due process problem regardless of whether authorized by state law).


183. See L. Tribe, supra note 18, at 1704 (except for limited areas such as procedural due process, clothing official with state authority is adequate to create constitutional responsibility). Martinez v. California, 444 U.S. 277, 280-83 (1980) (holding that state may erect defenses denying official liability), is not inconsistent with this argument because the state-law defenses upheld in that case limited a state-created, rather than constitution-based, right. See Felder, 108 S. Ct. at 2308-14 (state may not enforce state-law created defenses that materially undercut constitutional liability of state officers).

184. 365 U.S. at 184; see Ex Parte Virginia, 100 U.S. at 346-47 (state is conception that may act only through real persons).
assumption that a state actor represents the collective will and sees only a lone gunman with a badge?

This intellectual conundrum partially explains why the Court is drawn toward using tort concepts when it creates standards of care for constitutional torts. First, tort phrases are highly individuated because they focus on the state-of-mind of the actor; thus they may be easily adapted to fit the Monroe-type circumstance in which there may be no articulated institutional interest, only an eccentric individual defense interest. Second, tort standards are derived from a balancing process at common law that traditionally measured the interests of two competing private citizens, a situation replicated under § 1983 when the official defendant acts in contravention of the collective will as expressed in state law.

This is not to say that the constitutional standard only balances private interests; rather, because the constitutional-tort phrase is stated in terms of tortious mental elements, thus requiring no further balancing, it can be applied easily to circumstances in which the defendant represents no state interest. The tort-based “test” works well in § 1983 cases, therefore, because it is equally manageable regardless of whether the defendant has violated or followed state law. Any interest that the state might have had was factored in when the appropriate tort phrase was initially chosen.

The intellectual conundrum created by dual coverage also may explain why the Court has in the last fifteen years been attracted toward intent as the predominant mental element for reflecting constitutional norms. Prior to the adoption of constitutional tort analysis in Monroe, the intent test had a very checkered history in constitutional decisionmaking, but the availability of § 1983 actions to attack official misconduct soon brought new respect

185. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 6 (5th ed. 1984) [hereinafter PROSSER & KEETON]. It is possible that the state-of-mind element will apply to the plaintiff as well, as in contributory negligence or self-defense. This occasionally occurs in the creation of constitutional norms. See Spence v. Washington, 418 U.S. 405, 409-10 (1974) (per curiam) (intent of speaker to communicate is key ingredient in symbolic speech claim); see also infra Part II.B.1.c (discussing cases in which “definitional balancing” has been used). But see Pierson v. Ray, 386 U.S. 547, 558 (1967) (inviting arrest does not vitiate constitutional claim).

186. PROSSER & KEETON, supra note 185, at 5-6.

187. See Estelle, 429 U.S. at 106 (adopting deliberate indifference standard for failure to provide prison medical care).

188. See id. at 108 (considering state interest in developing tort-based standard); Whitley, 475 U.S. at 320-21 (1986) (explaining Estelle’s balancing of interests); supra text accompanying notes 161-69 (discussing Estelle and Whitley).

189. See supra note 115 (listing mental elements adopted in various cases).

190. See supra notes 38-39 (discussing cases adopting and rejecting intent inquiries); see generally Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205 (1970). In the first few years after Monroe, the Court occasionally continued to express the view that motive was irrelevant in constitutional analysis, see United States v. O’Brien, 391 U.S. 367, 383 (1968) (congressional motivation irrelevant in first amendment case), but such cases soon fell from grace, see infra notes 195-96 (citing later cases in which motive considered relevant).
for the intent standard.\textsuperscript{191} Quite simply, its attractiveness lies in the fact that it is more workable than the traditional balancing approaches in the context of action that violates state policy. Traditional constitutional law focuses on ends and means, with the means test often serving only as a proxy inquiry into prohibited ends.\textsuperscript{192} In the context of constitutional review of legislative action, such a means test avoids the political difficulty of labeling a legislative action ill-motivated. But when no policy is at issue and only an individual defendant accused of violating state law is present, there is no such etiquette problem, and motive may be tested directly.

Yet the intent test created some new problems even as it ameliorated older ones. In order to make the intent test work, the Court needed to identify precisely those ends that are constitutionally forbidden.\textsuperscript{193} This the Court has done.\textsuperscript{194} To the extent that this new thinking raised the specter of facing down legislative motives, the Court also has taken some steps to reduce potential conflict. It not only has limited discovery into legislators' motives,\textsuperscript{195} it has more importantly created a mixed-motive defense that is especially helpful to legislative bodies.\textsuperscript{196} To combat the argument that motive is diffic-

\footnotesize{\textsuperscript{191} See Village of Arlington Heights, 429 U.S. at 265-68 (intentional discrimination violates racial-discrimination ban of fourteenth amendment); Doyle, 429 U.S. at 283-84 (intent is relevant in case of alleged discharge for exercise of first amendment rights).

\textsuperscript{192} See, e.g., Carey v. Population Serv. Int'l, 431 U.S. 678, 695 (1977) (unreasonableness of means indicates proffered end not actually at stake in use of contraceptives); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977) (irrationality of means in protecting in-state apple consumers fuels concern that intentional discrimination against out-of-state products may be at issue); Griswold v. Connecticut, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring) (legislature's choice of means reveals its true ends); Lochner, 198 U.S. at 64 (lack of close connection between limited bakers' hours and health of bakers shows state law not intended as health or labor law).

\textsuperscript{193} Cf. PROSSER & KEETON, supra note 185, at 46 (distinguishing between object intended in battery—"to inflict physical injury"—and the object intended in assault—"to arouse apprehension").

\textsuperscript{194} Two examples are instructive. When the Court adopted the intent test for race-based equal protection claims, in the Arlington Heights case, it soon faced an attempt to read intent as it is sometimes read in torts, as a foreseeability test. See Arthur v. Nyquist, 573 F.2d 134, 140-43 (2d Cir. 1978) (adopting foreseeability test); United States v. Texas Educ. Agency, 564 F.2d 162, 168 (5th Cir. 1977) (same). The Court decisively rejected that approach and instead tied intent to the intent to bring about certain desired, but constitutionally prohibited, ends. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 278-79 (1979) (inquiring whether statute benefiting veterans—most of whom are men—actually passed to exclude women from benefits). Similarly, in the prison discipline arena, which spans several constitutional rights, the Court has adopted a variant of the intent test, one that focuses directly on whether the state actor's end was to carry out permissible ends (imposition of order and discipline) or prohibited ends (the imposition of harm for the mere goal of punishment). See Whitey, 475 U.S. at 320-21 (rejecting dispute as to efficacy of prison guard's actions and requiring showing of intent to harm); Bell, 441 U.S. at 536-37 (1979) (inquiring whether pretrial detention served permissible state goals).

\textsuperscript{195} Village of Arlington Heights, 429 U.S. at 269 & n.18.

\textsuperscript{196} See Doyle, 429 U.S. at 285-86 (school board that fired teacher for protected speech may escape liability by showing that constitutionally permissible purpose alternatively motivated its de-}
cult to discern, the Court has reintroduced into constitutional law the concept of "good faith," now as an antagonistic measure of constitutionally permissible ends.197

The Court may also be responding to the dual coverage problem, albeit apparently unwittingly, in its rulings on municipal liability. Under Monell v. Department of Social Services198 municipalities and other local government units have joined real persons as potential defendants under § 1983, liable not automatically under respondeat superior, but only when the decisions of high ranking officials "may fairly be said to represent official policy."199 For purposes of ruling on whether an officer's acts may be ascribed to the municipality, Justice White and others have ruled that the Court should use a variation of the very Brer Rabbit test that was rejected in Monroe in the context of finding individual responsibility: officials acting in violation of local law cannot be said to be acting pursuant to such law, he reasoned, and therefore the municipality cannot be held liable in such circumstances.200 This reasoning responds to the dual-coverage conundrum in a very elegant functional manner because of the way in which successful plaintiffs would seek to enforce their judgments. When an officer acted in violation of local law, he would bear individual responsibility, but when obeying local law he would effectively escape liability.201 Yet, this remains a limited development, restricted to local government units.202

Even if no direct correlation can be made between Monroe's dual coverage and the two patterns used in developing standards of care, one fundamental

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197. See Whitley, 475 U.S. at 320-21 ("good faith" used as synonym for permissible motive).
199. Id. at 694.
200. Pembaur v. City of Cincinnati, 475 U.S. 469, 486 (1986) (White, J., concurring). The precise question was whether an Ohio county could be held liable for a search authorized by the County Prosecutor. White agreed that it could, reasoning that the attorney possessed policy-making power to authorize searches and that no state constitutional, statutory, or local laws expressed the government's policy that such unlawful searches were forbidden. Id. at 1301-02. The apparent purpose of White's position was to encourage municipalities to draft effective rights-protecting regulations by holding out the prospect that the regulations would insulate the municipality from liability.

Justice O'Connor concurred in Justice White's reasoning in Pembaur, id. at 1304, and later authored the plurality opinion in City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988), which sounded similar themes. See id. at 924-26 (O'Connor, J., concurring) (scope of authority to make policy to be determined by reference to state law as construed by state courts).

201. Since liability under § 1983 is ordinarily joint and severable, cf. Dobson v. Camden, 725 F.2d 1003, 1004 (5th Cir. 1984) (en banc) (assuming joint liability), and since judgments could be satisfied most easily by collecting in one step from the municipality's deep pocket, a judgment against both an officer and municipality would effectively run against the latter alone.

202. Monell applies only to local government units, not to state-level entities which retain sovereign immunity. See Lake Country Estates v. Tahoe Regional Planning Auth., 440 U.S. 391, 400-01 (1979) (setting out standards for distinguishing between local and state-level government bodies).
observation remains valid. The condensation of two problems—state-sanctioned unconstitutional conduct and unconstitutional officer conduct violative of state law—under one statute, § 1983, has led to certain conceptual problems that are more easily solved when courts phrase their constitutional inquiries in terms of state of mind, at least state-of-mind tests that clearly delineate the ends forbidden by the Constitution. This style of constitutional rulemaking may look odd when compared to the dominant structured decisionmaking process of the 1960s and early 1970s. But that is precisely the point: § 1983's coverage of state actors' state-law misconduct has changed the dynamics of constitutional law and produced a different style of constitutional rule.

c. The New Patterns and "Definitional Balancing." Although the Court's creation of state-of-mind requirements under § 1983 has led to a constitutional law quite different from the structural constitutional law popularized in the 1960s and 1970s, these new approaches have direct historical antecedents in first amendment law, particularly the rules that Nimmer calls the product of "definitional balancing." In the area of free-speech analysis where a state's interest may be related to the content of speech, the Court has created a series of tests that depart from the predominant balancing model not by eschewing balancing altogether, but by choosing a test that describes the product of appropriately balanced interests. Such tests then become "a rule . . . [that] can be employed in future cases."

Such definitional balancing thus eliminates the need to return to overt balancing of governmental and individual interests in every future case; instead the appropriate test is applied to the facts at issue, indicating a preferred result. While Nimmer has praised the "actual malice" standard of New York Times Co. v. Sullivan, the same approach can be seen in several other cases. The balancing of interests done to arrive at the appropriate test is

203. The state-of-mind requirement must be tied to a constitutionally specified duty, a forbidden end, in order to achieve the goal of creating a standard of care for § 1983. See infra Part III.


205. Id. at 944.

206. For an interesting overview of definitional balancing and its chief competitors, "ad hoc balancing" (similar to what I have called merely balancing) and "absolutism," see G. Gunther, supra note 18, at 983-85, 1056-57.


208. See, e.g., Miller v. California, 413 U.S. 15, 31 (1973) (for obscenity, multi-part test including "appeals to the prurient interest"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (for subversive advocacy, speech "directed to inciting or producing imminent lawless action is likely to" do so); Edwards v. South Carolina, 372 U.S. 229, 236 (1963) (in hostile audience situations, "incitement"); Feiner v. New York, 340 U.S. 315, 321 (1951) (for inflammatory speech, speech surpasses bounds of argument or persuasion and undertakes "incitement to riot"). I cannot contend that these cases are of exactly the same mold as the § 1983 cases, for their tests focus more on asserters
remarkably similar to that undertaken in some of the § 1983 cases discussed above.209

Although a direct cause-and-effect relation between substance and procedure is difficult to establish, it is at least possible to say that a procedural dynamic similar to § 1983 was at work in the definitional balancing cases. Although there was an early movement to restrict review to legislative decisions,210 the Court later rejected that approach and developed an active jurisprudence that justified its inquiry into the constitutionally relevant facts of each case.211 Perhaps more important than the Supreme Court’s own practice were the related procedures that it encouraged for lower courts, those that entailed considering cases on their individualized facts rather than entertaining so-called “facial” or “overbreadth” attacks.212 These procedural dynamics thus permitted the Court in free-speech cases to peer more closely into individual circumstances instead of dealing only with institutionalized concerns appearing on the face of official policy.

The recognition of this similar approach in free-speech law allows us to see the tort influence on § 1983 in somewhat starker relief, especially the Monroe-based development of constitutional norms that can be applied to officers acting in violation of state law. As we have seen, in the definitional balancing cases the Court has created rather black-letter rules that are, like those created for § 1983, susceptible to application in circumstances in which the state official has violated state law. Yet, in several areas of free-speech jurisprudence, the Court has independently required that the state official be acting pursuant to a specific ordinance or statute and failure to act pursuant to legislative directive is deemed to be an independent first amendment violation.213 No similar practice can be found in § 1983 cases,214 in which courts of rights (section 1983 plaintiffs) than on officials (section 1983 defendants)—the opposite of § 1983’s focus. But like the § 1983 cases, these cases adopt tort-like state-of-mind tests rather than undertake ad hoc balancing of interests in each new case.

209. Compare New York Times, 376 U.S. at 254 (individual’s free speech interest in criticizing state officials affords privilege in libel suit absent malice) with Whitley, 475 U.S. at 320-21 (prison guards given great deference in quelling prison riot in absence of showing of malice).

210. See Gitlow v. New York, 268 U.S. 652, 668-70 (1925) (Court will defer to legislative determination that certain speech involves danger); Whitney v. California, 274 U.S. 357, 367, 371-72 (1927) (actual danger presented by speech is unreviewable question of fact, not a constitutional question).


212. See Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973) (limiting overbreadth attacks and expressing aversion to facial attacks); Bridges v. California, 314 U.S. 252, 272-73 (1941) (attacking contempt power as applied to speech).

213. See Miller, 413 U.S. at 25 (statute clearly defining speech is prerequisite for obscenity conviction); Kunz v. New York, 340 U.S. 290, 295 (1951) (licensing statute must contain standards to
are more likely to follow the maxim that an errant official's violation of state law, while not defeating § 1983 liability, certainly raises only state-law issues that do not amount to a constitutional violation. Perhaps one can explain this discrepancy by noting that the demand for statutory authorization is properly limited to free-speech cases because of our traditional fear of censorship. Or perhaps the Court should face the fact that its practice of choosing tort phrases to reflect constitutional norms masks the deeper problem previously noted—that its development of standards for § 1983 has so far ignored the fact that no state interest is present to be constitutionally balanced when an officer violates state law.

2. The Problem of Charging the Jury: Who Finds Constitutional Facts?

Monroe v. Pape not only provided a Constitution-based claim for official conduct violative of state law, it also provided a federal forum for the claim. And along with the federal forum goes the right to a jury trial. This created a new magnitude of problem for constitutional decisionmaking—how to integrate jury decisionmaking into the traditional judge-domi-
nated process of protecting constitutional rights. Prior to Monroe, federal judges realized that factfinding power played a large role in protecting federal constitutional rights, but their feared principal competitors in factfinding were state judges and jurors. The mask of federalism concerns was torn free after Monroe, forcing federal judges to decide how they could allow any other persons, even federal jurors, to share in constitutional adjudication.

Choosing tort phrases to reflect constitutional norms—which would then be used to charge the jury—appeared to solve parts of the problem, or so judges might have thought. The traditional view is that tort phrases present a body of well-established tests that produce somewhat predictable results, at least at the margins of jury decisionmaking. In Estelle, for example, the Court could adopt the “deliberate indifference” standard with certainty that it would produce fewer verdicts for plaintiffs and consequently less federal interference with the state’s prison medical operations than would a negligence test. Psychologically, moreover, the chosen test would permit federal jurors to involve federal courts only when they were subjectively highly outraged by the prisoner’s suffering, paralleling the Court’s determination that the eighth amendment forbids only wanton or heinous infliction of harm. Similarly, ascertaining a defendant’s motive or intent is a traditional kind of inquiry that juries have managed to undertake both in civil and criminal law. At least the direction of juries to a single fact makes their job more manageable.

Jury-charging norms made from constitutional-law words and phrases cannot claim this same apparent traditional manageability. These phrases lack a history of workability with juries—they are judges’ talk. More fundamentally, however, the vocabulary of constitutional law has acquired a subtlety and nuance, a flexibility, that is designed to give some leeway to the federal judge playing her Marbury v. Madison role. “Probable cause,” the constitutional phrase read directly into § 1983 in Garner, is a good exam-


222. See supra note 211 and accompanying text (citing cases in which Court inquires into facts of case to determine constitutionality of the defendant’s activity). The solution developed in those appellate jurisdiction cases could not be carried over to § 1983 because of the seventh amendment.

223. See Prosser & Keeton, supra note 185, at 26-28 (discussing importance of determining defendant’s motive in establishing liability).

224. See supra text accompanying note 125 (discussing Estelle standard).

225. See Prosser & Keeton, supra note 185, at 9-15, 21-23 (moral considerations affect liability and damages, with higher standard such as deliberate disregard adopted to test for greater moral outrage).


227. See Prosser & Keeton, supra note 185, at 26-28 (discussing role of state-of-mind requirements).

228. 471 U.S. at 11.
ple. As much as the Court attempted in the Warren era to refine the meaning of the phrase,\textsuperscript{229} it remains flexible and acquires some precision only when employed by a judicial officer who has himself accumulated experience in balancing police needs against the privacy interests of citizens.\textsuperscript{230}

This theme—that constitutional law is inherently judicial law—is especially evident in the number of constitutional tests that purport to inquire into the "totality of the circumstances" or otherwise overtly balance interests.\textsuperscript{231} It should not be surprising, therefore, that multi-factor charges to the jury, such as were once fashionable in excessive force cases, tend to present recurring problems.\textsuperscript{232} The law applied in most circuits to excessive force cases came from an early Second Circuit case, \textit{Johnson v. Glick},\textsuperscript{233} and required the balancing of at least four separate factors.\textsuperscript{234} While such an approach might provide guiding standards for judges, who could look at the accretion of case-law determinations on specific facts, juries would be left standardless. Indeed, \textit{Johnson}'s demise has ceased to be the relevant issue; the question now is whether the Justices can create an alternative that allows any role for jurors.\textsuperscript{235}

A full listing of constitutional tests that would make jury instructions

\textsuperscript{229}. See \textit{Aguilar v. Texas}, 378 U.S. 108, 114-15 (1964) (anonymous tip from unverified source cannot provide probable cause).

\textsuperscript{230}. This observation is proved primarily by developments in the law of qualified immunity, in which the Court has developed an "objective reasonableness test" that courts would apply to dismiss claims prior to trial. See \textit{Malley v. Briggs}, 475 U.S. 335, 344 (1986) (adopting standard used by judges in ruling on suppression motions); \textit{cf. Ford v. Childers}, 855 F.2d 1271, 1275 (7th Cir. 1988) (en banc) (question of constitutional violation \textit{vel non} is for judge acting under a guise of ruling on what a "reasonable jury" could determine).


\textsuperscript{232}. See \textit{Justice v. Dennis}, 834 F.2d 380, 383 (4th Cir. 1987) (circuit court noted multi-part test and clarified mental element in a manner that allowed jury to focus on three different possibilities); \textit{Lester v. City of Chicago}, 830 F.2d 706, 713 (7th Cir. 1987) (excessive-force cases dealing with arrest incidents treated under more objective fourth amendment standards in which mental elements irrelevant).

\textsuperscript{233}. 481 F.2d 1028 (2d Cir.) (Friendly, J.), \textit{cert. denied}, 414 U.S. 1033 (1973).

\textsuperscript{234}. \textit{Id.} at 1033. The court listed the relevant factors:

\textit{In determining whether the constitutional line has been crossed, a court must look to such factors as [1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of the injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.}

\textit{Id.} (emphasis and numerals added). The court noted, however, that decisions also must be made with an awareness that constitutional standards must steer very clear of merely replicating state-tort standards. \textit{Id.}

problematic runs the risk of *reductio ad absurdum*. Think of a jury instruction on state action taken from *Burton v. Wilmington Parking Authority*\(^{236}\) or imagine directing a jury to decide whether saving a fetal life in a particular abortion case is a "compelling state interest."\(^{237}\) Traditional constitutional law phrases are inadequate bases for instructing a jury precisely because they have no meaning when shorn from the judges who are purposely given leeway by the tests.

Three solutions might be suggested, and the Court has tried them all. First, the Court might define with more particularity its constitutional tests so as to make them more suitable for jury implementation. This is arguably what the Court did in *Garner* when it defined the scope of "reasonableness" as a constitutional matter—deadly use of force without probable cause to fear danger to officer or community is per se unreasonable\(^{238}\)—so as to leave a much narrower issue for the jury. While this represents an improvement in manageability that may ultimately prove itself, it also creates a new and extensive list of problems similar to those previously faced in ordinary torts' nebulous field of negligence: when should certain conduct become a tort per se?\(^{239}\)

The second solution would be for the Court to retain some kind of veto power over jury decisions by converting triable issues into legal issues. The Court also has experimented with this approach, substituting its judgment for that of the primary factfinders, and ruling as a matter of law that certain evidence either possesses or lacks the requisite power to meet the prescribed constitutional test.\(^{240}\) This approach clarifies the primary legal standard and provides fodder for further instructions that could presumably confine a

\(^{236}\) 365 U.S. 715 (1961). The Court's test required "sifting facts and weighing circumstances," *id.* at 722, and contemplated a case-by-case accretion of law. While some of these are now in place, it seems that substantial balancing—judicial discretion—which necessarily plays a role. See *Gilmore v. City of Montgomery*, 417 U.S. 556, 568-69 (1974) (struggling to apply refined test that aid beyond "generalized services" that has a "significant tendency" to promote discrimination could lead to finding of state involvement).

\(^{237}\) *See Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (such test applies to abortion decisions). If it is thought that this is a truly legal question that could never conceivably go to the jury, consider a more likely factual candidate—whether regulations have a "significant impact" on any given person's exercise of the right. See *City of Akron v. Akron Center for Reproductive Health*, Inc., 462 U.S. 416, 434 (1983) (state regulation of abortion procedure places significant burden on exercise of right to abortion); *cf.* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258-59 (1974) (only "penalties" on exercise of fundamental right to travel receive strict scrutiny).

\(^{238}\) 474 U.S. at 11-12.

\(^{239}\) *Cf.* PROSSER & KEETON, supra note 185, at 227 ("negligence per se" is akin to strict liability and consists of doing what is forbidden by statutory rule).

\(^{240}\) *See Whitley*, 475 U.S. at 322-26 (extensively reviewing testimony and explaining why it is inadequate); *supra* notes 230-31 (citing cases in which Court retained veto power over factual determinations).
factfinder in future cases, thus producing quite typical traditional issues concerning what amounts to a tort "as a matter of law." This provides a judicially manageable way of solving the problem of reconciling juries' factfinding with the courts' duty to protect constitutional rights.

The third attempt to solve the problem of sharing power over constitutional torts is more problematical. Under the guise of altering the qualified immunity doctrine, the Court has endeavored to create a pre-merits issue that would be legal only. Thus, the doctrine protects officials from monetary liability in those circumstances in which constitutional law is unsettled and there is little doubt that what constitutes settled law is itself a question of law. Since fourth amendment law is as settled as it is likely to get, one might have expected that all cases in this area would go to a jury on the "merits." Thus, the probable cause issue in Garner would be assumed to be appropriate for a jury. Instead the Court in Malley converted that issue into one for the judge by measuring the real defendant's evidence and knowledge against a mythical reasonable police officer in the circumstances. The workability of this solution is in doubt.

As difficult as it might be to convert constitutional words and phrases into jury-triable standards of care for § 1983 actions, let me introduce a word of skepticism about the alternative, choosing torts phrases to serve the same goals. Even if juries do not in fact understand torts talk, judges understand the impact of such phrases on juries at the margin of decisionmaking. I have tried to capture this idea by repeatedly referring to the use of such phrases to "reflect" constitutional norms. But it should also be recognized that these reflections produce a derivative and thus less certain version of

241. See Whitley, 475 U.S. at 323-25 (not open to plaintiffs to present witnesses who will second-guess prison authorities on the need to restore order or best methods for it).
242. See PROSSER & KEETON, supra note 185, at 236-38 (explaining scope of power of court to rule "as a matter of law" in negligence cases).
244. This is because the question necessarily involves the question of what the law is or was. See Anderson, 107 S. Ct. at 3038-40 (discussing meaning of phrase "clearly established" constitutional law).
245. See id. at 3039 (principles of fourth amendment settled).
246. See supra text accompanying note 146 (quoting Garner's constitutional standard).
248. Id. at 343-44.
249. In Anderson the Court adhered to its Malley decision, but it appeared to admit that Malley's attempt to decide the issues by motions to dismiss or for summary judgment—that avoiding any appearance of jury-like factfinding—could not always work. See Anderson, 107 S. Ct. at 3040 (decision can be made only by knowing information available to defendant); id. at 3042 n.6 (discovery of facts may be necessary to make ruling). Of course, to the extent that factfinding is necessary, that development complicates the easy argument that this is purely a question of law and reduces the Court to holding that this is an issue of law only because the Court says so.
250. See supra text accompanying note 223 (arguing that tort phrases give more predictable results).
constitutional adjudication than does judicial decisionmaking that directly invokes the constitutional norms.\textsuperscript{251} The subtlety of constitutional lawmaking that open-ended constitutional norms now give to judges would be lost; there could be no steady course of decisions under a jury-enforced reflective test that could send a signal stronger than the underlying constitutional rules themselves. Worse still, the constitutional-law interest in having life-tenured judges protect minority rights would be diminished as decisionmaking under only reflective guidelines is handed to juries. Finally, there is the real fear that tort standards provide only the illusion of greater manageability with juries. In other constitutional contexts where they have been employed, some think that tort phrases "roll right past the jurors."\textsuperscript{252}

III. FROM STATE-OF-MIND TO STANDARDS OF CARE FOR CONSTITUTIONAL TORTS—THE LIMITS OF TORTS TALK AND THE RETURN TO CONSTITUTIONAL LAW

A. THE PROBLEM OF THE DISEMBODIED STATE-OF-MIND REQUIREMENT

For better or for worse, § 1983's creation of constitutional torts has changed constitutional interpretation. The inherent tension in covering both conduct illegal under state law and that consistent with state law, when joined with the need to charge juries in civil actions, has created problems affecting the very constitutional law that will be enforced in the § 1983 action. The primary effect, as discussed in the preceding section, has been the creation of tort-like standards of care or the adaptation of constitutional tests to resemble tort-like standards. This development has, however, created another problem: some courts, fascinated with state-of-mind phrases, have unfortunately viewed them as a panacea for some difficult issues, thus ducking the issue of prescribing the requisite objects of the state-of-mind, the duties imposed by constitutional law. These courts stop at a state-of-mind requirement when they should be fashioning a standard of care.

\textsuperscript{251} Consider the parallel criticism that several commentators have directed at "categorical" decisionmaking in free-speech cases. They charge that the use of such categories as "fighting words," "commercial speech," and "child pornography" to exclude certain speech from ordinary constitutional protection is but a gross version of balancing that should probably be discarded in favor of more precise balancing in each case. See generally Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1 (categorization versus balancing in obscenity analysis); Schauer, Codifying the First Amendment, 1982 Sup. Ct. Rev. 285 (categorization examined through analysis of Supreme Court's categorization of child pornography as unprotected speech); Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265 (1981) (preference for categorical distinctions in first amendment analysis ignores theoretically significant differences but provides framework for incorporating free speech values into legal system).

The problem appears in several contexts. Most are related to liability for indirect harms, those not personally inflicted by government officials but originating elsewhere and not restrained by government. In *Dollar*, for example, the parents of children killed by a natural flood sought to hold a county liable for failure to build a bridge that would have carried them above the waters. In *Jackson v. City of Joliet* and *Archie v. City of Racine* estates sought to hold cities liable for the consequences of accidents or natural health problems in contexts in which city aid seemed appropriate. In *Wood v. Ostrander* a person harmed by a third party after government officials failed to render aid sought to impose liability on the officials. In *Partridge v. Two Unknown Police Officers* an estate sought to hold officials responsible for the decedent’s self-inflicted death. A quite similar issue has arisen in some municipal liability cases in which plaintiffs seek to impose liability on government for the inadequacies of its personnel. In *McKenna v. City of Memphis* for example, the plaintiff sought to hold the city liable for its employees’ constitutional violations by alleging that the city had inadequately trained and supervised them.

In several of these cases, as well as others presenting similar problems, courts appear to have chosen the quite similar “gross negligence, recklessness, or ‘deliberate indifference’” tests as their state-of-mind requirements, and have turned the cases back to juries on these “[t]riable issues of fact.” To the extent that these cases emphasize a state-of-mind requirement standing alone, and allow juries to decide without further guidance, their holdings

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253. 704 F.2d at 1540. For a fuller discussion of *Dollar*, see supra text accompanying notes 81-82.


255. 847 F.2d 1211 (7th Cir. 1988) (en banc).

256. *In Jackson*, the police officer at the scene of an accident failed to ascertain whether a burning car was occupied before directing traffic from the area, thus preventing passersby from rendering aid. 715 F.2d at 1201-02. *In Archie*, the city provided emergency medical services via telephone that proved to be inadequate and misleading to the affected person; she died. 847 F.2d at 1213-14.

257. 851 F.2d 1212 (9th Cir. 1988).

258. *Id.* at 13 (woman raped by man who gave her ride after police officer arrested her companion, had his car impounded, and left her on foot in high crime area).

259. 791 F.2d 1182 (5th Cir. 1986).

260. *Id.* at 1183.

261. 785 F.2d 560 (6th Cir. 1986).

262. *Id.* at 561.

263. See, e.g., *Ketchum v. Alameda County*, 811 F.2d 1243, 1246 n.3 (9th Cir. 1987) (“gross negligence”); *Taylor v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (en banc) (“grossly negligent” or “deliberately indifferent”); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199-200 (6th Cir. 1987) (“gross negligence”); *Strandberg v. City of Helena*, 791 F.2d 744, 749 (9th Cir. 1986) (gross negligence); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (“gross negligence” or “reckless disregard”).


265. *Id.* at 1219.
are inadequate. They are the same as saying that "intent" violates the equal protection clause, without fully noting that it is "intent to segregate based on race" that comprises the full constitutional standard of care. If this is an outright mistake, it was not a mistake made by these courts alone.

B. THE FAILURE OF DANIELS AND DAVIDSON

The Supreme Court faced similar sets of facts two years ago when it first overtly adopted its current approach of finding § 1983 standards of care in constitutional rather than common law norms. In the companion cases of *Daniels v. Williams* 266 and *Davidson v. Cannon* 267 the Court decided that neither the procedural nor substantive due process aspects of the fourteenth amendment made negligent official conduct actionable under § 1983. Taking a bold stand, the Court declared "that the Due Process Clause . . . is not implicated by the lack of due care" 268 because "something more than negligence" 269 is required. In defining what that something more was, the Court hinted that only "deliberate decisions" give rise to a constitutional claim. 270

There may be a good deal to recommend the Court's intuitive judgment that due process concerns were not implicated in the cases before it, a slip-and-fall claim in *Daniels*, someone having left a pillow in the inmate's walking path, and a beating by fellow prisoners in *Davidson*. 271 But the Court's method of decision, letting a state-of-mind phrase carry the total burden of distinguishing constitutional wrongs, has nothing to recommend it. State-of-mind tests are meaningless and manipulable without an articulation of the duties that the law imposes.

That state-of-mind phrases alone could not serve the Court's goals should have been apparent to the Court based on observations it made in both cases. In *Daniels* the prisoner contended that a prior case involving loss of good-time credits without a hearing had implicitly recognized that negligent failure to provide hearings is a procedural due process violation. The Court responded that the "relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure" to provide a hearing about the loss. 272 That

266. 474 U.S. 327 (1986).
268. Daniels, 474 U.S. at 334.
269. Id. The Court attributed this remark to the plaintiff, but acknowledged in text and footnote that it did not quarrel with the view and would not rule on the precise issue it raised. See id. at 334-35 & n.3 (discounting plaintiff's argument that it would be difficult to determine precise standard if it is "something more than negligence").
270. See id. at 331 (noting that, historically, due process implicated only by such decisions); id. at 333-34 (giving example of deliberate decision leading to liability).
271. See supra notes 101-02 (summarizing facts of cases).
272. Daniels, 474 U.S. at 333-34.
statement is almost flatly at odds with the Court's holding in *Carey v. Piphus* 273 which emphasized that the constitutional interest deserving of compensation in procedural due process cases is primarily the interest in a hearing, not the rightness of the hearing's outcome. The plaintiff, therefore, appears to have focused on the correct constitutional interest. 274 Moreover, by changing the focus of the duty from the hearing to the good-time loss, the Court demonstrated that state-of-mind tests are easily manipulated unless they are tied to a particular duty. 275

The decision in *Davidson* illustrates the same flaw. Although it rejected the plaintiff’s claim concerning failure to protect him from fellow prisoners, the Court cited with approval two cases which had imposed liability. In the first, guards themselves had unnecessarily beaten an inmate, 276 and in the other, guards stood by while prisoners beat a fellow inmate. 277 There is no way to distinguish the latter of these two cases from *Davidson* on state-of-mind alone. The Court must also articulate the constitutionally imposed duty, possibly one to protect from harm prisoners in one’s presence, but not prisoners outside one’s presence. The dissenting opinion in *Davidson* faced this issue; 278 the majority did not. 279

The Court’s failure in *Daniels* and *Davidson* to explore the range of constitutional duties contrasts sharply with the Court’s earlier opinion in *Estelle*, in which articulation of a duty to provide care for “serious medical needs” provides the focus for choosing the “deliberate indifference” standard. 280 Shorn of a specific duty, deliberate indifference might be interpreted to release from liability a prison doctor who through mere inattentiveness—indeliberate indifference, not a “deliberate decision” to ignore his inmate patients—played more golf than he practiced medicine. But *Estelle*’s specification of a duty, the affirmative duty to provide care for serious medical needs, provides a focus for the state-of-mind inquiry. The same could be said for several other well-reasoned Supreme Court decisions. 281

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274. Id. at 266.
275. See supra notes 185-97 and accompanying text (discussing same issue with respect to ordinary torts and Court’s intent cases).
276. *Davidson*, 474 U.S. at 348 (citing Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)). *Johnson* and its importance are discussed above. See supra notes 233-35 and accompanying text.
278. Id. at 350 (Blackmun, J., dissenting) (distinguishing between dangers from which a prisoner could protect himself, such as a fall, and dangers from which only prison personnel could protect him, such as a fellow inmate’s attack).
279. Id. at 348 (majority opinion) (simply observing that as in slip-and-fall case only “lack of due care” was at issue in beating case).
281. See Arkansas Writers’ Project, Inc. v. *Ragland*, 481 U.S. 221, 228 (1987) (intent unnece-
There are some arguments that could be made for a disembodied state-of-mind requirement for due-process violations, even assuming that by "deliberate decision" the Daniels Court meant to cover decisions made with "deliberate indifference" or "recklessness." Most importantly, it would provide omnibus coverage, protecting all citizens from every kind of highly objectionable mistreatment by state officials. But that virtue is also a vice. The test could produce a potential claim in every citizen for every supposed harm, an approach at odds with the traditional approach of imposing greater duties upon governmental officials only in the context of a limited number of highly protected fundamental rights.

There are other arguments that also could be made for the practice, but their defects show the limitations inherent in letting tort phrases carry too much of the load of defining constitutional rights. First, the open-ended test might be conceived as a protection against arbitrariness, a recognition that current due-process doctrine prevents such governmental action. Yet that protection has been created in the context of judicially declared constitutional law in which judges appraise action with the substantial deference mandated by low-level scrutiny. To allow juries to make the arbitrariness decision, which they could do if courts did not restrict them by specifying constitutional duties, would turn our constitutional law on its head. Finally, it might be argued that this disembodied state-of-mind test would provide at least some protection against those excesses that failed some smell test and most upset society. However, this could lead not only to regional variations of the type lamented under the old Whirl approach to § 1983, but also to jury-to-jury variations depending on the sympathies of the parties and the values of the jurors. Only some articulation of constitution-based duties in free-speech case involving tax on magazines when it can be shown that tax varies by content of publications); Block v. Rutherford, 468 U.S. 576, 579-80 (1984) (intent to punish pretrial detainee, rather than intent to promote safety).

282. Cf. Wood, 851 F.2d at 1214 (construing Daniels to permit adoption of deliberate indifference or recklessness standard).
284. Daniels, 474 U.S. at 331.
286. See supra note 221 and accompanying text (life-tenured judges usually protect rights from majority pressure).
287. See supra text accompanying notes 54-55 (discussing problems inherent in adopting state common law standards for § 1983 cases).
288. Whatever may be said for Justice Rehnquist's observation that "many branches of the law abound in nice distinctions," Daniels, 474 U.S. at 334, the distinction between intent and gross negligence or "deliberate decisions" may be simply too psychologically crude to form the basis for constitutional law that jurors will apply. See Archie, 847 F.2d, at 1226 (en banc) (Posner, J., concurring) (doubtful of term's precision without articulation of duties).
ties can avoid these problems.

C. THE TENTATIVE 1989 DECISIONS

The Court returned to these issues in early 1989 and attempted to put some meat on the disembodied state-of-mind requirements that appeared to dominate the Daniels and Davidson cases. The two cases, DeShaney v. Winnebago County Department of Social Services289 and City of Canton v. Harris290 struck superficially discordant tones, DeShaney emphasizing constitutional duties, while Canton continued to use torts phrases.291 Although the cases cannot easily be reconciled, several similarities in the decisions indicate that the Court is finally beginning to appreciate that identification of constitutional duties is even more important than manufacturing state-of-mind requirements.

The DeShaney case involved a child beaten so severely by his father that he was left brain-damaged for life, but the § 1983 suit was brought not against the father but against county social workers who "fail[ed] to intervene to protect" the child.292 The Court rejected the case on grounds that spoke pointedly in terms of constitutional duties. The fourteenth amendment, said the Court, "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."293 Although the Court acknowledged that it had created exceptions for persons held involuntarily in state custody,294 it found these inapplicable because the child was in the custody of his father.295 Finally, sounding a long-standing theme, the Court pointedly noted that its decision was based on constitutionally supplied norms, not those relevant to the creation of state tort law.296

291. A third case, Brower v. Inyo County, 109 S. Ct. 1378 (1989), is also of some importance. See infra note 309 and accompanying text (discussing Brower).
292. DeShaney, 109 S. Ct. at 1002. Over a period of two years the county social services agency intervened to protect the child on one occasion, but provided only sporadic follow-up supervision despite repeated documented evidence suggesting that the father repeated abused the child. Id. at 1001-02.
293. Id. at 1003. The Court also noted that there is "no affirmative right to governmental aid," id. (citing Harris v. McRae, 448 U.S. 297, 317-18 (1980) (failure to provide funding for abortions not constitutional violation), and that as general matter, a "State is under no constitutional duty to provide substantive services," id. (quoting Youngberg v. Romeo, 457 U.S. 307, 317 (1982)) (services must be provided to involuntarily admitted mental patients, but not generally to others).
294. 109 S. Ct. at 1005 (discussing cases involving prisoners and mental patients); cf. White v. Rockford, 592 F.2d 381, 384 n.6 (7th Cir. 1976) (special relationship created when officers arrest child's custodian and leave child unattended).
295. 109 S. Ct. at 1005-06.
296. Id. at 1006-07.
The *Canton* case seems similar, for it involved the alleged failure of city officials to provide adequate training to their police officers, training that would forestall harm visited upon detainees by untrained officers. Never citing *DeShaney*, the Court ruled that liability could be imposed on the city if its inaction “amounts to deliberate indifference to the rights of persons with whom the police come into contact.”\(^{297}\) On its face the opinion appears not only to resort once again to disembodied state-of-mind requirements to identify constitutional norms, it also imposes affirmative duties in violation of *DeShaney*’s admonition that officials are liable only for their own misdeeds.

There are ways to distinguish *DeShaney* and *Canton*, but they satisfy only as well as fast food. *Canton*, one could argue, was a municipal liability case in which the Court appeared to understand that some officer had already committed a constitutional violation, and the sole remaining issue was who would pay.\(^{298}\) *DeShaney*, the argument goes, involved no extant violation since the offending father failed to qualify as a state actor.\(^{299}\) But the argument puts untenable pressure on the state-action distinction, for officers, even supervisors, are no more liable for the actions of fellow officers than they are for those of private persons.\(^{300}\) A variant of this argument might emphasize that *Canton* concerns municipal, not personal liability, but that thesis runs afoul of the observation that the law of municipal immunity has grown directly from the law of supervisors’ liability.\(^{301}\) A final mutation might press the position that municipal liability appears to depend on statutory, rather than constitutional, ascription of responsibility,\(^{302}\) but that argument fails to note that the same language covers all “person[s],” both real ones and municipalities.\(^{303}\)

\(^{297}\) 109 S. Ct. 1197.

298. *See id.* at 4272 (seeking “causal link between a municipal policy or custom, and the alleged constitutional deprivation”). Professor Schuck makes this assumption in his article on municipal liability that appears in this symposium. *See generally Schuck, supra* note 160.


301. *Compare id.* at 375-76 (no respondeat-superior-type liability for supervisors; causal link between supervisor’s acts and underling’s wrongs must be shown) (Rehnquist, J.) *with City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818-20 (1985) (plurality opinion of Rehnquist, J.) (rejecting respondeat superior liability for municipalities and demanding “affirmative link”) and *id.* at 828 (Brennan, J., concurring, joined by Marshall and Blackmun, JJ.) (requiring similar linkage). *See generally Canton*, 109 S. Ct. at 1203-04 (summarizing municipal liability rules).

302. *See Canton*, 109 S. Ct. at 1203-05 & n.8 (no constitutional violation by city supervisors, only by line officer (citing City of Springfield v. Kibbe, 480 U.S. 257, 267 (1987) (O’Connor, J., dissenting) (tying liability to statutory responsibility for “caus[ing]” constitutional deprivation)).

303. *See Monell*, 436 U.S. at 688-89 (municipalities are “persons” under § 1983); *cf. Malley*, 475 U.S. at 344 n.7 (ruling that causation, in context of individual responsibility and intervening events, is measured by statutory and common-law, rather than constitutional, norms).
Although the Canton opinion appears dazed and confused at this intellectual level, the rules actually announced in the case are a significant advancement over the Court’s earlier efforts in the Daniels and Davidson cases, for the Court carefully delineates the duties to which it ties the “deliberate indifference” mental element. Indeed, the state-of-mind phrase seems virtually irrelevant: the Court maintains that the pertinent “issue... is whether th[e] training program is adequate,” and proceeds to define quite narrowly the considerations that apply in making that determination. First, the Court adopts an obviousness test, imposing a duty to train when “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.” Second, the Court reinforces the program-level responsibility of city officials, opining that there is no duty to see that each officer is adequately trained. Finally, the Court protects the municipality from speculative claims by requiring that plaintiffs demonstrate that an identifiable failure to train “actually caused” or is “closely related” to the harm suffered.

Canton, therefore, is a far cry from prior cases that adopted a disembodied state-of-mind requirement: rather, it specifies the duties that a city policymaker must observe in order to avoid liability. To the extent that the DeShaney case also defines the perimeters of constitutional responsibility, it likewise contributes to the accretion of a law of constitutional duties that serves the traditional purposes of constitutional law by having the Court, rather than juries acting pursuant to vague mental elements, define constitutional law.

304. 109 S. Ct. at 1205.
305. Id. The Court illustrated the idea in a footnote that states that failure to train police officers in the use of their firearms would be an obvious factor leading to violations of the rule of Garner. Id. at 1205 n.10. The Court also adopted the view that a series of constitutional violations could put the city on notice that its training efforts were deficient, toleration of which would constitute a violation of § 1983. Id.
306. 109 S. Ct. at 1206.
307. Id.
308. See supra text accompanying notes 294-95 (distinguishing between custodial and non-custodial situations). In light of Davidson's holding that a jailor has no duty to protect from beatings prisoners who are outside his presence, see supra text accompanying notes 276-79, it appears that DeShaney's line will need further refinement.
309. In Brower, another related case decided in early 1989, the Court adopted an intent test for testing fourth amendment seizures. 109 S. Ct. at 1381 (“termination of movement through means intentionally applied” is a seizure; unintended restriction is not (emphasis in original)). Brower thus continues the trend of specifying constitutional standards of care not by adopting state-of-mind tests alone, by by specifying with some care the duty owed by the state actor. To the extent that the Court left open on remand the definition of constitutional unreasonableness, Brower also shows that the definition of constitutional duties may depend upon laying of several specified duties. Id. at 4323 (seizure found; demands of “reasonableness” under Garner open on remand).
IV. Conclusion

In a marked clarification of its ruling in *Monroe*, the Supreme Court has recently held that § 1983 has no state-of-mind requirement of its own, that it adopts the state-of-mind requirement of the constitutional right that the plaintiff seeks to enforce. This development not only rationalizes the law of § 1983, it also reiterates the long-established distinction between constitutional law and state common law. To the extent that this may make it more difficult for plaintiffs to induce federal courts to judicial activism, it is a difficulty grounded in a real appreciation for constitutional norms.

Yet the movement to find § 1983’s standards in constitutional norms tends to obscure a subtler reality, that the very existence of § 1983’s authorization of suits for damages alters the ensuing constitutional law that the Court makes. Assumptions about § 1983 that date back to its original reinvigoration, particularly its dual coverage of both official acts and official misconduct as well as its reliance on juries for enforcement of damage claims, create dynamic influences that force constitutional law more in the direction of a torts-like vocabulary and method of analysis. I have argued that movement can be reconciled with constitutional tradition only if courts end their over-reliance on disembodied state-of-mind requirements and begin to identify the more precise constitutional duties to which the mental elements attach.

The fluid ideas identified in this Article are more currents than stagnant pools. The movement toward constitutionalizing standards of care contains an eddy that seeks to have some issues of causation turn on statutory rather than constitutional norms. Even more fundamentally, the rise of municipal liability is undermining *Monroe*’s original model of individual responsibility and perhaps giving some impetus to a competing model of governmental responsibility, at least for the training of personnel. Grounded in constitutional concerns, § 1983 has shown itself to be as changeable as the constitutional law it enforces.