The Rights Revolution in the Age of Obama and Ferguson: Policing, the Rule of Law, and the Elusive Quest for Accountability

Lynda G. Dodd

Recent political science scholarship examining the institutional features of the rights revolution has highlighted the importance of the private enforcement of civil rights. This article discusses a less well-known line of Supreme Court cases concerning government liability that have undermined effective private enforcement of constitutional rights. I examine the impact of the Court's "procedural assault" on private civil rights enforcement and possible responses to the recent protests in Ferguson, Missouri, and elsewhere across the country regarding police use of force. After identifying the ways in which the Court has undermined a core strand of the rights revolution, I assess the challenges confronting the Obama administration and civil rights leaders as they respond to these developments.

In his 2014 book, *The Civil Rights Revolution*, Bruce Ackerman observes that "the sun is setting on the civil rights revolution." The struggles of the 1960s, the changes they wrought—"All this is ancient history for the rising generation."[1] Has there been a generational shift in the "age of Obama?" While there is much evidence to support Ackerman's claim, recent civil rights activism in the United Sates may lead to renewed attention to the institutional foundations of the rights revolution.

On August 9, 2014, an unarmed eighteen-year-old black man named Michael Brown was fatally shot by Darrell Wilson, a white police officer, in Ferguson, Missouri, sparking unrest in Ferguson and across the country.[2] Just a few weeks earlier, a widely-viewed videotape showed an NYPD officer using a prohibited chokehold maneuver, causing the death of Eric Garner in Staten Island, New York. The video of Eric Garner's final words and death left no room for debate about the events surrounding his death.[3] After the initial Ferguson protests in early August, participants in social media as well as journalists from national news outlets began paying greater attention to these and other recent killings, helping to spark more protests across the country.[4] Later in November and early December, when grand juries failed to indict the officers involved in the deaths of either Michael Brown or Eric Garner, even larger protests erupted in cities and towns across the United States. The large-scale peaceful protests that continued through the following holiday season represented the highest levels of civil rights activism in years.[5]

Much of the public debate initially focused on the criminal liability of the police officers involved and the role of local grand juries in seemingly shielding these officers from criminal prosecution, but local criminal prosecutions are not the only legal mechanism for holding police officers and other government officials accountable.[6] Protestors and civil rights leaders also repeatedly called on the Justice Department to pursue federal criminal prosecutions and broader civil rights investigations.[7] In this article, I examine

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another mechanism for holding these police officers accountable: civil actions, often referred to as "constitutional tort" lawsuits, for monetary damages under 42 U.S.C. § 1983, the federal statute that provides a civil cause of action in federal courts for constitutional rights violations.[8] Despite its crucial role in upholding the rule of law in the United States, this category of civil rights litigation targeting governmental constitutional violations has received far less attention from political scientists, perhaps because the law of constitutional torts has been developed exclusively by federal judges into an extremely complicated and technical doctrinal framework.[9] Section 1983 litigation is, however, a central part of the rights revolution ushered in during the 1960s.[10]

The families of Michael Brown and Eric Garner joined a long list of plaintiffs when they hired attorneys to prepare for civil litigation under Section 1983.[11] Yet, as leading civil rights scholar Erwin Chemerinsky noted in an August 26, 2014, *New York Times* op-ed, "How the Supreme Court Protects Bad Cops," their prospects for success have been hindered by a little-noticed line of recent Supreme Court decisions that have undermined the ability of plaintiffs to hold police officers and other officials responsible for their unconstitutional actions. In this article, I analyze these Rehnquist and Roberts Courts decisions displaying an increasingly hostile view of Section 1983 litigation. I also place these decisions within the context of a number of earlier cases from the 1970s and 1980s that structured Section 1983 doctrine in a way that makes it difficult for plaintiffs to successfully sue the police or other government officials.[12]

A second major goal of this article is to consider the fate of Section 1983 litigation in "the age of Obama." President Obama has done very little to respond directly to these doctrinal developments. I suggest, instead, that Obama exemplifies an across-the-board lack of enthusiasm with the rights revolution's reliance on private enforcement and adversarial legalism. Rather than pursue override legislation to help bolster constitutional accountability through Section 1983 litigation, Obama has favored government enforcement through Justice Department actions. I argue that this approach is insufficient, because most civil rights enforcement occurs through private civil rights litigation. I also assert that it is dangerous to rely solely on the stealthier option of federal court appointments. Securing the institutional foundation of the rights revolution—private enforcement litigation—instead requires broader public support and recognition of private enforcement's importance, efficacy, and legitimacy. The reaction to the recent protests in Ferguson and across the country gives hope that, in the "age of Ferguson," there will be renewed attention to the need for civil rights litigation under Section 1983.

I address at least four recent lines of inquiry in political science scholarship on law and the courts. First, like many scholars building on the insights of Sean Farhang's groundbreaking 2010 book *The Litigation State*, I am interested in the relationship between government and private enforcement and here compare the civil rights enforcement efforts of the Justice Department to private litigation under Section 1983.[13] Although much of the public's attention over the past year has focused on the Justice Department's role, the government typically investigates only a handful of police departments each year. In 2014, private litigants filed over 15,000 cases in federal district courts to enforce civil rights.[14] Section 1983 litigation is by far the most important vehicle for the enforcement of constitutional rights against police officers and other government officials. Second, by focusing on the constitutional tort cases challenging police brutality, the largest category of Section 1983 litigation, this study engages with recent political science scholarship examining the carceral state, policing, and other criminal justice issues.[15] Because Section 1983 is invoked most often in the context of policing and incarceration—through lawsuits alleging excessive use of force, race-based patterns of stop and frisk, unconstitutional conditions of confinement, and wrongful convictions—constitutional tort litigation can play a role in deterring and remedying the most egregious sources of governmental wrongdoing in an era of aggressive policing and mass incarceration. Third, by updating the story of private enforcement of civil rights beyond the 1990s, where Farhang ends his account, I consider whether there remains sufficient support for private enforcement to permit the possibility of override legislation to bolster civil rights enforcement by private plaintiffs. Recent political science scholarship on the conservative legal movement and retrenchment of access to the federal courts has emphasized a partisan dimension to these changes.[16] I seek to add to these accounts by highlighting the growing disenchantment with the litigation state among liberal legal scholars, civil rights leaders, and politicians, including Obama, since the 1990s. Finally, I call attention to aspects of the Obama presidency that have not been examined fully in political science scholarship. While there has been a great deal of work on Obama's approach to civil rights and race-conscious policies, I highlight here his views regarding the institutional features of the rights revolution and consider the limitations of his preference for governmental enforcement.[17] Many political scientists have emphasized the structural factors limiting Obama's options—the constraints imposed by the economic crisis, the political obstacles resulting from strengthened party unity and heightened polarization, and challenges associated with bolstering policies that are part of the "submerged state.[18] While acknowledging those limits, I here suggest that Obama simply has not considered supporting private enforcement of civil rights as a priority. It remains to be seen whether the calls for change following in the wake of the Ferguson protests will bring renewed attention to the

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need for a stronger regime of private enforcement of constitutional rights under Section 1983.

My argument proceeds as follows. The first section situates President Obama's views about the rights revolution in the context of the role that Section 1983 litigation has played since the 1960s, as well the more recent concerns about the failures of adversarial legalism. In the next section, I examine the impact of the Court's "procedural assault" on civil rights litigation and the possible responses to the recent cases regarding police use of force. In the final section, I evaluate the Obama administration's record on civil rights within the context of these little-known Supreme Court cases and assess the challenges confronting the administration and civil rights leaders in response to these developments.

"A Debt to Pay": Obama's Civil Rights Dilemma

On April 10, 2014, President Barack Obama delivered the keynote address at the Civil Rights Summit in Austin, Texas. Part of a three-day conference to mark the fiftieth anniversary of the passage of the Civil Rights Act of 1964, Obama's address praised the rights revolution that emerged in the wake of its passage. As he often has when paying tribute to the civil rights movement, President Obama acknowledged his place in history as a legacy of that movement:

> Because of the Civil Rights movement, because of the laws President Johnson signed, new doors of opportunity and education swung open for everybody—not all at once, but they swung open. Not just blacks and whites, but also women and Latinos; and Asians and Native Americans; and gay Americans and Americans with a disability. They swung open for you, and they swung open for me. And that's why I'm standing here today—because of those efforts, because of that legacy.
>
> And that means we've got a debt to pay. That means we can't afford to be cynical. Half a century later, the laws LBJ passed are now as fundamental to our conception of ourselves and our democracy as the Constitution and the Bill of Rights. They are foundational; an essential piece of the American character.[19]

Obama's sense of obligation to the civil rights movement is clearly evident in this speech. There is ample evidence demonstrating that the Great Society laws—not only the Civil Rights Act of 1964, but also the 1965 Voting Rights Act, the 1965 Immigration and Nationality Act, and the 1965 Higher Education Act—transformed the electorate in ways that made his 2008 election victory possible.[20] Less clear, however, is the precise nature of Obama's commitments and their effect on his administration's civil rights agenda. Obama, like many of his generation, faces a new dilemma—supporting civil rights enforcement in a time of growing skepticism about earlier civil rights strategies and goals.

The Rights Revolution and Section 1983

Although it has never received the same sort of public recognition as the Johnson era civil rights statutes, Section 1983 has served as a central pillar of the rights revolution for over half a century. The revival of Section 1983 began in a 1961 Warren Court case, *Monroe v. Pape*, that involved a shocking instance of police misconduct: a warrantless police invasion of a family's apartment in the middle of the night, the violent and threatening interrogation of the parents and their six children, and the arrest of the father on open charges.[21] The Supreme Court upheld James Monroe's claim for monetary damages under Section 1983 and interpreted the "under color of law" requirement in the statute to include unauthorized actions taken by government officials in excess of their authority, thereby liberating this form of constitutional litigation under Section 1983 from a longstanding doctrinal straightjacket.[22] *Monroe*'s introduction of a damages remedy for unauthorized and unconstitutional official actions has been described as "one of the great innovations of modern American law"[23] and "the case of the century for our rights as citizens."[24] By extending the reach of Section 1983 to include official misconduct, *Monroe* gave new life to a statute that is now the primary vehicle for constitutional litigation in the United States.

Monroe also made it possible for more plaintiffs to receive compensation for constitutional violations. Before *Monroe*, injunctions were the typical remedy for those complaining of unauthorized governmental conduct. Because such a remedy was available only for *ongoing* government programs and practices, many victims of constitutional violations were left without a remedy. By endorsing the alternate remedy of damages and creating a new kind of constitutional tort litigation, the *Monroe* Court encouraged future plaintiffs to pursue backward-looking claims involving already—completed governmental action that produced constitutional violations.[25]

As more Bill of Rights provisions were incorporated to apply to the states during the Warren Court's heyday, Section 1983 offered a potentially effective new weapon for plaintiffs seeking to enforce the Constitution in the federal courts.[26] In 1960, on the eve of the *Monroe* revolution, a mere 280 suits were filed in federal court under all of the civil rights statutes.[27] Soon, however, because the Court in *Monroe* held that plaintiffs need not first exhaust state judicial remedies before pursuing a federal claim, Section 1983 would achieve renown as the "legal bulwark of the ripening civil rights movement."[28] Although Congress did not intervene directly in the development of constitutional tort doctrine under Section 1983, it did provide crucial support for this side of the rights revolution when it passed the Civil Rights Attorneys Fees Award Act of 1976. The prospect of attorney's fees that CRAFAA offered to victorious civil rights plaintiffs greatly increased the attractiveness of this litigation, and the numbers of cases increased. By 1979,

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the number of nonprisoner filings had risen to 13,168 each year, and prisoners filed an additional 11,195 suits.[29]

As Charles Epp has detailed so superbly in *Making Rights Real*, this rise in litigation under Section 1983 created pressure for professional reforms in police departments across the country during the 1980s, and, he argues, this growth in "legalized accountability" helped significantly reduce police use of force in the United States.[30] In the aftermath of the Rodney King beating by the Los Angeles police in 1991, however, leading civil rights litigators such as David Rudovsky began questioning whether Section 1983 could ever sufficiently deter police misconduct.[31] Civil rights leaders called for new measures that would permit more widespread structural reforms of police departments.[32]

Adversarial Legalism and Its Critics

During this same period, the impact of the Reagan Revolution's challenge to legal liberalism began to be felt. Private enforcement of civil rights and litigation more generally came under attack.[33] In part this was due to the impact of the tort reform movement, which has attempted with considerable success to stigmatize litigation as "jackpot justice" and "lawsuit abuse" that is intrinsically unfair to defendants.[34] Whereas previously citizens who had "the courage of their convictions" to seek justice in the court system and vindicate the rights of all their fellow citizens had often been lauded, over the past three decades civil rights plaintiffs and their lawyers have confronted increasing hostility, in part no doubt due to the rise in anti-litigation rhetoric.[35]

Although support for civil rights litigation remains, the commitment of liberal elites and politicians tends to be a little more lukewarm than in the past, perhaps reflecting a generational shift in perspective. The generation of liberals who witnessed the collapse of the post-New Deal Coalition shared a post-Watergate skepticism of national government, yet believed its responsibilities should expand. The litigation state, by assigning significant responsibilities to liberal legal organizations, was, as Shep Melnick has observed, "particularly well suited to the purposes of these ambivalent activists."[36] Today, however, there appears to be less support all around for civil rights litigation. Obama's skepticism about the effectiveness of litigation is of a piece with the views of a new generation of elites noted by legal scholar David Fontana: "[As] these voices of the Warren Court Generation disappear, their voices are replaced by something murkier. The next generation of elite lawyers, with some exceptions, does not often push the argument that courts interpreting the Constitution can make the world a better place."[37] A number of political scientists have offered similarly pessimistic appraisals of a litigation-centered politics.[38] Other legal scholars on the left, such as Stanford law professor Richard Thompson Ford, have produced sharper critiques of the rights revolution's legacy and praised Obama for expressing a similar skepticism.[39]

Obama's stance is thus firmly within those of recent mainstream scholarship embracing a less than celebratory view of the role of courts in the rights revolution.[40] Although it has received little attention from scholars and pundits, Obama has long rejected a "heroic" role for the Supreme Court and civil rights litigation. In a 1995 television interview, he explained his preference for avoiding excessive reliance on litigation in terms of the increasingly conservative makeup of the federal judiciary, which "these days is not very sympathetic to the cause of civil rights." "Progress," he claimed, "is probably not going to come from the courts these days. We're not going to see a *Brown v. Board of Education* type of decision anytime soon. What we're going to have to do is work at the grassroots level and the community level."[41] Obama offered an even more skeptical view in a 2001 radio interview, where he described the emphasis on court-centered strategies as "one of the . . . tragedies of the civil rights movement" because it produced "a tendency to lose track of the political and community organizing activities on the ground that are able to put together the actual coalitions of power." He further argued that the reliance on litigation is intrinsically problematic, because courts are "poorly equipped" to handle "basic issues of political and economic justice in this society."[42] In his 2006 *The Audacity of Hope*, Obama "wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy."[43]

As the elites on the right and the left increasingly criticized adversarial legalism, federal judges had their own reasons for wanting to tame the rights revolution. The role of constitutional tort litigation, in particular, has not been highly valued by the federal judges in charge of supervising its development. The enormous growth in litigation during the 1960s and 1970s led to charges that Section 1983 litigation was burdening the federal courts.[44] Except for a brief period of revival following the *Monroe* decision, much of the history of constitutional tort litigation has been a story of doctrinal trimming.[45] Since 1978, when the Supreme Court introduced the "policy or custom" requirement for government entity liability in *Monell*,[46] the Court has introduced a complex array of doctrines limiting the availability and scope of the constitutional tort remedy. That the number of caseload filings has remained relatively steady since then, however, indicates that something else besides continuously "exploding dockets" is at work.[47]

Whatever its cause, the doctrines adopted by the Rehnquist and Roberts Courts have limited the procedural framework for civil rights litigation. It is through these cases that the conservative legal movement that Steven Teles has described so well has reaped real results,

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mostly under the public's radar.[48] As Melnick observes, "the Supreme Court often leaves its biggest imprint on civil rights policy not in high visibility constitutional rulings, but in a large number of small adjustments in the 'remedial machinery' that turns abstract rights into binding norms."[49] The recent Court cases introducing obstacles for civil rights litigants—the civil rights procedural "rollback"—provide another example of the role of regime politics in judicial decision-making.[50] Nonetheless, perhaps because it is a far more stealthy variant than more high-visibility litigation concerning the constitutionality of such issues as affirmative action, campaign finance laws, and gay marriage, this development has been largely ignored in current political science scholarship. Without more attention to these less visible procedural cases, the Supreme Court may appear to be far more moderate than it actually is to scholars focusing on the most prominent constitutional cases.[51]

"To Blush Unseen": The Procedural Assault on the Rights Revolution

Speaking at a Fourth Circuit conference in 2001, Chief Justice William Rehnquist discussed a handful of cases from the just-ended 2000 term that he believed would have an enormous impact despite receiving little attention from the press or the public.[52] Quoting from Thomas Gray's "An Elegy in a Country Churchyard," Rehnquist lamented that these cases are "like flowers which are born to blush unseen and waste their sweetness on the desert air," an apt description of the rulings at the core of the Court's procedural rollback of civil rights laws, a trend that has only strengthened during the Roberts Court. Although the cases in the four areas discussed in this section were closely watched within the legal community, they received less coverage in the mainstream press; as a result, the public is largely unaware of the impact of these cases on civil rights enforcement. Recent political science scholarship has also underestimated the role of judicial doctrine in making—and unmaking—the litigation state. The procedural prerequisites for the private enforcement of civil rights are not as entrenched as scholars have suggested.[53] They are instead the object of judicial transformation.

Attorney's Fees

One of the important but little-known cases Rehnquist was likely referring to is *Buckhannon Board & Care Home v. W. Va. Department of Health and Services* (2001),[54] a case that has been called "a neutron bomb" for civil rights litigation.[55] In this case, the Rehnquist Court ended the federal courts' longstanding practice of applying the "catalyst theory" for the determination of attorney fees under the Civil Rights Attorneys Fees Award Act of 1976,[56] which permitted awarding legal fees to the attorneys of all "prevailing plaintiffs" whose legal challenge produced some beneficial change in the defendant's behavior. In his majority opinion in *Buckhannon*, Rehnquist announced that that the "clear" meaning of "prevailing party" was something other than what eleven other circuit courts and four of his colleagues on the Supreme Court believed.[57] Quoting from an edition of *Black's Law Dictionary* that was not yet in existence when the phrase in question was incorporated in many fee-shifting statutory provisions, Rehnquist defined a "prevailing party" as "one in whose favor a judgment is rendered."[58] The *Buckhannon* plaintiffs had not received any judgment in their favor, he argued, so they would not be awarded attorney's fees. In a concurring opinion, Scalia argued that the catalyst theory rewarded plaintiffs who could pressure defendants to change their behavior simply by "threatening" a lawsuit, leading defendants to alter their actions just to avoid the hassle of litigation, not because they had done anything wrong. Because no legal determination of the merits of the plaintiff's case had yet been made in such cases, Scalia argued, citizen plaintiffs should not be rewarded for their "extortion."[59]

Scalia's characterization echoes the most negative rhetoric of anti-litigation forces. But while rhetoric about frivolous lawsuits may be influential, it is not supported by any systematic empirical evidence.[60] Even when the catalyst theory was followed, civil rights attorneys still faced the obstacle of Rule 11 sanctions for filing frivolous claims and the typical hurdles of summary judgment motions.[61] There is in fact some evidence to suggest that fee shifting should be encouraged because it provides a much-needed incentive for otherwise reluctant plaintiffs. Based on the empirical evidence regarding claiming in civil cases more generally, one can reasonably conclude that most victims of constitutional torts never file a claim against the government.[62] Indeed, it can be argued that in cases involving constitutional torts, there is an especially weighty *public* interest in encouraging plaintiffs to act as "private attorneys general" to hold the government accountable for unconstitutional actions.[63] For Scalia, however, the hypothetical possibility that a plaintiff with a "phony claim" could be awarded fees "far outweighs" the harm to the public interest that is caused by abandoning the catalyst theory.[64]

The importance of *Buckhannon* cannot be overstated: Attorney fees are the fuel sustaining the private enforcement regime. Following *Buckhannon*, civil rights plaintiffs must find attorneys willing to pursue a case vigorously even after an early settlement offer is on the table. Civil rights attorneys may feel pressured to recommend taking early settlement offers because of the fear that, after investing in the case, defendants will opt to remedy the problem at the eleventh hour and moot the case—what Catherine Albiston and Laura Beth Nielsen call "strategic capitulation."[65] One way to prevent that type of scenario is to request monetary damages along with declaratory and injunctive relief to prevent such last-minute maneuvers,

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but that is not an option in civil rights cases brought against state agencies, as in *Buckhannon*, because of the Court's sovereign immunity doctrine and its interpretation of Section 1983 itself, which I discuss next.

Sovereign Immunity and States' Rights

Of all the cases involved in the Rehnquist Court's federalism revival, those expanding state sovereign immunity have had the most far-reaching effects on civil rights litigation. In a series of 5–4 rulings, the Court placed obstacles for plaintiffs seeking to sue state governments for their injuries.[66] Congress can still force a waiver or "abrogate" state sovereign immunity through legislation authorized by the Fourteenth Amendment, as the Court had established earlier in *Fitzpatrick v. Bitzer* (1976). Because Section 1983 is based on the Civil Rights Act of 1871, which was originally titled "An Act to Enforce the Fourteenth Amendment," one might assume that it would readily fall within the *Fitzpatrick* abrogation doctrine. But in a series of cases that have been virtually ignored by scholars, Rehnquist led the way in limiting the liability of states under Section 1983. First, in 1979 the Burger Court concluded in *Quern v. Jordan* that Section 1983 did not abrogate state sovereign immunity.[67] Then, in 1989, in *Will v. Michigan Department of State Police,* the Court held, as a matter of statutory interpretation, that the language in Section 1983 referring to "persons acting under color of law" did not refer to states, state agencies, or state officials acting in their official capacity.[68] The states' rights revival led by Rehnquist during the 1970s and 1980s thus had broad and significant results for constitutional litigation against state agencies, including many county sheriffs around the country, who may be categorized as state policymakers according to the approach established by the Rehnquist Court in the 1997 case *McMillian v. Monroe County*.[69]

For ongoing violations of the Constitution or federal law, it remained an option to sue a state officer for injunctive relief under the *Ex Parte Young* doctrine, but the only way to seek damages for states' violations of the Constitution or federal laws would be through lawsuits against individual state officials in their personal capacity.[70] In such lawsuits, these defendants would benefit from a "qualified immunity" from suit.

Qualified Immunity and Supervisory Liability

The "qualified immunity" doctrine serves as a powerful shield from liability in constitutional tort claims against individual government officials, including police officers, as it holds that any government official sued in their personal capacity under Section 1983 or the *Bivens* doctrine will not be subject to litigation unless the constitutional right at issue has been "clearly established."[71] Because very few cases involving constitutional violations can meet that standard—particularly in cases challenging a police officer's use of force—qualified immunity is a powerful obstacle to civil right suits.[72] Police use of force is assessed by the least bright-line legal test of them all—a reasonableness standard. The 1985 case of *Tennesee v. Garner* was considered at the time to be a significant advance because it rejected the "fleeing felon" rule and replaced it with a requirement that an officer could use deadly force only if there is probable cause that the suspect poses "a significant threat of death or serious injury to the officer or others."[73] In *Garner*, the Court had emphasized that this would be enforced through an "objective reasonableness" standard, and in a 1989 case, *Graham v. Connor*, the Court clarified some of the factors involved in applying this standard: the severity of the suspected crime, whether the suspect is resisting arrest or attempting to escape, and if the suspect poses an immediate threat to the officers or others.[74] In applying this standard, the Court has admonished that care must be taken to respect the position of police officers who must make split-second judgments. In practice, this means that the *Garner*/*Graham* approach does little to hold police accountable. When the constitutional standard is combined with the qualified immunity doctrine—which will almost certainly find the officer immune unless there is a prior case law clarifying the constitutional standard was not met *in nearly identical circumstances*—it becomes clear that officers get multiple bites at the apple in these cases.[75] If the police officer wins on qualified immunity grounds, the case is dismissed by the judge before a jury is ever allowed to consider the case. If the motion to dismiss or a later summary judgment motion is denied, the police officer has the right to an "interlocutory appeal"—to immediately appeal that denial before the case goes to trial.[76] On the basis of qualified immunity, thousands of plaintiffs each year are thus prevented from challenging even extremely egregious police misconduct in court.

Recent cases have offered some hope that qualified immunity will not be an insurmountable barrier in certain cases involving shocking police violence. A 2014 Second Circuit opinion denied qualified immunity in a case involving a SWAT team invasion that included the use of a battering ram and three stun grenades as part of a warranted search of the home of a suspect thought to possess small amounts of cocaine.[77] The officers, who waited just five seconds after announcing their presence before deploying grenades, killed the suspect's houseguest and injured the suspect before collecting 2–6 doses of cocaine. There were no weapons in the residence. That the Second Circuit denied qualified immunity in this case leaves some small hope that in particularly egregious cases federal judges will not allow qualified immunity to shield officers from accountability under Section 1983. Another recent case involved a grenade exploding in a crib during a drug raid in Atlanta, detaching the nose from a two-year old's face.[78] These and other cases suggest that a coming

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line of cases in the lower courts regarding the hurdle of qualified immunity in the context of unnecessarily violent militarized police tactics could put pressure on the Court to consider the viability of its 2002 qualified immunity case *Hope v. Pelzer*, a rare opinion by the Court rejecting qualified immunity in a context in which there was no clear precedent on point, on the grounds that the conduct was so clearly unconstitutional the officials were fairly put on notice.[79] Yet another recent Roberts Court ruling that officers can shoot to kill both the driver and passengers of a speeding vehicle does not provide much ground for optimism.[80]

It is also extremely difficult to sue supervisory officials, such as mayors or police commissioners, for either damages or broader injunctive relief. In fact, the reason that a system of structural decrees governing police departments did not emerge, as they did in prison systems during the 1970s and 1980s, is the Court's holding in one of the least well-known but most important cases from Rehnquist's tenure as associate justice—the 1976 case *Rizzo v. Goode*.[81] In this case, the plaintiffs sought to hold high-ranking city officials in Philadelphia, including Mayor Frank Rizzo and the police commissioner, accountable for inadequate procedures within the police department for handling citizens' complaints regarding mistreatment.[82] The plaintiffs sued under Section 1983, with the ultimate goal of placing the entire police department under the receivership of a federal district judge.[83] The trial judge offered a narrower remedy, ordering the defendants to develop a plan to improve the processing of citizen complaints and reform police training programs and manuals.[84] After the Third Circuit unanimously affirmed the order, however, the Supreme Court granted certiorari. Rehnquist overturned the district court judge's grant of equitable relief, arguing that injunctions should be used sparingly, with due consideration of the principles of federalism.[85]

Rehnquist's opinion in *Rizzo* also sharply limited supervisory liability by stressing that plaintiffs needed to show an "affirmative link" between the supervisory official's conduct and the constitutional violations. Beyond that distinction, Rehnquist failed to provide guidelines regarding the causation requirement for cases involving allegations of institutional breakdown or systemic malfunction. Lower federal courts later ruled that supervisory officials can be held liable for their subordinates' misconduct, even in those instances where the supervisors did not take part in or witness the harmful act itself, but no consensus regarding a more precise legal standard has developed in the lower courts.[86]

The Roberts Court, however, has undermined any use of a more generous standard for supervisory liability by various circuit courts. In an important 2009 case, *Iqbal v. Ashcroft*, in which the Roberts Court endorsed stricter pleading requirements,[87] Justice Kennedy's opinion addressed the theory of supervisory liability for the first time since *Rizzo*. Section 1983 experts have called this less-discussed part of the *Iqbal* holding the "knockout blow" for constitutional tort litigation.[88] Kennedy, rejecting the term "supervisory liability" entirely, held that there is no vicarious liability in constitutional tort doctrine. High-ranking officials can be held liable only for their own unconstitutional conduct. In the *Iqbal* case, this would have required that the defendants themselves had the requisite discriminatory intent when they adopted the policy or directed action by subordinates. "Lest there be any mistake," Souter wrote in his dissent, "the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* [and Section 1983] supervisory liability entirely."[89]

Local Government Liability and the "Failure to Train"

This elimination of supervisory liability matters because the structure of the doctrine often prevents plaintiffs from otherwise reaching the cities or police departments that employ abusive police officers. To sue the city or a police department for damages, a plaintiff must meet the requirements of the Court's complex "policy or custom" doctrine, first developed in the Burger Court's 1978 *Monell* opinion.[90] Although *Monell* overturned the Court's earlier rejection of government liability in *Monroe*, it did not go so far as to endorse the more sweeping approach of respondeat superior liability, which would make local governments liable for their employees' constitutional violations committed during the course of their duties.[91] Instead, in *Monell* and subsequent cases, the Court required plaintiffs to show that the violation was caused by official policy, widespread custom, or deliberate indifference to an "obvious" need to train employees.[92] Plaintiffs in Section 1983 litigation thus have a far higher hurdle to meet in order to hold the government itself responsible for police misconduct and other violations than they do in Title VII and Americans with Disabilities Act cases, where the business or government entity is typically held responsible for their employees' misconduct. Section 1983 has long been an outlier when it comes to the form of liability that can best provide incentives for broader organizational reforms.[93]

The Roberts Court has recently indicated that it would hold liability of government entities for "failure to train" to the most stringent requirements. In its 2011 decision in *Connick v. Thompson*, again in a 5–4 opinion, the Court threw out a $14 million jury verdict in favor of John Thompson against the Orleans Parish District Attorneys' Office for his wrongful conviction and eighteen years of imprisonment for a crime he did not commit, and for the parish's violation of its constitutional obligations under *Brady v. Maryland* to disclose favorable evidence.[94] In response to the egregious constitutional violation, Justice

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Thomas concluded that the failure to train category under the *Monell* policy or custom requirement requires deliberate indifference to an obvious need to train, a requirement that could not be met without a series of known violations.[95] Few could argue with Thompson's response to the opinion in a *New York Times* op-ed piece: "I don't care about the money. I just want to know why the prosecutors—who hid evidence, sent me to prison for something I didn't do and nearly had me killed—are not in jail themselves. There were no ethics charges against them, no criminal charges; no one was fired and now, according to the Supreme Court, no one can be sued."[96]

All of these doctrines taken together—limits on suits against states and state officials, qualified immunity, supervisory immunity, and the policy or custom requirement—create an interlocking set of hurdles for plaintiffs seeking to hold police officers and other government officials accountable for constitutional violations. If they do not accept a settlement offer first, the lawyers for the families of Michael Brown and Eric Garner will be forced to navigate an extremely complex doctrinal terrain. Given how the qualified immunity doctrine is applied in excessive force cases, it is highly unlikely that the officers themselves will be held liable in their personal capacity. To hold the city of Ferguson or New York City liable for failing to train or supervise these police officers, the plaintiffs' attorneys will require much more evidence regarding the police departments' training, supervision, and other practices to show deliberate indifference with respect to safeguarding the constitutional rights of individuals.[97]

Those legal scholars who have drawn attention to these procedural dimensions of the Court's counterrevolution have termed it a "retrenchment,"[98] "procedural activism,"[99] a conservative "assault,"[100] and a civil rights "rollback."[101] Through these actions, Pamela Karlan observes, "the Court leaves the formal right in place but constricts the remedial machinery. At best, this will dilute the value of the right, since some violations will go unremedied. At worst, it may signal potential wrongdoers that they can infringe the right with impunity. Remedial abridgment is a pervasive tool of the contemporary Supreme Court."[102] Yet because these developments have occurred in very technical legal opinions, there has been little public awareness or debate regarding the stakes of these procedural doctrines. The stealth of these legal developments has therefore benefited those opposed to private enforcement of the Constitution and civil rights statutes.

Given the importance of these doctrinal hurdles, it is troubling that so little has been done to broaden public support for access to the courts and civil rights litigation. After the 2008 election, it appeared that Obama had the best opportunity in decades to urge Congress to use its override authority to shore up federal civil rights statutes, yet as the following review of his administration's record suggests, some important opportunities to do so were missed.

"A Relay Swimmer in the Currents of History": Obama's Civil Rights Record and the Challenges Ahead

Near the end of his 2014 speech marking the fiftieth anniversary of the 1964 Civil Rights Act, President Obama conceded that his administration had not yet achieved all that he had hoped:

> Those of us who have had the singular privilege to hold the office of the presidency know well that progress in this country can be hard, and it can be slow, frustrating, and sometimes you're stymied . . . The office humbles you. You're reminded daily that in this great democracy, you are but a relay swimmer in the currents of history, bound by decisions made by those who came before, reliant on the efforts of those who will follow to fully vindicate your vision.[103]

These words display a considerably chastened tone and recognition that there is much left to do. In early 2015, Obama's speeches continued to elaborate these themes.[104] In a widely anticipated speech in Selma, Alabama, on March 7, delivered just a few days after the release of the Justice Department's Ferguson report, Obama reemphasized the "solemn debt" we owe the civil rights protestors of the 1960s, and once again asked "how might we repay that debt?" Obama called on the country to repay the debt by continuing "the march," to help ensure that the nation lives up to its ideals: "Oh, what a glorious task we are given, to continually try to improve this great nation of ours."[105]

Obama's speeches on the legacy of the rights revolution extoll the virtue and impact of direct protest and democratic reform. The institutional framework implementing the rights revolution is left unmentioned.[106] Indeed, it is not as though Obama has tried but failed to shore up "the litigation state." Rather, he simply has not made supporting the private enforcement of civil rights a priority in his campaigning or thus far as president. To be sure, he has not been hostile to civil rights litigation, and, as discussed below, his appointees in the Justice Department and other civil rights agencies have pursued progressive civil rights agendas. Nonetheless, his administration has missed some important opportunities to push back against the Court's counterrevolution, to set the rights revolution's institutional framework on a surer footing, and to ensure that private enforcement of civil rights claims effectively promotes constitutional accountability.

Legislative Overrides

The first major piece of legislation that Obama signed into law was the Lily Ledbetter Fair Pay Act of 2009, which overrode the Court's 2007 ruling in *Ledbetter* to ensure that Title VII could address longstanding equal pay claims.[107] Despite his very public support of the Ledbetter bill, however, Obama did not attempt to reintroduce and

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push through a more comprehensive civil rights bill, such as the Civil Rights Act of 2008.[108] That bill was sponsored in the House by Representative John Lewis, who argued, "We cannot allow recent court decisions to turn back the clock . . . . We want to be able to say that on our watch, we did all we could as members of Congress to ensure the protection of civil rights in this country."[109] The Senate version of the bill included a short list of Democratic co-sponsors, including then-Senator Obama. The Civil Rights Act of 2008 would have responded to a series of Supreme Court decisions limiting civil rights claims under Title VI, Title IX, the Rehabilitation Act, the ADA, and the Age Discrimination and Employment Act and restored the prevailing party standard undermined in the Court's 2001 *Buckhannon* case, discussed above. Although Obama signed on as a sponsor of this bill in the 110th Congress, he did not feature its provisions—other than the Equal Remedies Act—in his campaign materials, nor did he work with congressional Democrats to move the bill in the 111th Congress. Given the closeness of the votes for the Ledbetter Fair Pay Act, the administration and Democratic sponsors may have decided there was insufficient support to pass the bill.

Although the Civil Rights Act of 2008 would have done much to protect the private enforcement of civil rights, none of its provisions addressed the Court's liability framework in Section 1983 litigation. Indeed, Congress has never successfully altered any of the major components of the Court's substantive liability framework under Section 1983 since the Civil Rights Attorneys Fees Awards Act of 1976 incentivized Section 1983 litigation by extending a fee-shifting provision to constitutional tort claims.[110] The last major push for federal legislation on this issue was in 1977, before the Court's decision in *Monell*.[111] Since then, no major civil rights bill has addressed litigation under Section 1983 other than the Prison Litigation Reform Act of 1996 that actually severely limited prisoners' ability to file civil rights claims under Section 1983.[112] Although numerous organizing efforts are underway nationwide to address mass incarceration and unfair sentencing practices[113] and the Lawyers' Committee has led a coalition of civil rights organizations to issue a call for reforms in response to the Ferguson protests,[114] there has been no organizing by these same civil rights organizations—or even any public discussion or awareness—of the current challenges presented by the legal framework for constitutional tort claims against abusive police officers.[115]

Justice Department Enforcement

Obama, it must be acknowledged, has taken seriously the role of *governmental* enforcement of civil rights.[116] Eric Holder, the first African American to hold the office of Attorney General, has presided over a number of significant civil rights developments concerning voting rights and has revitalized the Civil Rights Division, which had experienced a great deal of turmoil in the Bush Administration.[117] In recent months, many scholars, pundits, civil rights activists, and members of the public have called for the Justice Department to take the lead in holding the police officers responsible.[118] But although the Justice Department does have some authority to hold local police officers accountable for constitutional violations, it is important to recognize that the scope of its enforcement activity is miniscule compared to private enforcement through constitutional tort litigation. Because the Justice Department handles so few civil rights investigations, its role should not be considered an adequate substitute for or an alternative to private enforcement under Section 1983. As Sean Farhang has shown in the context of employment discrimination litigation, *private* enforcement is the institutional foundation of the rights revolution.[119]

One of the enforcement tools available to the Justice Department is the Civil Rights Division's responsibility for bringing federal criminal civil rights charges against state and local officials. Two of the officers involved in the Rodney King beating, for instance, were successfully prosecuted under 18 U.S.C. § 242, the criminal civil rights provision derived from Reconstruction-era civil rights statutes. Because the Court has since its 1944 opinion in *Screws v. United States* required the government to prove willful intent to violate civil rights, this statute sets a high standard for prosecution and for that reason is not widely used.[120] Only a handful of prosecutions involving police officers under § 242 occur each year, compared to the thousands of private cases annually brought against the police and corrections officers.[121]

Since 1994, the Justice Department has used § 14141 to conduct investigations and enter into federal consent decrees or settlement agreements with police departments across the country, including Cincinnati, Los Angeles, New Orleans, Pittsburgh, Seattle, Detroit, Oakland, Albuquerque, and Washington, D.C.[122] These Department of Justice "pattern or practice" interventions almost always include a similar package of reforms that have, once fully implemented, produced impressive results.[123] The remaining challenge involves leveraging incentives for nationwide reforms.[124] Each year the Justice Department typically investigates no more than three departments, out of the 18,000 local law enforcement agencies nationwide. Although there are advantages to a structural reform approach, the Justice Department does not have enough capacity to handle oversight nationwide.[125] Section 1983 remains the essential tool for holding the police and other government officials accountable.

Remaking the Federal Judiciary

If new civil rights legislation is not in the offing and Justice Department enforcement cannot serve as a full substitute for private enforcement, the final option for

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improvement may be Obama's appointments to the federal judiciary. Within the first twenty months of his presidency, Obama was given the opportunity to appoint two new Supreme Court justices, whose performance on the Court thus far indicates that they will be strong progressive voices in the years to come. Less clear, however, is what their appointments mean for the future of Section 1983 doctrine, given that they replaced justices who had both supported reforming Section 1983 doctrine to be more supportive of civil rights plaintiffs and that they have supported recent qualified immunity decisions favoring the government.[126]

Obama was criticized for early delays in nominating lower federal court judges,[127] and those he did submit faced a far lower confirmation rate than Clinton and Bush nominees.[128] In response to Republicans' unprecedented use of the filibuster in the Senate and their opposition to filling the remaining open seats on the D.C. Circuit Court of Appeals, the decision of Democrats to exercise the so-called "nuclear option" in November 2013 has helped Obama play catch up with the lower federal court seats and to nominate stronger progressives, which will perhaps constitute an important part of his legacy.[129] By December 2014, he had managed to get 96 federal court judges through the confirmation process in the 113th Congress, but the number of vacancies in 2015 increased in the Republican-led 114th Congress.[130]

Much of Obama's broader legacy regarding civil rights will depend on the performance of his appointments to the lower federal courts. Although the Obama administration has touted the diversity of these new judges, some progressives have criticized the president for selecting too many nominees with corporate law or prosecutor backgrounds, which account for more than 85 percent of his nominees; fewer than 4 percent have worked in public interest organizations.[131] Although political scientists have rated the ideology of his district court and appellate judicial nominees as similarly liberal to those of Carter and Clinton, it remains to be seen how Obama's nominees perform with respect to constitutional tort doctrines.[132]

The federal courts and the Supreme Court will almost certainly experience turnover after the 2016 election, and it is possible that they will shift in a direction slightly more favorable to plaintiffs seeking to hold government officials accountable under Section 1983. Yet, I would argue, something as important as the mechanisms to hold government officials, including police officers, accountable for serious misconduct and constitutional violations should not be left to the courts alone. Title VII has been subject to repeated congressional overrides, as in the Civil Rights Act of 1991 and the Lily Ledbetter Act of 2009. Each time, there involved a fairly extensive public debate and a broad base of support for the legislative reforms, which is sorely needed at both the local and national level if we are to successfully deal with the problem of police brutality. In particular, there needs to be greater public awareness of the obstacles to civil liability under Section 1983, the major vehicle for enforcing constitutional rights in the United States. If there is an opportunity for a "national conversation" about the limits of the government liability framework, high-profile cases like those of Michael Brown and Eric Garner will provide it. As of early May 2015, there continue to be organized protests online and in the streets in response to incidents of police brutality.[133] It appears that the pressure will continue. The next step will be to organize around a set of reforms in response—including those that can help ensure constitutional accountability under Section 1983.

Implications: The Empirical Turn in Section 1983 Scholarship

A national conversation about civil rights litigation reform will depend on high quality data about Section 1983 litigation's strengths and weaknesses, yet there is so much left to learn. To conclude, I briefly consider some of the most promising avenues for future scholarly research on the private enforcement of constitutional rights.

Scholarship examining trends in Section 1983 litigation over time has made extensive use of the filing data provided by the Administrative Office of the United States Courts.[134] An important source for future empirical work may be the computerized federal court data available through PACER, which most federal districts have used since the mid-2000s.[135] David Engstrom has provided a useful overview of the types of data that can be easily obtained from PACER records, which raises a number of possibilities for future Section 1983 research, including scanning for attorney names to collect a database of the most active civil rights practitioners, compiling a database of the charges alleged in Section 1983 complaints, examining dismissal and summary judgment rates, and tracking individual officers named as defendants.[136]

Scholars like Joanna Schwartz, Charles Epp, Laura Beth Nielsen, and Catherine Albiston have successfully used large-scale survey data to advance empirical scholarship on civil rights litigation.[137] To supplement this scholarship, it would be useful to develop case studies of the use of Section 1983 litigation, particularly for police brutality cases, in key jurisdictions across the country, including New York City, Philadelphia, Chicago, Oakland, and Los Angeles. By examining the networks of civil rights attorneys, the practices of municipal law departments, and the case management practices of local federal district courts, it will be possible to develop more fine-grained portrayals of how Section 1983 litigation currently works in the largest cities in the country.[138]

These studies could provide more insight into the ongoing issues hindering the effectiveness of Section 1983 litigation. Legal scholars have identified a number of obstacles that prevent Section 1983 litigation from

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serving as an optimal deterrent in litigation against police departments, including the indemnification of individual officers, the use of general municipal budgets to pay awards and settlements, the quality and litigation strategy of local law departments, state-level protections for police officers, police union bargaining agreements, and a lack of coordination between city law departments and police departments.[139] Even if some of the doctrinal obstacles discussed here are eventually altered, many other features of Section 1983 litigation remain to be more fully explored and evaluated. These kinds of empirical studies are crucial, because federal judges have thus far developed Section 1983 doctrine using inaccurate empirical assumptions, and there is a danger they will continue to do without better and more thorough data to support judicial and public deliberation about civil rights enforcement.

In 1888, the poet James Russell Lowell warned that the Constitution is not a "machine that would go of itself."[140] Neither is the rights revolution. The infrastructure of the rights revolution—the remarkable system of private enforcement of civil rights—will require a new generation of political leaders and civil rights activists to work together to build broader popular support for protecting the civil rights of all citizens, including those who have been harmed by police officers and other government officials. That is the way forward if the rights revolution is to survive, and possibly flourish, in the twenty-first century.

Notes

1 Ackerman 2014.

2 Vega and Eligon 2014.

3 Goldstein and Schweber 2014. Other police shootings also received national news coverage that summer and fall. On August 5, a twenty-two year old African American man, John Crawford, was shot and killed in a Beavercreek, Ohio, Wal-Mart store after picking up a pellet air rifle gun in the sporting goods section of the store. A recording of the incident showed that the police officers' initial explanations were false. The officers, however, were not indicted by a local grand jury; Gokavi 2014. Two days after the shooting of Michael Brown, on August 11, Ezell Ford, an African American man with known mental health issues, was shot and killed by Los Angeles police officers. Vives, Winton, and Mather 2014. On November 22, a twelve-year old African American boy, Tamir Rice, was shot and killed by police officers while playing with a toy gun in a Cleveland playground. A video later disclosed that the officer shot the boy within two seconds of arriving at the park; Dewan and Oppel 2015.

4 In an Associated Press poll, news directors and editors voted the police killings and protests the top story of 2014; Crary 2014. As they sought to provide greater context for the 2014 protests, journalists called attention to the lack of comprehensive official data on police misconduct; Goff 2014, Fisher-Baum 2014, Lee 2014, Schmidt 2015c. There are no federal government databases collecting comprehensive, uniform reports on police shootings or other forms of police misconduct. Although the FBI's Supplementary Homicide Report is based on information voluntarily provided from only a fraction of police agencies nationwide and is limited to "justifiable homicides" by the police, many journalists used these reports to consider the available evidence of the trends in police shooting incidents over time and to examine the breakdown by race. In 2014, there were 461 justifiable homicides by police officers, the most in two decades of reporting; Johnson 2014. In March 2015, a study released by the Bureau of Justice Statistics concluded that the numbers in the FBI's Supplementary Homicide Report missed approximately half the estimated number of police homicides; Lopez 2015. Drawing on the data in the FBI's Supplementary Homicide Report and the most recent U.S. Census figures, Pro Publica reported that in 2010–2012 young black men were 21 times more likely to be killed by police than young white men: "The 1,217 deadly police shootings from 2010 to 2012 captured in the federal data show that blacks, age 15 to 19, were killed at a rate of 31.17 per million, while just 1.47 per million white males in that age range died at the hands of police"; Gabrielson, Grochowski Jones, and Sagara 2014.

5 Capps 2014; Mueller and Southall 2014. Much of the organizing of the 2014 street protests was done online and used the hashtag #BlackLivesMatter, which itself had come into use in response to the 2012 shooting death of Trayvon Martin, a seventeen-year old African American high school student accosted and killed by George Zimmerman, who had imagined Martin's presence in his Sanford, Florida neighborhood to be a threat. When Zimmerman was found not guilty in 2013, protestors mobilized and the social media hashtag #BlackLivesMatter became a popular tool for protest and solidarity. See, e.g., Wells 2014, Capehart 2015, Kang 2015. Another notable feature of the responses to these episodes was the racial split in public opinion. A 2013 Pew Poll found that 86 percent of blacks but just 30 percent of whites were dissatisfied with Zimmerman's acquittal. A 2014 Pew Poll found that 80% of blacks but only 23 percent of whites disagreed with the grand jury decision not to indict the officer who killed Michael Brown; 90 percent of blacks and 47 percent of whites disagreed with the grand jury decision not to indict the officer involved in the killing of Eric Garner; Pew 2013, 2014; see also Ramsey 2015.

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6 Police officers are rarely indicted in use of force cases; Casselman 2014, Kindy and Kelly 2015.

7 Bosman and Goode 2014; Horwitz,Leaning, and Kinder 2014; Apuzzo and Fernandez 2014.

8 Section 1983 is a provision in the United States Code, derived from the Civil Rights Act of 1871 that allows individual plaintiffs to sue government officials acting "under color of law" to violate rights protected by the Constitution and laws of the United States. 42 U.S.C. § 1983:

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

For harms committed by federal officials, courts have developed a separate doctrine to allow constitutional tort claims against individual officials; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* doctrine uses the same qualified immunity defense used in Section 1983 suits against individual officials.

9 Dodd 2004. Exceptions include Epp 1998, 2009; Melnick 2014; Staszak 2015.

10 By contrast, the statutory rights revolution launched by the 1964 Civil Rights Act has attracted the attention not only of political scientists specializing in law and courts but also of American Political Development and policy scholars examining the role of courts from an "interbranch perspective"; see, e.g., Barnes 2007, Farhang 2010, Melnick 2014. For more on the role of litigation in American politics, see Kagan 2001, Burke 2002, Silverstein 2009.

11 For more information about these civil rights lawsuits, including links to many of the complaints or notices to sue, see Addo 2015 on Michael Brown, Moore and Hutchinson 2014 on Eric Garner. For information about other high-profile cases and the families' lawsuits, see Izadi 2014 on John Crawford, Vives 2014 on Ezell Ford, Heisig 2015 on Tamir Rice.

12 I do not offer a full assessment of the development of Section 1983 doctrine here. In my forthcoming book, I examine the available papers of the Burger Court justices as part of a more extensive examination of this crucial formative period when the main contours of the doctrinal framework for constitutional torts were established. The book's coverage of the Burger Court cases highlights the role of legalist concerns and features the role of the moderate swing justices. Depending on the particular issue and the coalition of justices, the Burger Court would offer civil rights plaintiffs one (sometimes large) step forward, but then follow with two (or more) steps back. Many of the cases now cited as moments of progress were typically the product of a great deal of doctrinal pressure, so the new holding was introduced in a somewhat begrudging fashion, with new steps intended to produce careful hemming in following soon after. The result was an extremely complex doctrinal framework for constitutional tort litigation, the product of judicial bargaining and compromise that likely undermined more comprehensive legislative reforms to Section 1983 in the 1970s—what is now understood to be the high point of popular support for civil rights litigation.

13 See, e.g., Lieberman 2007, Mulroy 2012, Melnick 2014.

14 Administrative Office of the U.S. Courts, 2014 Annual Report of the Director, table C-2. When evaluating trends in section 1983 cases, one should approach the Annual Report statistics with caution. The category of "other civil rights" cases used in the Annual Reports is not limited to those actions brought under Section 1983. It also encompasses other kinds of civil rights cases, including *Bivens* actions brought against federal defendants, cases based upon 42 U.S.C. § 1985, 42 U.S.C. § 1981, and housing discrimination cases brought under Title VIII of the Civil Rights Act of 1964. Although the exact percentage is unknown, most of the cases in this category are the result of constitutional tort actions under Section 1983 and *Bivens*.

15 See, e.g., King and Smith 2011; Murakawa 2014; Lerman and Weaver 2014; Gottschalk 2014; Epp, Maynard-Moody, and Haider-Markel 2014.

16 See, e.g., Teles 2008; Hollis-Brusky 2015; Farhang and Burbank 2014; Staszak 2015.

17 See, e.g., King and Smith 2011; Sugrue 2010; Kloppenberg 2011; Remnick 2010.

18 See, e.g., Jacobs and King 2010; Mettler 2010; Skocpol and Jacobs 2011 2012; Milkis, Rhodes, and Charnock 2012.

19 Obama 2014.

20 Klinkner and Schaller 2009; Smith, King, and Klinkner 2011.

21 *Monroe v. Pape*, 365 U.S. 167(1961). For more on the background of this case, see Gilles 2008.

22 The *Monroe* Court did not allow the action against the City of Chicago. Section 1983 was later interpreted to permit lawsuits against municipalities; *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

23 Jeffries 1998.

24 Shapo 2001.

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25 Shapo 1965.
26 Ibid., 303.
27 Administrative Office of the United States Courts, 1960 Annual Report of the Director at 232.
28 Schuck 1983, 49.
29 Administrative Office of the U.S. Courts, 1979 Annual Report of the Director at 60–61.
30 He notes that part of the change was due to a change in Fourth Amendment doctrine, when the Court abandoned the "fleeing felon" rule in *Tennessee v. Garner*, 471 U.S. 1 (1985); Epp 2009.
31 Rudovsky 1992.
32 When the original federal "pattern or practice" bill allowing structural reforms of local police departments was first proposed in 1991, the Democratic sponsors included a provision for private enforcement, but the provision was rejected by Republicans. By the time the "pattern or practice" provision was slipped into the mammoth Violent Crime Control and Law Enforcement Act of 1994, the power to initiate the investigations was limited to the Justice Department.
33 For influential examples from the 1990s, see Howard 1997; Olson 1991. Galanter 1983 describes the increasingly widespread concern about litigation that developed along with the rights revolution earlier in the 1970s.
34 McCann and Haltom 2004; Southworth 2008.
35 Irons 1988; Dodd 2004.
36 Melnick 2012, 29–30; Farhang 2010.
37 Fontana 2014.
38 Scheingold 2004; Rosenberg 1991; Kagan 2001; Silverstein 2009.
39 Ford 2011. For an important critique of Ford's argument, see Chen 2013.
40 Rosenberg 1991; Powe 2000; Klarman 2004.
41 Driver 2011.
42 Obama interview quoted in Francis 2014.
43 Obama 2006, 83.
44 For an influential empirical study challenging those perceptions as "overstated," see Eisenberg and Schwab 1987, 643. For overviews of the legal scholarship on federal court caseloads, see Baker 1994, Yackle 1994, Posner 1996, Resnik 1997, Levy 2013.
45 Blackmun 1985. Karen Blum, a leading Section 1983 scholar and educator, notes that "fifty-plus years after *Monroe*, many of us are asking, 'what went wrong?'"; Blum 2015, 913.
46 *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978).
47 Eisenberg 2013.
48 Teles 2008.
49 Melnick 2011.
50 Farhang and Burbank 2014.
51 A number of political scientists have focused on high visibility constitutional opinions to support claims that minimalism is a trend in the Roberts Court; see, e.g., Ward and Pickerill 2013.
52 Myers 2001. The coverage for the 2000 Term was dominated by *Bush v. Gore*, 531 U.S. 98 (2000).
53 See, e.g., Burke 2002, Farhang 2010; compare Farhang and Burbank's recent work highlighting the role of judicial retrenchment; Farhang and Burbank 2014.
54 532 U.S. 598 (2001).
55 Tebo 2003.
56 42 U.S.C. § 1988.
57 532 U.S. at 600-610.
58 Rehnquist's definition contradicts that found in the Senate Report: "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief*" (emphasis added); Albiston and Nielson 2007, 1089.
59 532 U.S. at 618.
60 Miller 2013, 360–2.
61 Miller 2003.
62 Burke 2002, 207, n. 14 cites a finding from The Civil Litigation Research Project: "For every one thousand 'grievances' perceived by respondents involving at least $1,000, only fifty cases were filed in court, a rate of 5 percent."
63 The term "private attorney general" was coined by Judge Frank in *Associated Industries of New York State v. Ickes*, 134 F.2d 694 (2d Cir. 1943). After the passage of Title VII, the Supreme Court acknowledged that private plaintiffs were serving a broader public function. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401–02 (1968) (observing that suits under the Civil Rights Act of 1964 are "private in form only" because whenever a plaintiff "obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority"). As the legislative history of CRAFAA makes clear, Section 1983 plaintiffs play a similar role by protecting important constitutional values; Farhang 2010, ch. 5.
64 532 U.S at 618.
65 Albiston and Nielson 2007, 1091.
66 See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). Cf. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which Rehnquist switched sides and wrote a majority opinion holding that the Family and Medical Leave Act of 1993 was a valid use of Section 5 of the Fourteenth Amendment and thus subject to the post-*Fitzpatrick* abrogation doctrine.

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67 440 U.S. 332 (1979).
68 491 U.S. 98 (1989).
69 520 US. 781 (1997). In *McMillian*, the Court required an examination of each state's law to determine whether sheriffs should be deemed state or local officials for any given function they perform. For an overview of *McMillian's* impact in a number of circuit court opinions, see Blum 2005.
70 *Ex parte Young*, 209 U.S. 123 (1908); *Hafer v. Melo*, 502 U.S. 21 (1991).
71 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 6335 (1987). The Warren Court had previously applied a good faith defense to police officers in *Pierson v. Ray*, 386 U.S. 547 (1967). In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court introduced the doctrine of "qualified" immunity and offered a policy-based justification focusing on the need to preserve vigorous enforcement without undue fear of liability. In *Wood v. Strickland*, 420 U.S. 308 (1977), the Court assessed qualified immunity using both subjective and objective tests. The innovation introduced in *Harlow* (1982) was that qualified immunity would now be based solely on *objective* reasonableness. In *Anderson* (1987), the Court emphasized that reasonableness would be based on whether there was a clearly established legal ruling providing notice of a constitutional violation. The *Harlow*/*Anderson* approach made it much easier to dismiss cases on qualified immunity grounds prior to discovery (because the standard was an objective one and no longer required evidence regarding subjective beliefs) and also required the plaintiff to show a factually similar precedent, typically in the same circuit, existed to clearly establish the unconstitutionality of the conduct. With these changes, qualified immunity doctrine began imposing an extremely high initial hurdle for plaintiffs, particularly in police use of force cases.
72 For two critical analyses that emphasize the Court's efforts to allow the termination of these lawsuits at the earlier possible stage, prior to discovery or full development or assessment of the facts, see Rudovsky 1989, Chen 2006.
73 471 U.S. 1 (1985).
74 490 US. 386 (1989).
75 Because the Roberts Court recently abandoned a requirement that federal judges first assess the constitutionality of an official's action before turning to the qualified immunity inquiry, it will be more challenging to develop a line of precedent in each circuit that could further clarify the *Garner*/*Graham* standard. The mandatory two-step sequence was first endorsed by the Court in *Saucier v. Katz*, 533 U.S. 194 (2001) and then rejected in *Pearson v. Callahan*, 555 U.S. 223 (2009).
76 *Mitchell v. Forsyth*, 472 U.S. 511 (1985).
77 *Terebisi v. Terreso*, 764 F.3d 217 (2d Cir. 2014).
78 Boone 2014.
79 *Hope v. Pelzer*, 536 U.S. 730, 739–740 (2002).
80 *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014). In this case, police officers attempted to stop a car with a missing taillight and engaged in a high-speed pursuit, eventually killing the driver and the passenger when the driver attempted to flee again. The Court addressed the merits question first (despite *Pearson's* ruling that merits-first decisions were no longer required) and ruled that this behavior did not constitute excessive force under the Fourth Amendment. Id. at 2021–22. The Court also offered the backup position that qualified immunity would have applied regardless of the answer regarding excessive force. Id. at 2023.
81 423 U.S. 362 (1976).
82 For an overview of the *Rizzo* litigation, see Cooper 1988, ch. 11.
83 423 U.S. at 364–5.
84 423 U.S. at 365.
85 423 U.S. at 380. On the unprecedented nature of the *Rizzo* holding, see Weinberg 1977. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Court completely closed off the availability of private structural reform litigation in police use of force cases when it ruled 5–4 that plaintiffs do not have Article III standing to seek injunctive relief in police brutality cases. These standing obstacles did not apply to structural reform litigation challenging prison conditions because of the ongoing nature of the violations for prisoners involved in the lawsuits. For an overview of the prison reform litigation, see Feeley and Rubin 1999. Congress introduced other limits on injunctive relief in the 1996 Prison Litigation Reform Act. For discussion of Section 1983 cases seeking injunctive relief to improve prison conditions in the post-PLRA era, see Schlanger 2003, 2006, 2015.

Class action challenges against police practices can occasionally overcome the *Lyons* standing hurdle and will be certified. For example, a number of Section 1983 class action challenges to stop-and-frisk practices have been certified in recent years, including in New York City. For the 2012 order granting class certification to the New York City plaintiffs and discussing the standing requirements under *Lyons*, see: http://ccrjustice.org/files/5-16-12%20Floyd%20Class%20Cert%20Opinion%20and%20Order.pdf . For the 2013 liability opinion analyzing the city's liability under Section 1983, see *Floyd v. New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). Constitutional allegations regarding police brutality or excessive force, however, will rarely be aggregated into similar class

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actions, because the *Garner*/*Graham* standard requires an individualized determination of the constitutionality of each police action; Garrett 2012.

86 Kinports 1997, 147, 150, 158.

87 556 U.S. 662 (2009). *Iqbal's* potential readjustment of notice pleading requirements has generated a large legal literature. For an overview, see Engstrom 2013.

88 Schwartz 2009.

89 556 U.S. at 693 (Souter, J., dissenting).

90 436 U.S. 658 (1978).

91 On the rejection of respondeat superior liability in *Monell*, see Rothfeld 1979; Achtenberg 2005.

92 *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Bd. of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997); *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

93 See, e.g., Chemerinsky 2014b, noting the anomaly of the rejection of respondeat superior in Section 1983 and *Bivens* litigation.

94 373 U.S. 83 (1963).

95 131 S.Ct. at 1360.

96 Thompson 2011. Thompson could not sue the prosecutors directly because they benefited from "absolute immunity" from suit. In the 2009 *Van de Kamp v. Goldstein* case, 129 S.Ct. 855 (2009), the Roberts Court extended the absolute immunity doctrine to cover supervisory failures to train or implement programs to prevent *Brady* violations. The plaintiff in *Van de Kamp*, Thomas Goldstein, was left with no remedy for prosecutorial misconduct, after spending 24 years in prison for a crime he did not commit. Justice Breyer wrote the majority opinion in this case.

97 Because the NYPD Inspector General had already issued a report finding "troubling deficiencies" in the NYPD's disciplinary practices when confronted with allegations of prohibited chokeholds, Garner's municipal liability case appears to be quite strong and will likely end in a settlement; Barkan 2015. In 2014, New York City Comptroller Scott Stringer announced a new policy to seek settlements in major civil rights cases prior to the start of litigation and has expressed interest in reaching a settlement with Garner's family; Weiser 2014.

98 Karlan 2003, Staszak 2015.

99 Jois 2009.

100 Chemerinsky 2011.

101 Morgan et al. 2006.

102 Karlan 2012.

103 Obama 2014.

104 During a ceremony to honor African-American history month, for example, Obama invited Trayvon Martin's parents to the White House, alluded to the Black Lives Matter protests, and referred again to what will be left to the next generation to fight for: "On the third anniversary of Trayvon Martin's death, showing all of our kids—all of them—every single day that their lives matter, that's part of our task." When referring to his upcoming visit to Selma, he stated that he wanted to remind his children "of their own obligations. Because there are going to be marches for them to march and struggles for them to fight. And if we've done our job, then that next generation is going to be picking up the torch as well"; Obama 2015a.

105 Obama 2015b.

106 Consider also his 2009 speech marking the centennial of the NAACP, which is filled with references to the NAACP's anti-lynching campaign, the sit-in protestors, freedom riders, and the voting registration campaigns; Obama 2009.

107 Pub. L. 111–2, resetting the 180-day statute of limitations for Title VII claims with each new paycheck affected by discriminatory action; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

108 110th Congress, H.R. 5129.

109 Lewis 2008.

110 Farhang 2010.

111 Civil Rights Improvements Act of 1977, S. 95 and H.R. 454.

112 Pub. L. 104–134. Although the *Iqbal* decision in May 2009 did prompt civil rights organizations, consumer groups, and plaintiffs' lawyers to mobilize, their legislative response focused on the pleading standard introduced in Kennedy's opinion, not the portion of the opinion eliminating the option of supervisory liability in Section 1983 cases.

113 Eisen 2014 describes bipartisan criminal justice reform bills.

114 On August 18, 2014, the Lawyers' Committee, along with twenty national civil rights organizations, issued "A Unified Statement of Action to Promote Reform and Stop Police Abuse," calling for a Justice Department investigation; a comprehensive federal review and reporting of police killings and excessive force; the development of national use of force standards; federal review and reporting of "racially disproportionate policing," including stop and frisk practices and racial profiling; mandates for police vehicle dashboard cameras and Body-Worn Cameras; efforts to prevent use or misuse of federal military equipment by local police departments; the elimination of broken windows policing; greater and more effective oversight; and the establishment of a law enforcement commission; Lawyers' Committee for Civil Rights under Law 2014. Reforms to strengthen litigation under Section 1983 were not included in the Unified Statement of Action.

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115 On December 18, 2014, President Obama signed an executive order establishing the President's Task Force on 21st Century Policing, which considered testimony from a number of reform organizations and policing experts. The NAACP LDF was invited to present in-person testimony at a listening session on "Building Trust and Legitimacy" on January 13, 2015 and in its testimony called for greater data collection and endorsed the "PTSR" reforms discussed in note 123 below that are typically included in Justice Department consent decrees. In the same session, the ACLU highlighted the need to strengthen federal mandates for data collection and to establish effective civilian oversight bodies. The Center for Constitutional Rights (CCR), one of the nation's leading civil rights litigation organizations, was invited to present in-person testimony at the "Policy and Oversight" session on January 30, 2015, and focused its recommendations on improving civilian complaint investigative bodies nationwide and including greater community involvement in court monitorships resulting from Justice Department § 14141 investigations or Section 1983 class action litigation. None of these leading civil rights organizations called attention to the need to revise Section 1983 liability doctrines in order to strengthen private enforcement of constitutional rights against police misconduct. The Task Force issued its interim report in March, 2015, with a lengthy list of recommendations and action items, but did not include any discussion of reforms to improve the effectiveness of Section 1983 litigation; President's Task Force 2015.

116 I am focusing here on DOJ enforcement under §242 and the "pattern or practice" statute because these are the federal enforcement tools available to target state and local unconstitutional actions. It is important to note that the Justice Department's Torts Branch defends *Bivens* cases, and thus has played an important albeit indirect role, through its arguments defending qualified immunity, in limiting Section 1983 doctrine. In the Obama era, the Justice Department has continued to use the states secrets privilege and other claims to defend federal officials in constitutional litigation.

117 Toobin 2014; on the turmoil during the Bush years, see Markon 2010; Savage 2006, 2009.

118 There is a long history of calls for the Justice Department to take the lead in civil rights enforcement. For a discussion of debates in Truman's Presidents' Committee on Civil Rights the 1940s, see Dodd 2010. Farhang 2010 discusses similar calls for Justice Department enforcement in the 1950s and 1960s. For more recent calls for Justice Department action in 2014, see Leber 2014; Lemiuex 2014; Voorhees 2014.

119 Farhang 2010.

120 325 U.S. 91 (1945).

121 The Justice Department conducted an investigation of the shooting of Michael Brown and issued a report explaining that the forensic evidence and witness statements did not support filing charges under § 242; Justice Department 2015a.

122 For the full list, as of 2014, see Rushin 2014, Appendices A and B. Harmon 2009 provides a useful overview of § 14141 investigations and proposes changes that could encourage more reform nationally. Rushin 2014 explores the bases for selecting cities to investigate and draws on interviews with Justice Department lawyers. During the Bush administration, the Justice Department began to use memoranda of agreements, rather than consent decrees. As a result, the evidence obtained in § 14141 investigations during the Bush administration could not be obtained by Section 1983 litigators; Silveira 2004.

123 In March 2015, the Justice Department completed its initial investigation of the Ferguson Police Department and issued its letter of findings; Justice Department 2015b. It was a detailed, extremely critical report that included evidence of racial profiling, excessive use of force, and the use of fees and fines to support municipal finances. The report itself received national attention, and the Justice Department is currently negotiating a resolution with the Ferguson Police Department. Most Justice Department consent decrees or settlements include reforms requiring improved data collection, early intervention systems, effective citizen complaint investigation procedures, and strengthened internal and external review procedures. Although many of the particulars will vary depending on the size of the department, these goals and reform categories are fairly well established. Samuel Walker uses the acronym PTSR—policy, training, supervision, and review—when summarizing the key features of these reforms. For an overview of the elements of "the new police accountability" agenda pursued by the Justice Department, see Walker and Archbold 2014, 16–28.

124 In the wake of the protests in 2014, Attorney General Eric Holder and FBI Director James Comey both urged improvements in the federal data collection mandates, particularly with respect to fatal police shootings; Schmidt 2015a; Schmidt 2015b. In December 2014, Congress passed the Death in Custody Reporting Act, Public Law No: 113–242, which requires states and localities receiving federal criminal justice assistance funding to report all deaths of individuals in custody, including those in the process of being detained or arrested; Gross and Schatz 2014. The interim report of the Task Force on

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21st Century Policing also highlighted the need for more comprehensive data about police shootings and racial profiling; President's Task Force 2015.

125 After a long delay before confirmation, Loretta Lynch was sworn into office as Attorney General on April 28, 2015. At the time of her confirmation, there were reports that Lynch planned to avoid making public statements that would be deemed critical of the police and to begin her tenure with a tour of local police departments; Apuzzo and Steinhauer 2015.

126 See, e.g., three recent unanimous opinions addressing qualified immunity: *Lane v. Franks*, 134 S.Ct. 2369 (2014); *Wood v. Moss*, 134 S.Ct 2056 (2014); *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).

127 Markon and Murray 2011; Carp, Manning, and Stidham 2013.

128 In Obama's first term, 75 percent of his nominees were confirmed. Clinton's rate was 84 percent and Bush's was 88 percent; Wolf 2012.

129 Cooper 2013, Ruger 2013, Kamen 2014.

130 In May 2015, there were 55 vacancies, 24 of which were considered judicial emergencies, and 17 pending nominations. For further information, see www.judicialnominations.org

131 White House 2014; Ruger 2014.

132 Carp, Manning, and Stidham 2013.

133 In 2015, a kind of post-Ferguson template emerged: Accounts of police brutality were quickly disseminated online, often amplified by the availability of photos and video. Protests emerged quickly in towns and cities across the country. Local officials in increasing numbers began to respond more quickly to condemn the police actions and to call for investigations. For more on the 2015 protests, see Berman 2015 on the Madison, Wisconsin fatal police shooting of nineteenth-year old Tony Robinson; Golgowski, Murphy, and Silverstein 2015 on the law enforcement-inflicted beating of a University of Virginia undergraduate Martese Johnson; Schmidt and Apuzzo 2015 when a South Carolina police officer was charged with homicide after a bystander's cell phone video revealed that the officer shot motorist Walter Scott eight times in the back when he attempted to escape on foot; Bacon and Welch 2015 when a reserve sheriff's deputy in Tulsa, Oklahoma fatally shot an unarmed man Eric Harris as he ran away; Rector 2015; Marbella 2015 when Baltimore police were accused of unlawfully arresting Freddie Gray, who was handcuffed, shackled by his feet, and then placed unsecured in a police van and taken on a lengthy ride during which he severed his spine and later died, setting off large protests in Baltimore and solidarity protests nationwide.

134 Eisenberg 2013; Schlanger 2003, 2006, 2015.

135 Engstrom 2013. PACER refers to the Public Access to Court Electronic Record system of electronically filed documents maintained by each of the 92 federal district courts.

136 Ibid. Engstrom notes that chief district judges have not granted fee waivers to academics seeking to use the PACER service, despite authorization under Judicial Conference rules to do so.

137 Schwartz 2010, 2014; Epp 2009; Albiston and Nielsen 2007.

138 As Epp has shown, police misconduct attorneys are a type of "cause lawyers"; Epp 2009. Similar studies could examine cause lawyers "within the state," by focusing on the Justice Department lawyers (and the private contractors) pursuing investigations under § 14141; Rushin 2014, NeJaime 2012. A more comprehensive study examining how Section 1983 litigators are affected by § 14141 intervention is also much needed.

139 See, e.g., Levinson 2000; Armacost 2004; Schwartz 2010, 2014.

140 Lowell 1888, 312.

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