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Federal Courts Symposium II

THE *MONROE* MYSTERY SOLVED: BEYOND THE “UNHAPPY HISTORY” THEORY OF CIVIL RIGHTS LITIGATION

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I. INTRODUCTION

The standard model of the emergence of modern remedies for constitutional torts lacks full explanatory power. In this essay I explore this interesting problem. I challenge the prevailing description of the causes and impact of the key case of *Monroe v. Pape*.¹ I explain certain characteristics of civil rights litigation not previously as well understood. I also reach a new conclusion about the origin of the “*Bivens*” cause of action,² the analog of *Monroe* for suits against federal officials.

II. THE *Monroe* MYSTERY

*Monroe v. Pape*³ is thought to be one of the great watershed cases of the Warren Court. Yet little of its significance for civil rights litigation is imparted by what is held in it. *Monroe* was an action against police

1. 365 U.S. 167 (1961).

2. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

3. 365 U.S. 167 (1961).

officers under the Civil Rights Act of 1871.⁴ The complaint alleged damage caused by an unreasonable search.⁵ In a broad ranging discussion of the legislative history, (1991) *BYU L. Rev.* 738 the Court, per Justice Douglas, construed the statutory requirement that the defendant's conduct be "under color of" law.⁶ An unlawful search, the Court held, was "under color of" law even though the search was unauthorized by, and in fact in violation of, state law as well as federal.⁷

We know that before *Monroe* the Civil Rights Act of 1871 had been pretty much a dead letter. It has puzzled writers that *Monroe* made a real difference⁸—that the case generated the expansion of civil rights litigation that in fact followed.⁹ Writers generally describe *Monroe* simply as "rediscovering" or "reinvigorating"¹⁰ the Civil Rights Act.

4. Today the cause of action given by the Act is codified at 42 U.S.C. § 1983 (1988).

5. *Monroe*, 365 U.S. at 169-71.

6. The Act reads,

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

42 U.S.C. § 1983 (1988).

7. *Monroe*, 365 U.S. at 170-71.

8. E.g., P. LOW & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 891-95 (2d ed. 1989) (qualitatively case made little difference; quantitative impact conceded; *Monroe's* degree of innovation "hard to pin down").

9. Few cases under section 1983 are found prior to *Monroe*. See Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV.L.REV. 1486, 1486 n. 4 (1969). After *Monroe*, the number of filings rose rapidly. See Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 L. & SOC.ORD. 557, 567 n. 44. Approximately 150 non-prisoner cases were filed in 1961 and 10,000 in 1986. *Id.* I am discounting the statistics of the Administrative Office of the United States Courts by 50% to allow for prisoners' cases and cases brought under other civil rights laws. The 50% figure is suggested in Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L.REV. 641, 669 (1987). See the remarks of Justice Rehnquist in *Cleavinger v.*

The prevailing theory seems to be what, for want of a better name, one might call the “unhappy history” theory. In this view, before *Monroe*, the Civil Rights Act “lay dormant,”¹¹ because of pre-*Monroe* jurisprudence. In a well known article, Professor Eugene Gressman explored the “unhappy history” of the civil rights laws.¹² Although written before *Monroe* changed the situation, his paper well reflects the now established understanding (1991) **BYU L. Rev. 739** of the pre-*Monroe* status of civil rights litigation. Under this “unhappy history” model, the Supreme Court hobbled the Civil Rights Act in the nineteenth century. There were the *Slaughter-House Cases*¹³ neutralizing the privileges and immunities clause of the fourteenth amendment as an independent source of rights. The *Slaughter-House Cases* limited the “privileges and immunities” protected by the clause to a short list of fundamental *federal* rights only.¹⁴ State-created privileges and immunities were not to be included.¹⁵ Since constitutional and statutory federal rights were already protected from state interference under the supremacy clause, the ruling effectively made the privileges and immunities clause of the fourteenth amendment an irrelevancy.¹⁶ Then there were the *Civil Rights Cases*,¹⁷ with their insistence on a “state action” requirement for enforcement of civil rights laws—even though the Reconstruction Congress, in enacting civil rights legislation, had been concerned about the Ku Klux Klan, a private conspiracy.¹⁸ In addition, there was the old difficulty about the statutory “color of” law language in the Civil Rights Act of 1871. Perversely, a showing that the defendant state official’s

Saxner, 474 U.S. 193, 210-11 (1985) (Rehnquist, J., dissenting) (viewing expansion of section 1983 filings with dismay).

10. *E.g.*, P. LOW & J. JEFFRIES, *supra* note 8, at 896 (civil rights statutes “lay dormant” until “rediscovered and reinvigorated” in modern era).

11. *Id.*

12. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH.L.REV. 1323 (1952).

13. 83 U.S. (16 Wall.) 36 (1872).

14. *Id.* at 77-78.

15. *Id.* at 74-75.

16. *See infra* note 67.

17. 109 U.S. 3 (1883).

18. *Monroe*, 365 U.S. at 172-79.

conduct violated state law as well as federal had become a complete defense to the federal claim.¹⁹

A. Inadequacy of the “Unhappy History” Theory

All these things are true, and this listing is not exhaustive. But the picture is unsatisfying. The “unhappy history” model of the past can not tell us how *Monroe* made such a break with the past. The model lacks full explanatory power. After all, much of what was formally “held” in *Monroe* made no dramatic break with the past. The “color of” law difficulty was in good part laid to rest before *Monroe*. In 1913, the Court had already held, in *Home Telephone & Telegraph Co. v. City of Los Angeles*,²⁰ that a state’s violation of the Constitution, even if also a violation of the state’s constitution, was nevertheless “an act of the state.”²¹ **(1991) BYU L. Rev. 740** The Court did not purport to construe the Civil Rights statute. But the rationale of *Home Telephone*, protective of the policies underlying the fourteenth amendment,²² would clearly extend to the Civil Rights Act.²³ Moreover, civil rights cases need not be brought under the Act, but apparently could be brought directly under the Constitution, as *Home Telephone* was.²⁴ This option would be open in state courts, and, after 1875, in the general federal question jurisdiction of federal courts.²⁵ Thus, by the time *Monroe* was decided, “color of” law as

19. This was the prevailing view after *Virginia v. Rives*, 100 U.S. 313 (1879), which was reinforced by *Barney v. City of New York*, 193 U.S. 430 (1904).

20. 227 U.S. 278 (1913).

21. *Id.*; see also *United States v. Classic*, 313 U.S. 299, 314 (1941) (suggesting that an action would lie against a state official for miscounting ballots in a primary election). But see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789 (1978) (mistake to read *Classic* as supporting finding of “state action” in case of action unauthorized by state law).

22. *Home Telephone*, 227 U.S. at 295-96.

23. Cf. *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941) (holding the phrase “under color of” state law in Section 2 of the Civil Rights Act of 1866, 18 U.S.C. § 242, applied to official misuse of power whether or not authorized by the state).

24. *Home Telephone*, 227 U.S. at 281-84, 295-96.

25. Act of March 3, 1875, Ch. 137, 18 (pt. 3) Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1988)). Prior to this only an abortive provision in the “law of the

a practical matter could not have presented a substantial obstacle to the bringing of section 1983 claims.

This is not to say that we do not see real differences between the period of the “unhappy history” and the post-*Monroe* period. For example, the civil rights powers of Congress are now understood to reach private conduct,²⁶ notwithstanding the *Civil Rights Cases*. But this development is unrelated to, and certainly does not explain the success of, *Monroe*. It occurred after *Monroe*.

Much of the “unhappy history” is still with us. *Monroe* clarified but did not remove the *Civil Rights Cases*’ requirement of “state action” for a section 1983 civil rights claim—that requirement **(1991) BYU L. Rev. 741** remains intact. It is true that a violation of state law will no longer save the defendant from the consequences of a violation of federal law. But the tortious action complained of must be state governmental action. And thirty years after *Monroe* we also still retain the *Slaughter-House Cases*’ narrow reading of the privileges and immunities clause.²⁷

The “unhappy history” theory does not explain why the great 1954-55 Warren Court decisions in *Brown v. Board of Education*²⁸ did not produce

midnight judges” attempted to give federal question jurisdiction to federal courts. Act of Feb. 13, 1801, Ch. 4, 2 Stat. 89, *repealed* by Act of April 29, 1802, Ch. 31, 2 Stat. 156.

26. For Congress’s civil rights powers to reach private conduct under section 5 of the fourteenth amendment, see, *e.g.*, *United States v. Guest*, 383 U.S. 745 (1966) (sustaining an indictment under 18 U.S.C. § 241 against individual members of anti-negro conspiracy; six Justices agreed on section 5 power to reach private conspiracies; opinion for the Court on different grounds); *see also* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (thirteenth amendment). For Congress’s civil rights powers to reach private conduct under the commerce clause, *see, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (sustaining power of Congress under commerce clause in action to enforce Public Accommodations Act of 1964 against local motel; motel rented rooms to interstate travelers); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding Public Accommodations Act could be applied to local restaurant; racially discriminatory practices in local places of public accommodation had requisite effect on interstate commerce).

27. *See supra* notes 13-16 and accompanying text; *infra* note 67 and accompanying text.

28. There were two opinions in *Brown*. The Court reinterpreted the equal protection clause in *Brown v. Board of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*] (holding separate schooling inherently unequal, overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The Court then held the case over to consider the remedy. Chief Justice

the expansion of litigation we associate with *Monroe*, six years later. Of course, “color of” law was not a problem in *Brown*; there, state law did authorize segregated schools. But this distinction does not fully explain why *Brown*’s effect on the docket was so modest. There were plenty of litigable state-authorized civil rights violations from 1955 through 1960. It is true *Brown* was an injunction suit, while *Monroe* was an action at law for damages. But why should that matter? The *Brown* cause of action was, as in *Monroe*, to be found in section 1983. As in *Monroe*, *Brown* was for a claimed deprivation of constitutional right. What did *Monroe* have that *Brown* did not?

The “unhappy history” of the civil rights laws does not explain the relative scarcity of civil rights cases before we had civil rights laws. Suits directly under the Constitution have always been known, and have been brought both before and after the Civil Rights Act of 1871. *Home Telephone*²⁹ is an instance; *Ex parte Young*³⁰ is a more famous example. *Young* is the celebrated case in which the Supreme Court saved injunction suits against *state* officials from the operation of the eleventh amendment. Actions for damages were also available directly under the Constitution, without need for a statutory remedy. Certainly *Osborn v. Bank of the United States*³¹ was an action for money, if a famous example is wanted, although *Osborn* was in equity. In (1991) **BYU L. Rev. 742** *Osborn*, the plaintiff bank was seeking to get money back from state officials who were trying to enforce an unconstitutional state tax.³² The Court decided that the constitutional federal judicial power extended to this.³³ I discuss examples of true damages cases in Part E below.³⁴

B. Rounding Up the Usual Suspects

Warren set out the rudiments of future trial court administration of school desegregation cases in *Brown v. Board of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*] (fashioning remedy of judicially supervised school desegregation).

29. 227 U.S. at 278.

30. 209 U.S. 123 (1908).

31. 22 U.S. (9 Wheat.) 738 (1824).

32. *Id.* at 797.

33. *Id.* at 828.

34. See *infra* notes 119-25 and accompanying text.

If civil rights filings were sparse until *Monroe*, then, something more than the “unhappy history” of the civil rights laws must explain it. One commentator³⁵ has recently suggested that the explanation for the pre-*Monroe* paucity of filings may lie in the ambiguity of the source of constitutional rights before *Erie Railroad Co. v. Tompkins*.³⁶ But that theory, though it helps, does not explain the paucity of filings *after Erie*.

I also think we can eliminate the eleventh amendment as the operative early inhibition. Eleventh amendment jurisprudence was probably less restrictive in the nineteenth century than it is today.³⁷ As the example of *Osborn* reminds us, Chief Justice Marshall had seemed to approve a “party of record”³⁸ (1991) **BYU L. Rev. 743** rule in that case. As long as the named defendant was not the state, but only an official of the state, the

35. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO.L.J. 1493, 1532 (1989) (arguing that the “growing positivist assault” on litigation not grounded in causes of action under identified law accounted for the relative dearth of constitutional claims). *See also infra* note 144 and accompanying text.

36. 304 U.S. 64 (1938) (holding *inter alia* that in federal courts the law to be applied, whether statutory or decisional, must be that of an identified sovereign). For late discussion of the pre-positivist and post-positivist positions, *see* Weinberg, *Federal Common Law*, 83 NW.U.L.REV. 805, 819-27 (1989).

37. It is true that the Court has recognized power in Congress under the commerce clause to abrogate the eleventh amendment. *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989); *see also* *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding Congress has power under section 5 of the fourteenth amendment to abrogate the eleventh amendment). But unless Congress does so with a clear statement, the modern restrictions are in place. These restrictions apply even in suits in equity against a named official, if orders for the payment of money are at stake, *Edelman v. Jordan*, 415 U.S. 651 (1974), or if only state law ultimately grounds relief, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). A state may not be held to have consented to suit in federal court without a clear statement. *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 471-78 (1987) (overruling in part *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)).

38. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 797 (1824). This broad reading of *Osborn* was controversial; but although played down in *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), it was reiterated in *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872). The position that seems closer to the spirit of the cases is probably that formally stated in *Ex parte Young*, 209 U.S. 123 (1908) (holding that the eleventh amendment would not bar an action in equity against a named state official for threatened violation of the Constitution, since the violation stripped the official of authority to act).

eleventh amendment would not be an issue.³⁹ In any event, the notion that the eleventh amendment blocks federal litigation even in federal question cases took hold only as late as 1890, with the case of *Hans v. Louisiana*.⁴⁰ Moreover, the eleventh amendment was inoperative in state courts; only the states' own sovereign immunity rules could matter in state litigation of civil rights at that time.⁴¹ Yet civil rights cases as we know them do not much appear in state courts in the nineteenth century.

Given the state courts, it is also hard to say that want of federal question jurisdiction in federal courts before 1875⁴² explains the pre-Civil Rights Act scarcity of litigation of federal constitutional claims. The claims could have been brought in state courts. A few were.⁴³ The states, after all, have concurrent jurisdiction of federal questions not confined to

39. *Osborn*, 22 U.S. (9 Wheat.) at 857-58. See, e.g., *Scott v. Donald*, 165 U.S. 58, 113-14 (1897) (holding that an action to recover damages against state officials for property wrongfully taken is not a suit against the state within the meaning of the eleventh amendment).

40. 134 U.S. 1 (1890). Well known earlier cases such as *In Re Ayers*, 123 U.S. 443 (1887) (contract clause), typically litigated state debt avoidance. Such cases generally stated a federal question under the contract clause but fell within the literal language of the eleventh amendment barring suit by citizens of another state. Cf. *id.* at 508 (Field, J., concurring) (foreign state). In *Hans*, on the other hand, the plaintiff was a citizen of the defendant state.

41. Today there is an analog to the eleventh amendment which will keep suits under *Monroe v. Pape* out of state courts as well as federal. That is the doctrine of *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989) (state is not a defendant "person" within meaning of Civil Rights Act of 1871).

42. General federal question jurisdiction dates from an Act of March 3, 1875, Ch. 137, 18 (pt. 3) Stat. 470 (codified at 28 U.S.C. § 1331 (1988)). Prior to this only an abortive provision in the "law of the midnight judges" attempted to give federal question jurisdiction to federal courts. Act of February 13, 1801, Ch. 4, 2 Stat. 89, *repealed* by Act of April 29, 1802, Ch. 31, 2 Stat. 156.

43. See, e.g., *South Covington & C. St. Ry. v. City of Covington*, 235 U.S. 537 (1915) (unconstitutional municipal regulation of streetcars; injunction); *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910) (school prayer struck down under state constitution); *Giles v. Teasley*, 193 U.S. 146 (1904), *aff'g* 136 Ala. 228, 33 So. 820 (1903) (fifteenth amendment violation, suffrage; damages and mandamus sought); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (impairment of contract; injunction).

exclusive federal jurisdiction,⁴⁴ as indeed they do of suits under the Civil Rights (1991) *BYU L. Rev.* 744 Act.⁴⁵ Before 1875, state courts would have had exclusive jurisdiction of any questions arising generally under federal law, because there was no general federal question jurisdiction, and the supremacy clause imposed a duty upon the states to hear such cases.⁴⁶

One obvious reason for the low rate of antebellum constitutional litigation is that there were fewer antebellum constitutional rights. There was no fourteenth amendment, no equal protection clause, and no due process clause that would work against the states. But that does not explain the paucity of litigation after ratification of the fourteenth amendment—from 1868 to *Monroe*. In short, nothing we have considered thus far seems to solve the *Monroe* mystery.

C. *Monroe and the Incorporation Cases*

It seems to me that *Monroe* did make a great difference, but not simply one of “rediscovering” or “reinvigorating” the Civil Rights Act. In explaining the difference *Monroe* made, too much attention has been paid to “the unhappy history” of the civil rights laws and to *Monroe’s* holding on “color of” law. Justice Douglas is somewhat responsible for this; his *Monroe* opinion dwells almost exclusively on the “color of” law issue.⁴⁷

44. See *Yellow Freight Sys., Inc. v. Donnelly*, 110 S.Ct. 1566 (1990) (holding states have concurrent jurisdiction of suits under Title VII of the Civil Rights Act of 1964); *Tafflin v. Levitt*, 110 S.Ct. 792 (1990) (civil RICO claims); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) (claims arising under the Outer Continental Shelf Lands Act). In all these cases the presumption is that unless the jurisdiction is made expressly exclusive it is concurrent. For current discussion, see also Kenny, *RICO and Federalism: A Case for Concurrent Jurisdiction*, 31 B.C.L.REV. 239 (1990).

45. Cf. *Howlett v. Rose*, 110 S.Ct. 2430 (1990) (holding under the supremacy clause that state courts may not cloak boards of education with state sovereign immunity in civil rights cases, since boards of education are not immune in federal civil rights cases).

46. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816) (Story, J.):

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that this constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land. . . .

He precedes his “color of” law discussion with a separate section containing only a statement of the case, and follows it with a final separate section on municipal immunity. Thus, a reader gains the natural impression that the “under color of” law issue is the key to the case. But Douglas briskly concludes this operative (1991) *BYU L. Rev.* 745 central section with, “So far, then, the complaint states a cause of action.”⁴⁸ That is rather a large deduction from so confined an inquiry. And parts of the opinion are written with a prescriptive sweep oddly unsuited to the decision of a narrow issue, but rather as if creating a new tort.⁴⁹ “Section [1983],” Justice Douglas writes, slipping this into the last paragraph of his “color of” law discussion, “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”⁵⁰ And in his part III, Justice Douglas for the Court refuses to extend the new tort to actions against cities.⁵¹ Justice Harlan, joined by Justice Stewart, concurs separately, precisely to point out that the question about “color of” law is rather a non-issue, but being one of first impression. Justice Frankfurter’s dissent, significantly, is full dress, obviously written in opposition to a new tort, with initial strong emphasis on the underlying substantive legal theory, exploring the privileges and immunities and due process clauses of the fourteenth amendment.⁵²

Id.

47. *Monroe*, 365 U.S. 168, 172-87.

48. *Id.* at 187.

49. For a current discussion of this sort of judicial law fashioning generally, see Blomquist, “New Torts”: *A Critical History, Taxonomy, and Appraisal*, 95 *DICK.L.REV.* 23 (1990) (examining judicial recognition of “new torts”). For current discussion of the law of constitutional “tort” under *Monroe* see generally *Symposium: Section 1983: The Constitution and the Courts*, 77 *GEO.L.J.* 1437 (1989). See *infra* Part III of this essay, notes 128-62 and accompanying text, for brief discussion of federal official constitutional torts.

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

51. *Id.* at 187-92 (overruled by *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658 (1978)).

52. *Monroe*, 365 U.S. at 202, 205-11.

The *Monroe* mystery has its signal clue here, I think, in the seeming awareness of the entire Court that the case creates a new remedy⁵³—that it is not simply an exercise in statutory construction. In trying to understand this, I think we need to lay more emphasis than we have done on the likely role of the Bill of Rights.⁵⁴ Let me enlarge on this.

A pivotal development, which goes far to explain the potency of *Monroe*, seems to have been the contemporaneous creation (1991) **BYU L. Rev. 746** of new constitutional rights. In the same term that the Court decided *Monroe v. Pape*, it also decided *Mapp v. Ohio*.⁵⁵ *Mapp* did not itself incorporate the fourth amendment into the due process clause of the fourteenth; the Court had done that twelve years previously in *Wolf v. Colorado*.⁵⁶ *Mapp* fashioned the rule requiring exclusion of unconstitutionally obtained evidence in a state prosecution.⁵⁷ It is also true that extensive, modern incorporation of the Bill of Rights into the fourteenth amendment did not begin with *Wolf* and *Mapp*. The Court had tried a long experiment—which failed⁵⁸—in reading economic “liberty” into the due process clause.⁵⁹ The Court had already put the states under first amendment constraints—at first by deeming first amendment liberties to be among rights substantively included within the protections of the due

53. For some recent “constitutional tort” perspectives, *see, e.g.*, Abernathy, *Section 1983 and Constitutional Torts*, 77 *GEO.L.J.* 1441 (1989); Note, *A Theory of Negligence for Constitutional Torts*, 92 *YALE L.J.* 683 (1983); Whitman, *Constitutional Torts*, 79 *MICH.L.REV.* 5 (1980).

54. A temporal connection is suggested in C. WRIGHT, *THE LAW OF FEDERAL COURTS* 120 (4th ed. 1983) (time was “ripe” for expansion of civil rights litigation, given expansion of rights).

55. 367 U.S. 643 (1961) (holding under fourteenth amendment due process clause that evidence obtained in violation of the fourth amendment must be excluded from state as well as federal criminal prosecutions).

56. 338 U.S. 25 (1949) (finding the fourth amendment’s guarantee against unreasonable searches and seizures applicable to the states because incorporated in the due process clause of the fourteenth amendment).

57. *Mapp*, 367 U.S. at 654-55.

58. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

59. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Lochner v. New York*, 198 U.S. 45, 53 (1905).

process clause⁶⁰—eventually, by simply holding the first amendment to be “incorporated” in the due process clause.⁶¹ But with *Mapp*, the Supreme Court began in earnest selectively to “incorporate” into the fourteenth amendment numerous other rights to be found in the original Bill of Rights. Justice Frankfurter complains emphatically about this process in his *Monroe* dissent.⁶² Here we had, in effect, a whole new Bill of Rights. I do not think this is an overstatement. This was not simply an expansion of existing rights. These were rights for the first time held applicable to the states.

Monroe may be understood as taking these new rights—rights like the fourth amendment right recognized in *Wolf* and *Mapp*—and making them actionable.⁶³ Just as *Mapp* (1961) 377 U.S. 911 created an exclusionary rule for evidence obtained in violation of the right recognized in *Wolf*, *Monroe* contemporaneously created a *claim* for the same violation. Counsel in *Monroe* showed how a violation of this new federal right could be turned into a private lawsuit by pleading the violation as a deprivation within the meaning of the Civil Rights Act of 1871. This “new” remedy would then eventually, naturally, attach to other incorporated constitutional rights. In *Monroe*, the Court picked up the old bottle of the ancient statute and into it poured this new wine.

After *Monroe* and *Mapp*, the Court began to “incorporate,” among other rights, the parts of the Bill of Rights that could impact most directly on the general population: those controlling the *criminal law enforcement process*.⁶⁴ Soon after *Mapp*, the Court handed down, among other

60. *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925).

61. *E.g.*, *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (non-establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (speech and assembly); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931) (free press); *Fiske v. Kansas*, 274 U.S. 380 (1927) (free speech).

62. *Monroe*, 365 U.S. 167, 209-11 (Frankfurter, J., dissenting).

63. An important precursor was *Hague v. Committee for Indus. Org.*, 101 F.2d 774 (3d Cir.), *aff'd*, 307 U.S. 496 (1939) (decided under the incorporated fourth amendment). In affirming, the Supreme Court relied, rather, on the first amendment, the protections of which already had been extended against state interference. *See infra* note 83.

64. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment).

incorporation cases, *Robinson v. California*,⁶⁵ incorporating into the due process clause the eighth amendment proscription against cruel and unusual punishment. Such rights, like fourth amendment rights, have inherently actionable qualities. They are violated by identifiable individual employees of the government; these employees, though likely to be reimbursed, can be sued in their own right, obviating a doctrinal need for *respondeat superior*; and their violations can cause personal injuries or other weighty and measurable damages.

The decade immediately following *Monroe* was marked by increasing absorption of the Bill of Rights into the fourteenth amendment.⁶⁶ Although those who had hoped for a fount of rights in the privileges and immunities clause⁶⁷ had been disappointed,⁶⁸ a different fount of rights against the states was to be **(1991) BYU L. Rev. 748** found, after all, in the Bill of Rights and the fourteenth amendment's due process clause.⁶⁹

*Brown v. Board of Education*⁷⁰ might be taken as another example of the effect on litigation of a great change in substantive law. The injunction against unconstitutional state action had been long available, as

65. 370 U.S. 660 (1962).

66. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory attendance of witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

67. Since the *Slaughter-House Cases* held that state-created rights were not within the purview of the privileges and immunities clause, see *supra* notes 13-16 and accompanying text, the Court has twice rejected the proposition that the privileges and immunities clause incorporates the Bill of Rights. See *Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900).

68. For a recent expression of this disappointment, see M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 171-96 (1986).

69. For newer litigational opportunities under section 1983, see *infra* note 127 and accompanying text.

70. *Brown II*, 349 U.S. 294 (1955) (fashioning remedy of judicially supervised school desegregation).

*Ex parte Young*⁷¹ makes clear. But desegregation litigation became possible because of a revolution in substantive rights, both changes occurring in the same litigation. The modern equal protection clause, in its bearing on race relations, was created in *Brown*.⁷² “Separate” was no longer “equal”; *Plessy v. Ferguson*⁷³ was overruled.⁷⁴

These observations raise a further question. If the trouble before *Monroe* and *Brown* was a need for substantive new theories, why should that have been so? Where were the old theories? There were, after all, some constitutional rights. Even before commencement of the process of incorporation of the Bill of Rights, and notwithstanding the gutting of “privileges and immunities” in the *Slaughter-House Cases*,⁷⁵ there were the equal protection and due process clauses of the fourteenth amendment, as well as those provisions in the body of the Constitution that would operate against a state—notably the commerce clause, the contract clause, the guaranty clause, and the privileges and immunities clause of Article IV.

To read over the list is to recognize how meagre it was. Before 1868 there was no equal protection clause at all, of course. Then there were substantial early difficulties in administration of the equal protection clause. It is part of the “unhappy history” of section 1983 that its reference to rights “secured by” the Constitution did not include the right to equal protection of (1991) **BYU L. Rev. 749** the laws, in the absence of racial or other invidious discrimination.⁷⁶ After *Plessy* (1896),⁷⁷ and until

71. 209 U.S. 123 (1908) (action against state attorney general to restrain enforcement of state ratemaking allegedly unconstitutional under fourteenth amendment due process clause).

72. *Brown I*, 347 U.S. 483 (1954) (holding separate schooling inherently unequal, overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

73. 163 U.S. 537 (1896).

74. See generally Frank & Munro, *The Original Understanding of “Equal Protection of the Laws”*, 50 COLUM.L.REV. 131 (1950) (discussing legislative history of the clause and its early application).

75. See *supra* notes 13-16 and accompanying text.

76. See, e.g., *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900) (holding that the Civil Rights Act would not ground an equal protection challenge to a state tax).

77. See *supra* text accompanying note 73.

Brown v. Board of Education (1954), the equal protection clause could not protect against state-mandated segregation.

Interestingly, the commerce clause was sufficiently politicized to have a one-way utility in cases reviewing state attempts either to impose or forbid racial segregation. A state could convict a railway for violation of a statute requiring separate railway coaches for black and white passengers, and the conviction would be sustained under the commerce clause⁷⁸ as well as under the equal protection clause.⁷⁹ On the other hand, a state statute mandating equal access to common carriers for blacks could be struck down as an unconstitutional regulation of interstate commerce.⁸⁰

Of course there was no due process clause limiting state action before Reconstruction. It is true that once the due process clause of the fourteenth amendment was in place, litigants quickly apprehended its usefulness for procedural challenges to state action.⁸¹ But the clause seemed a rule of decision rather than a fount of private claims—beyond the obvious claim of a “taking.” As perceptions of the clause evolved, it increasingly seemed available for injunctions to protect substantive economic,⁸² but not personal “liberty” interests.⁸³

As for the protections from state action to be found in the body of the Constitution, the Court has read narrowly those few relevant guarantees that are not inherently narrow. The contract **(1991) BYU L. Rev. 750**

78. *Louisville, New Orleans & Tex. Ry. v. Mississippi*, 133 U.S. 587 (1890).

79. *Chesapeake & Ohio R.R. v. Kentucky*, 179 U.S. 388, 393 (1900) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

80. *Hall v. DeCuir*, 95 U.S. 485 (1877).

81. *E.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (state assertions of personal jurisdiction henceforth would be reviewable under the fourteenth amendment due process clause).

82. *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905).

83. *See generally* Note, *The Supreme Court and “Civil Rights,” 1886-1908*, 100 *YALE L.J.* 725 (1990). In *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939), the Court recognized the “liberty” interest protected by the due process clause. Justice Stone’s separate opinion makes clear that the due process clause, as well as the equal protection clause, was important for the protection of such interests, and that emphasis on the privileges and immunities clause was unnecessary. *Id.* at 519. But the major “incorporations” into the due process clause of the criminal procedural protections of the Bill of Rights had not yet been effected.

clause is not a source of private rights to enforce contracts.⁸⁴ The Supreme Court has cancelled the guaranty clause as a practical matter with the “political question” doctrine.⁸⁵ In any event the guaranty clause is also not a source of private rights.⁸⁶ The privileges and immunities clause of Article IV in terms protects only American citizens who are nonresidents of the state, and will not protect corporations.⁸⁷

D. Explaining Some Characteristics of Monroe Actions

We now can begin to understand certain features of litigation under *Monroe*. The civil rights injunction litigation under *Brown*⁸⁸ and *Baker v. Carr*⁸⁹ typically is against a very different sort of governmental defendant from the damages defendant under *Monroe*. *Monroe* does not happen in equity. This is not only, as the second Justice Harlan remarked, because for victims of unlawful searches, as a practical matter, it is “damages or nothing.”⁹⁰

For the most part the incorporated rights that, after *Monroe*, revived the Civil Rights Act were rights attaching to *the state criminal process*. A federal injunction against a state violation of these sorts of rights is virtually unavailable and would have been virtually unavailable

84. Compare *Georgia R.R. Banking Co. v. Redwine*, 342 U.S. 299 (1952) (unconstitutional breach actionable in equity) with *In re Ayers*, 123 U.S. 443 (1887) (eleventh amendment bars suit); see also *Carter v. Greenhow*, 114 U.S. 317, 322 (1885) (contract clause not actionable under Civil Rights Act of 1871 because contract rights not “directly secured” by Constitution).

85. Compare *Baker v. Carr*, 369 U.S. 186 (1962) (holding malapportionment of legislature actionable under the equal protection clause) with *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (holding legitimacy of government of Rhode Island unadjudicable under the guaranty clause because a political question); but see *Powell v. McCormack*, 395 U.S. 486 (1969) (holding not barred by the political question doctrine a claim challenging Congress’s refusal to seat an elected representative).

86. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

87. See *Blake v. McClung*, 172 U.S. 239 (1898); cf. *Santa Clara County v. So. Pac. R.R.*, 118 U.S. 394, 396 (1886) (corporations are “persons” within meaning of fourteenth amendment due process clause).

88. *Brown I*, 347 U.S. 483 (1954).

89. 369 U.S. at 186.

90. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

throughout our history.⁹¹ Federal judicial interference with state criminal process has always been under a cloud. Not coincidentally, perhaps, *Younger* (1991) **BYU L. Rev. 751** v. *Harris*,⁹² the modern key doctrinal inhibition on federal injunctions against state criminal proceedings, emerged after the Supreme Court's incorporation of the fourth, fifth, and sixth amendments into the fourteenth amendment's due process clause. Even when civil rights injunctions are sought to restrain police misconduct or other extra-judicial dysfunction in state criminal justice, the Supreme Court typically disapproves them.⁹³ So federal equity as against state officials is confined, by and large—as *Brown v. Board of Education*⁹⁴ suggests—to rights that would work outside the context of the state criminal process: to equal protection claims (but only after *Brown*), and to substantive due process claims, as *Ex parte Young*⁹⁵ suggests.

E. Pre-Monroe Litigation Under the Civil Rights Act

This analysis also helps to explain the nature of pre-*Monroe* civil rights litigation. Such litigation would occur to the extent that it plausibly could be grounded in a right that plausibly could be argued in its bearing on then-current social problems. So, for example, we could expect to find cases between 1871 (the date of the Civil Rights Act) and 1961 (the date

91. See Anti-Injunction Act of 1793, Ch. 22, 1 Stat. 335 (codified as amended at 28 U.S.C. § 2283 (1988)).

92. 401 U.S. 37 (1971) (holding that, without regard to the Anti-Injunction Act, principles of equity, comity, and federalism would limit interferences with pending state criminal proceedings grounded on section 1983 injunction suits). For the view that *Younger* was put in place to forestall the effect of the cancellation of the Anti-Injunction Act for civil rights cases then about to be effected in *Mitchum v. Foster*, 407 U.S. 225 (1972), see Weinberg, *The New Judicial Federalism*, 29 STAN.L.REV. 1191, 1209-15 (1977).

93. See, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976) (holding that principles of equity, comity, and federalism bar a federal injunction to augment police grievance procedures, on evidence of numerous instances of police misconduct against minority suspects); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (same, injunction to restrain discriminatory local bail-setting). *But see* *Allee v. Medrano*, 416 U.S. 802, 814 (1974) (holding an injunction against local police misconduct “an appropriate exercise of the federal court's equitable powers”). For my comments on *Rizzo*, see Weinberg, *supra* note 92, at 1215-35.

94. *Brown I*, 347 U.S. at 483.

95. 209 U.S. 123 (1908).

of *Monroe v. Pape*) challenging the then-obtaining state restrictions on the franchise. The all-important availability of a *right* would have been incontrovertible in right-to-vote cases, since the right was given in the fifteenth amendment, and could be read also into other parts of the Constitution governing the franchise. The equal protection clause, notwithstanding *Plessy*, would naturally furnish a useful auxiliary in such litigation. We could expect to find that other civil rights litigation of that period would be confined **(1991) BYU L. Rev. 752** largely to due process and equal protection challenges to state taxation, takings, ratemaking, and other economic regulation. These are very much the sorts of cases we do find.⁹⁶

Among the old civil rights cases we do find, the success rate seems low. Although the old cases lacked the sophisticated superstructure of thought-out, if incoherent, defenses⁹⁷ which account for the low success

96. Apart from famous cases like *Ex parte Young*, 209 U.S. 123 (1908), see, e.g., such miscellany as *Ohio Tax Cases*, 232 U.S. 576 (1914) (unconstitutional state tax; injunction); *Louisville & Nashville R.R. v. Garrett*, 231 U.S. 298 (1913) (ratemaking; injunction); *People's Nat'l Bank v. Marye*, 191 U.S. 272 (1903) (unconstitutional state tax; injunction); *Walla Walla City v. Walla Walla Water Co.*, 172 U.S. 1 (1898) (impairment of contract; injunction). The ratemaking cases survive until the Johnson Act of 1934. Act of May 14, 1934, Ch. 283, 48 Stat. 775 (codified as amended at 28 U.S.C. § 1342 (1988)). The tax cases survive until the Tax Injunction Act of 1937. Act of Aug. 21, 1937, Ch. 726, 50 Stat. 738 (codified as amended at 28 U.S.C. § 1341 (1988)). This Act for the most part codified common law constraints long in place. See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855) (injunction denied because complainant has "plain, adequate, and complete" remedy at law; distinguishing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

Civil rights cases proper do appear in the reports, but much less frequently. See, e.g., *Terrace v. Thompson*, 263 U.S. 197 (1923) (action under treaty and article II of the Washington state constitution to restrain enforcement of state law disqualifying aliens from taking farm land); *Truax v. Raich*, 239 U.S. 33 (1915) (action to restrain enforcement under the equal protection clause of state statute limiting employers to specified percentage of alien employees).

97. See Weinberg, *The New Judicial Federalism*, *supra* note 92. Important subsequent additions to the superstructure of defenses canvassed there include *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding, under eleventh amendment, that federal courts may not enjoin state governmental violations of state law within the pendent jurisdiction of a federal civil rights claim); *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989) (holding that state is not a defendant "person" within meaning of Civil Rights Act of 1871).

rate in civil rights cases today,⁹⁸ the judges in the old cases raise some of the same hard questions about remedies that judges raise today. Beyond this, judicial unwillingness seems to be the characteristic feature of civil rights litigation both before and after its brief effluorescence in the Warren Court era.

An interesting group of still-cited election cases decided in the Supreme Court from 1900 to 1904 gives the flavor of the civil rights litigation of the period. *Wiley v. Sinkler*⁹⁹ was a federal action for damages against the board of managers of a general election in the city of Charleston. The complaint alleged that the board unconstitutionally rejected the plaintiff's vote for a **(1991) BYU L. Rev. 753** member of the House of Representatives. No mention was made of the Civil Rights Act, which apparently was not pleaded. The Court, per Justice Gray, held that the complaint stated a federal question, and found jurisdiction and a cause of action. But the Court affirmed the dismissal below. The plaintiff had not alleged that he was qualified to vote. For all that appeared of record, the plaintiff might not have been qualified.¹⁰⁰ Of course this was formalistic.¹⁰¹ The Court could have taken the complaint as if amended without presuming the voter's qualifications as if proved. A few years later the Court took a complaint as if amended in *Giles v. Harris*,¹⁰² another franchise case.

More resonant, perhaps, to a modern ear, was Justice Gray's passing remark on "the difficulty of subjecting election officers to an action for damages for refusing a vote which the statute under which they are appointed forbids them to receive."¹⁰³ This sort of conflict of duties, of course, is one of the acute problems of damages at the heart of so much of

98. See generally Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L.REV. 641 (1987).

99. 179 U.S. 58 (1900).

100. *Id.* at 66-67.

101. *But see* *Murphy v. Ramsey*, 114 U.S. 15 (1885) (holding barred plaintiffs who had not alleged that they were qualified to vote, in action by Mormons some of whom failed to allege that they were not polygamists).

102. 189 U.S. 475, 485 (1903).

103. *Wiley*, 179 U.S. at 66-67.

our modern jurisprudence on official capacity suits,¹⁰⁴ on the official immunities defenses,¹⁰⁵ and on the eleventh amendment.¹⁰⁶ One suspects it lay at the root of the Court's unwillingness to let *Wiley* go forward.

To Justice Gray's doubts about damages actions to enforce the right to vote, we should add Justice Holmes's doubts about **(1991) BYU L. Rev. 754** injunction suits, voiced by him in *Giles v. Harris*.¹⁰⁷ *Giles* was a bill in equity brought by a black plaintiff both in his own behalf and as representative of a class of five thousand similarly situated voters.¹⁰⁸ *Giles* prayed for an order compelling the board of registrars of Montgomery County, Alabama, to register blacks on the voter rolls. He challenged, under the equal protection clause, the suffrage provisions of the Alabama Constitution. The United States Supreme Court held the complaint failed to state a cause of action for which relief could be granted.¹⁰⁹

Justice Holmes wrote for the Court. Because the challenged portion of the Alabama constitution was fair on its face, he saw the case as challenging the defendant officials' discriminatory administration of the

104. See *Kentucky v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). For discussion of these cases see Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA.L.REV. 1075, 1091-95 (1985).

105. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding local prosecutor absolutely immune from liability for damages); *Butz v. Economou*, 438 U.S. 478 (1978) (federal prosecutor, same). But see *Burns v. Reed*, 111 S.Ct. 1934 (1991) (prosecutor has only "qualified immunity" when advising police officers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (holding other local executive officials have "qualified immunity" from liability for damages in civil rights suits if they can show a good faith belief that their conduct was lawful); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (federal officials, same). But see *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (president has absolute immunity from liability for damages for acts within official responsibilities).

106. E.g., *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding eleventh amendment bars injunction against local official that would require disbursement of funds from state treasury to remedy retrospective harms); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (holding eleventh amendment bars suit for damages against a statewide agency).

107. 189 U.S. 475, 487 (1903).

108. *Id.* at 482.

109. *Id.* at 482-87.

suffrage.¹¹⁰ *Giles* pleaded the Civil Rights Act of 1871, but did not allege the supposedly applicable jurisdictional amount under the federal question jurisdictional statute.¹¹¹ He might have done, and Holmes was willing to treat the complaint as if amended in order to sustain jurisdiction.¹¹² He even went so far as to opine that an action at law might be maintained on the facts alleged—thus neatly distinguishing the earlier cases.¹¹³

For Holmes, the sticking point was the relief prayed for. “It seems to us impossible,” he wrote, “to grant the equitable relief which is asked. . . . The traditional limits of proceedings in equity have not embraced a remedy for political wrongs.”¹¹⁴ He was willing to consider, in this “new and extraordinary situation,”¹¹⁵ some exception to that view, but on further reflection he had two reasons for abiding by it. His first, regrettably, shares the unsettling disingenuousness of civil rights opinions of that period. He tells us that he could not order a voter to be registered on a void voter list: “[H]ow can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?”¹¹⁶

Holmes’s second reason for withholding the remedy, more **(1991) BYU L. Rev. 755** persuasive to a modern reader, was a pragmatic one. That was that a great political wrong is a function of the people’s will, and too heavy for a court to handle. Holmes wrote,

If the conspiracy and the intent exists, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong . . . by the people of a State and the State itself, must be given by them or by the legislative and political department of . . . the United States.¹¹⁷

110. *See id.* at 483, 487-88.

111. *Id.* at 485.

112. *Id.*

113. *Id.* at 485-86.

114. *Id.* at 486.

115. *Id.*

116. *Id.*

117. *Id.* at 488.

Here of course Holmes saw deep into the political shadows obscuring the outcome of any civil rights injunction suit. With or without the use of force, the efficacy of an injunction to right “a great political wrong” must depend, in the end, on the general consent of the polity. The Court might affect the terms of public discourse, but if “the conspiracy and the intent exists,” on what sort of consent could the Court confidently rely? Of course Holmes’s pessimism was well founded. But we also know that eventually the Supreme Court would indeed give relief from great political wrongs such as these.¹¹⁸ Whatever the defects of American civil rights litigation, whatever its ultimate successes or failures, at least American courts did what could be done by them to make the suffrage fairer as they saw it.

Giles, in those less hospitable days, took up Justice Holmes’s invitation to resort to an action at law for damages. This time *Giles* went into state court, and there brought an action against the board of registrars for damages for their refusal to register blacks, claiming it a violation of the fourteenth and fifteenth amendments. For one in *Giles*’s position, of course, it was specific relief “or nothing.” So *Giles* also sought a writ of mandamus to compel the registration. In *Giles v. Teasley*,¹¹⁹ the Supreme Court held that Alabama had dismissed *Giles*’s case under state law, and thus the case presented no federal question.¹²⁰ **(1991) BYU L. Rev. 756** The following, in its entirety, is the dispositive part of the decision of the Alabama Supreme Court which the United States Supreme Court thought fit to let stand:

As these sections of the [Alabama] constitution assailed created the board of registrars, fixed their tenure of office, defined and prescribed their duties, if they are stricken down on account of being unconstitutional, it is entirely clear that the board would have no existence and no duties to perform. So then, taking the case as made by the petition,

118. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing principle of “one person, one vote” for apportionment cases); *Baker v. Carr*, 369 U.S. 186 (1962) (under the equal protection clause, approving judicial intervention to remedy malapportionment of state legislature). See also, e.g., *Terry v. Adams*, 345 U.S. 461 (1953) (holding that white voters’ association’s pre-primary election of candidates was “state action” depriving some black voters of the right to vote).

119. 193 U.S. 146 (1904).

120. *Id.* at 165.

without deciding the constitutional question attempted to be raised or intimating anything as to the correctness of the contention on that question, there would be no board to perform the duty sought to be compelled by the writ and no duty imposed of which the petitioner can avail himself in this proceeding, to say nothing of his right to be registered. - Affirmed.¹²¹

This verbiage seems almost comically perverse. Alabama's argument seems to be that if the provisions authorizing the registrars were unconstitutional, there was no deprivation of the right to vote because there were no registrars. At best this unedifying wordplay might be taken to mean that if Alabama officials lacked authority under state law—to act unconstitutionally—they could not have so acted, and therefore did not. But if so, the reader will detect the federal question the United States Supreme Court purported not to see—the question of the meaning of “state action” that was answered in *Home Telephone*.¹²²

The Supreme Court was more forthcoming, and Justice Holmes true to his word on damages, decades later in the well known case of *Nixon v. Herndon*.¹²³ There, under the fourteenth amendment, the Court held, reversing the court below, that black qualified voters could sue state election officials for damages for denial of the right to vote in a primary election. Despite Holmes's pessimism about judicial power to right “great political wrongs,” he could now say, “The objection that the subject matter of the suit is political is little more than a play upon words.”¹²⁴ Here, no doubt, he meant to distinguish damages **(1991) BYU L. Rev. 757** from injunctions, since he cited *Giles v. Harris*.¹²⁵ No mention was made of the Civil Rights Act; the action appears to have been brought directly under the Constitution.

Although judicial unwillingness to deal with the problem of suffrage for black Americans is patent in most of these cases, the cases also show that with or without the Civil Rights Act, civil rights litigation would

121. *Id.* (quoting *Giles v. Teasley*, 136 Ala. 228, 229-30, 33 So. 820, 821 (1903)).

122. *See supra* notes 20-21 and accompanying text.

123. 273 U.S. 536 (1927). *See also* *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932).

124. *Herndon*, 273 U.S. at 540.

125. *Id.* (citing *Giles v. Harris*, 189 U.S. 475 (1903)).

occur in both state and federal courts. From this very brief glimpse into the past I think we can conclude that the essential condition for such litigation was the existence of a right commensurate with a then-public wrong. By keeping short the list of actionable constitutional rights, the *Slaughter-House Cases*¹²⁶ did indeed relinquish much of the opportunity opened up by the fourteenth amendment. Little else in the standard “unhappy history” seems relevant to solving the *Monroe* mystery.

F. Summing Up: The Monroe Mystery Solved

The key to the *Monroe* mystery is not found in the “unhappy history” of civil rights litigation. Rather, it seems to lie in the Warren Court’s incorporation of the Bill of Rights, most significantly those rights affecting the criminal process, into the fourteenth amendment. The trick of *Monroe* was to make swords out of these shields—to make these new rights actionable.¹²⁷

(1991) BYU L. Rev. 758 III. THE *Bivens* MYSTERY

Thus far I have confined discussion to *Monroe*. But an interesting similar question arises for civil rights cases against federal officials—the so-called “*Bivens*” cause of action. I want to take a brief look at that question here.

126. 83 U.S. (16 Wall.) 36 (1872) (holding the privileges and immunities clause protected only fundamental rights of federal citizenship). The Court’s interpretation of “fundamental” was narrow; the rights thus protected generally were already protected elsewhere in the Constitution or laws; and thus the privileges and immunities clause of the fourteenth amendment was rendered virtually without utility. *See supra* text accompanying notes 13-16, 67. Since 1873, the Court has twice rejected the proposition that the privileges and immunities clause incorporates the Bill of Rights. *See Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900).

127. It is important to note that section 1983 has latterly become a fount of *nonconstitutional* rights as well. Not only will an action lie under section 1983 for state violation of a federal statute, *Maine v. Thiboutot*, 448 U.S. 1 (1980), but also for state violation of the commerce clause, *Dennis v. Higgins*, 111 S.Ct. 865 (1991), and even for violation of immunity from preempted state regulation, *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989) (holding available a section 1983 action to challenge preempted state action, although preemption is generally a defense, but declining to hold the action lies for all violations of the supremacy clause). *But see, e.g.*, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Public Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237, 248 (1952) (federal defense does not become a federal claim simply because pleaded as such in an action for declaratory relief).

The 1971 case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹²⁸ was another well known exercise in Supreme Court creativity in the field of civil rights. *Bivens* arose on fourth amendment facts fairly like those of *Monroe*, except that the defendants were federal, rather than state, officials. In *Bivens* the Court held that, even in the absence of a statutory cause of action, a civil rights action for damages could be brought against federal officials for violation of a constitutional right.¹²⁹ In effect, in *Bivens*, the Supreme Court created a non-statutory civil rights “act.”

There is, indeed, a *Bivens* “mystery.” The world before *Bivens* is not explained, as the *Monroe* mystery is, by a dearth of rights. The Bill of Rights was always available in such cases; it needed no incorporation into anything else. It also may seem puzzling that for a hundred years following the enactment of the Civil Rights Act of 1871, Congress did not act to make federal civil rights violations equally actionable against federal officials.

A. The “Unhappy History” of Suits Against Federal Officers

Obviously a great obstacle to imposing liability on federal officials for their constitutional torts was the absence of a section 1983—there was no special statutory cause of action against federal officials for violations of the Constitution. Yet *Ex parte Young*¹³⁰ and *Osborn*,¹³¹ though against state officials, were prototypical *Bivens* cases in that they were actions directly under the Constitution, without benefit of statutory authorization. Thus, the absence of civil rights damages suits against federal **(1991) BYU L. Rev. 759** officials seems unexplained by the absence of a statute authorizing suit against them.

I pause to note that what is wrong with cases like *Franchise Tax Board* is that the availability to the declaratory defendant of injunctive relief under federal law should be enough to ground the declaratory plaintiff’s federal question. Declaratories are supposed to encompass anticipatory actions. What gives difficulty to the Court in cases like *Franchise Tax Board* is that injunction suits themselves are anticipatory actions. Declaratories anticipating injunction suits double the anticipations.

128. 403 U.S. 388 (1971).

129. *Id.* at 391-92.

130. 209 U.S. 123 (1908).

131. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

In his famous concurrence in *Bivens*, Justice Harlan suggested that there always had been a judge-made action for the constitutional torts of federal officers. He spoke of “the presumed availability” of equity.¹³² Given relief against federal officials in equity for threatened violations of the Bill of Rights, the question then became, “Why not damages?” Thus, presuming the availability of equity, Justice Harlan adroitly could frame the problem the case presented as one of remedy only.

But the background here is different from the background of *Ex parte Young* and *Monroe*, and Justice Harlan’s formulation simply skirts the difficulties. The problem was not so much one of claim as of defense, not so much want of judicial lawmaking power as the enormity of national sovereign immunity.

Contrary to Justice Harlan’s assumption, early actions for specific relief against federal officers¹³³ were similar to such suits at common law in that they shared a dependence on state-law tort theory.¹³⁴ Such actions if brought in state court generally were removed to federal.¹³⁵ Although such actions against federal officials might well succeed, in some the sovereign immunity of the nation seems to have extended to cloak the defendant official. At these times the Court has tended to conceptualize the problem as a failure to substitute the United States as the defendant party.¹³⁶ Later, especially after *Ex parte Young*,¹³⁷ actions against federal officers for specific relief from constitutional torts do occur and share *Ex parte Young*’s use of an authority-stripping rationale to avoid the

132. *Bivens*, 403 U.S. at 398 (Harlan, J., concurring) (citing no authority). Suits for declaratories or injunctions to block enforcement of allegedly unconstitutional acts of Congress do seem to have been accepted even after *Erie*, without inquiry into the basis of the cause of action. *E.g.*, *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947).

133. *E.g.*, *United States v. Lee*, 106 U.S. 196 (1882).

134. Attorney General’s Comm’n on Administrative Procedure, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 81, S.Doc. No. 8, 77th Cong., 1st Sess. (1941).

135. *See* 28 U.S.C. § 1442(a) (1988).

136. *E.g.*, *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371 (1945); *Louisiana v. Garfield*, 211 U.S. 70 (1908).

137. 209 U.S. 123 (1908) (holding federal injunction against state official not barred by eleventh amendment because official stripped of authority to act by violation of the Constitution).

sovereign immunity problem.¹³⁸ Nevertheless, if specific relief against individual officers **(1991) BYU L. Rev. 760** would impact on the federal treasury or assets, it remained unavailable.¹³⁹

But whatever the early history of claims for specific relief against federal officials—and it is a tangle of difficult and inconsistent cases¹⁴⁰—by 1971 the option of a federal analog to *Ex parte Young* had been seriously compromised by the 1949 case of *Larson v. Domestic & Foreign Commerce Corp.*¹⁴¹ *Larson* was an action for an order to the War Assets

138. See, e.g., *Shields v. Utah Idaho Central R.R.*, 305 U.S. 177 (1938); *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110 (1936).

139. See generally Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV.L.REV. 1 (1963). Note the analogy to *Edelman v. Jordan*, 415 U.S. 651 (1974) (state officials).

140. Successful pre-*Bivens* declaratories and injunctions against federal officers emerge with greatest clarity in the Fifties. See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); see also *Bolling v. Sharp*, 347 U.S. 497 (1954) (Washington, D.C.). Earlier cases permitting specific relief include *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (action by property owner for an injunction restraining the Secretary of War from enforcing federal criminal law forbidding construction of wharf beyond harbor line; action lies for abuse of power; prohibitory relief); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930) (affirmative relief); *Tindal v. Wesley*, 167 U.S. 204 (1897) (same).

Specific relief in actions at law was even more problematic, before mandamus became statutory in 1962. Mandamus and Venue Act of 1962, Pub.L. No. 87-748, § 1(a), 76 Stat. 744 (codified at 28 U.S.C. § 1361 (1988)). Chief Justice Marshall thought mandamus at least theoretically available in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding mandamus unavailable in original jurisdiction of Supreme Court without independent basis of original jurisdiction). Apart from its obvious limitations as a remedy for the withholding of “ministerial” action only, mandamus has been afforded only very grudgingly. E.g., *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 543-44 (1937) (mandamus against a federal official not available where another remedy was); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619-26 (1838) (holding mandamus against a federal official available only in the Circuit Court for the District of Columbia; but see Mandamus Act, supra); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604-05 (1821) (holding mandamus against a federal official unavailable in state courts where unavailable in federal).

Federal injunctive power, indeed, became infected by the difficulties plaguing mandamus. See, e.g., *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958) (suit for mandatory injunction should be judged by same standards as mandamus). See also 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 169 (2d ed. 1983) (injunction or

Administrator to prevent the transfer to another of coal claimed by the plaintiff. The Supreme Court affirmed dismissal, agreeing with the district court that this was relief against the sovereign. Of course the government ought not to be impeded in its essential governmental functions, and it might be thought that *Larson* could be cabined on some such analysis. But it is hard to sort out a discrete (1991) **BYU L. Rev. 761** category of such cases from all suits against officials acting in official capacity. Indeed, the Supreme Court has quite recently pulled *Larson* into an important discussion of federal judicial power in actions against state officials, expressing serious doubt about the authority-stripping rationale of *Ex parte Young*.¹⁴²

Even if we are willing to go the distance with Justice Harlan in *Bivens* and presume the availability at that time of a federal constitutional cause of action in equity, damages actions against federal officials would have seemed extremely problematic. In such cases Congress traditionally waived sovereign immunity but substituted the United States as defendant.¹⁴³ None of these statutory actions provided damages for constitutional or other intentional torts.

It seems not irrelevant to the happening of *Bivens* that *Erie* was decided. *Erie* sorted out the respective common law powers of the nation

declaratory superior to statutory review or mandamus provided word “mandatory” does not modify “injunction”).

141. 337 U.S. 682 (1949).

142. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). For the view that *Pennhurst's* reliance on *Larson* was a serious challenge to *Ex parte Young*, and for a discussion of the “official capacity” problem in *Pennhurst* and other official capacity cases, see Weinberg, *supra*, note 104, at 1075.

143. *E.g.*, Federal Tort Claims Act of 1946, Ch. 646, 62 Stat. 842 (codified as amended at 28 U.S.C. § 1346(b) (1988)). *See also* Equal Access to Justice Act of 1980, Pub.L. No. 96-481, 94 Stat. 2325 (codified as amended at 28 U.S.C. § 2412 (1988)) (generally authorizing attorney’s fees against the United States under private litigation standards); Tucker Act of 1887, Ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1988)) (general waiver of immunity for contract claims). For a typical specific statutory waiver, see, e.g., Civil Rights Act of 1964, Pub.L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-16 (1988)) (waiver of immunity for claims of discrimination in federal employment). For statutory review of administrative agency action, see Administrative Procedure Act of 1966, Pub.L. No. 89-554, 80 Stat. 392 (codified at 5 U.S.C. §§ 701-06 (1988)) [hereinafter “APA”]. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

and the states, and thus cleared the way for unambiguously *federal* common law, binding on the states under the supremacy clause.¹⁴⁴ Between 1938, when *Erie* was decided, and 1971, when *Bivens* was, the question of a common law action for federal violations of civil rights was raised importantly in two cases in the Supreme Court. But in both *Wheeldin v. Wheeler*¹⁴⁵ and *Bell v. Hood*,¹⁴⁶ the Court was able to avoid the issue and (1991) **BYU L. Rev. 762** rule on other grounds. Thus, in *Bivens*, on the deeply difficult issue of a remedy in damages for constitutional tort, neither Justice Harlan's concurrence nor Justice Brennan's opinion for the Court had much to offer in the way of precedent beyond *J.I. Case Company v. Borak*.¹⁴⁷ *Borak*, though a case of implied private right, was not a case of constitutional tort, but only an action between private parties for violation of the securities laws.

Against the background surveyed briefly here, the emergence of *Bivens* seems mysterious indeed. The case appears out of the blue.

B. The Happier Aftermath: Congress Steps In

Events since "*Bivens*" have strengthened the legitimacy of both damages actions¹⁴⁸ and injunction suits¹⁴⁹ against federal officials.

144. See *supra* note 35 and accompanying text; see generally Weinberg, *Federal Common Law*, 83 *Nw.U.L.Rev.* 805 (1989).

145. 373 U.S. 647 (1963) (in action under fourth amendment challenging unauthorized House of Representatives committee subpoena, avoiding the question whether a cause of action existed by construing the fourth amendment as inapplicable on the facts).

146. 327 U.S. 678 (1946) (holding that action for damages for violation of fourth amendment states federal question; remanding for determination whether cause of action existed). On remand, the district court dismissed. 71 *F.Supp.* 813 (S.D.Cal.1947).

147. 377 U.S. 426 (1964) (cited in *Bivens*, 403 U.S. at 397 (Brennan, J.), 407 (Harlan, J., concurring)). The *Bivens Court* also offered as precedential support the suffrage cases canvassed *supra* notes 99-125 and accompanying text. *Bivens*, 403 U.S. at 395-96.

148. See *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing nonstatutory action for wrongful death against a federal official under eighth amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing nonstatutory action for wrongful dismissal from employment against a congressman under fifth amendment). *But see Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining to extend *Bivens* in presence of assertedly comprehensive statutory remedial scheme); *Bush v. Lucas*, 462 U.S. 367 (1983) (same).

Congress's first significant step in this post-*Bivens* effort was not especially helpful; in 1974 Congress amended the Federal Tort Claims Act to substitute the United States as defendant in certain cases of intentional tort.¹⁵⁰ *Bivens* survives this only because the Court recognizes that the two remedies serve different purposes.¹⁵¹ An action against an individual may have greater deterrence value, especially since punitive damages **(1991) BYU L. Rev. 763** are available under *Bivens*, but not under the Federal Tort Claims Act; the plaintiff may want trial by jury, also not available under the Act; and *Bivens*, unlike the Federal Tort Claims Act, does not depend on finding an actionable right under state law.

More effectively, in 1976 Congress enacted an amendment to the Administrative Procedure Act that appears to be an analog to *Ex parte Young*.¹⁵² The amendment provides that in a nonmonetary suit against a government official acting in official capacity, the United States need not be joined or substituted as a party.

Little in this brief review of *Bivens*' "unhappy history" and its aftermath helps to solve the *Bivens* mystery. What, then, does account for the fashioning of the *Bivens* cause of action, 100 years after the Civil Rights Act of 1871?

C. *The Bivens Mystery Solved?*

149. Of special interest on federal injunctive power against federal officials, although not a civil rights case, is *United States v. Nixon*, 418 U.S. 683 (1974) (sustaining subpoena ordering President to turn over the "Watergate" tapes needed for evidence in a criminal prosecution).

150. Act of March 16, 1974, Pub.L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. §§ 2680(h) (1988)).

151. *See, e.g., Carlson*, 446 U.S. at 20-23 (*Bivens* remedy needed apart from statutory remedy, as it serves different purposes). Congress amended the Act again in 1988 to conform it to the Court's view. *See* 28 U.S.C. § 2679(b)(2)(A) (as amended Nov. 18, 1988, by the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. 100-694, §§ 5, 6, 102 Stat. 4564) (Federal Tort Claims Act is exclusive remedy against federal employees acting within scope of their employment except for *Bivens* actions). *Cf. United States v. Smith*, 111 S.Ct. 1180, 1185 (1991).

152. Act of October 21, 1976, Pub.L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. § 702 (1988)); *see Warin v. Dep't of Treasury*, 672 F.2d 590 (6th Cir.1982) (stating that the Act as amended is a waiver of sovereign immunity for nonstatutory constitutional torts by federal officials), and cases there cited.

I strongly suspect that the solution to the mystery of *Bivens* is linked to *Monroe v. Pape*. With *Monroe v. Pape*, after all, the Bill of Rights was wrenched oddly out of context. Rights intended to protect the individual from the nation were now actionable not against the nation but against the states. After *Monroe* the rationalizing pressure for *Bivens* would, and did, become irresistible.¹⁵³ It took only ten years from *Monroe* for *Bivens* to happen.

A minor weakness in this supposition is, of course, *Wheeldin v. Wheeler*.¹⁵⁴ *Wheeler* more or less presented the *Bivens* (1991) **BYU L. REV. 764** problem to the Supreme Court two years after *Monroe* was in place, and eight years before *Bivens*. No doubt the Court might have read the fourth amendment more broadly in order to do in *Wheeler* what it eventually did in *Bivens*. Instead, the Court sidestepped the question of a private right to sue for damages by holding, on the facts in *Wheeler*,¹⁵⁵ that there was no violation of the fourth amendment.¹⁵⁶ As to this, it seems reasonable to speculate that when *Bivens* finally did come before the Court, *Wheeler* may well have begun to look less like statesmanship and more like a missed opportunity. Recall that *Bivens* was handed down, and the Bill of Rights at last made enforceable in damages actions against federal officials, in the centennial year of the Civil Rights Act of 1871.

The civil rights litigation story does not have a particularly happy ending. Today, Justice Gray's concerns about requiring an official to pay

Arguably *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 3177 (1990) (recognizing that official federal violations of federal environmental statutes may be challenged under the Administrative Procedure Act), furnishes a federal analog of the so-called *Thiboutot* cause of action under section 1983. See *Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that section 1983 gives a cause of action for a state official's or agency's violation of federal statutes as well as of the Constitution); Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM.L.REV. 233, 254-55 (1991).

153. See Weinberg, *Federal Common Law*, *supra* note 144, at 844-45.

154. 373 U.S. 647 (1963) (seeing no necessity to reach the question whether a private cause of action lay for violation of the fourth amendment because holding there was no violation of the fourth amendment on the facts; the action was for damages against a federal official for stigmatizing the plaintiff with an unlawful subpoena to appear before the House Un-American Activities Committee).

155. *Id.* at 652.

156. *Id.*

personal damages for official actions¹⁵⁷ and Justice Holmes's concerns about the efficacy of injunctions to right political wrongs¹⁵⁸ have not gone away. The *Bivens* action is hedged round with proliferated official immunities defenses just as the *Monroe* action is.¹⁵⁹ And recently the Supreme Court has refused to extend the *Bivens* action beyond the rights earlier made actionable under *Bivens*.¹⁶⁰

Today civil rights claims seem disfavored. Post-*Monroe* and -*Bivens* claims are heavily burdened with defenses.¹⁶¹ Success on a civil rights claim is probably less likely than success on an ordinary state law tort.¹⁶² The hesitations that shaped the "unhappy history" are still with us.

(1991) BYU L. Rev. 765 IV. CONCLUSION

The operative feature of *Monroe v. Pape* was that it took the Bill of Rights, then in the process of "incorporation" into the due process clause of the fourteenth amendment, and showed how to ground civil rights litigation in it. The "incorporated" criminal process rights, in particular, were important in giving characteristic shape to the civil rights action for damages. This is far from the conventional "color of" law understanding of the contribution of *Monroe v. Pape*, and not very relevant to the "unhappy history" model of the dormancy of the Civil Rights laws before *Monroe*. Also the emergence of the *Bivens* action in the midst of a welter of federal statutory remedies probably was a consequence of *Monroe*. A rationalized jurisprudence required that individual rights intended as a

157. See *supra* notes 103-06 and accompanying text.

158. See *supra* notes 114-17 and accompanying text.

159. See *supra* note 105. Indeed, remanding in *Bivens*, Justice Brennan, for the Court, left to the court below the question whether the defendants were entitled to a defense of official immunity. *Bivens*, 403 U.S. at 307-08. I do not mean to suggest that, long before *Bivens*, official immunities defenses were not found for federal officials in actions for damages under state law. Cf., e.g., *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1826) (holding there was a defense of good faith in action against a collector of customs for damage to goods wrongly detained under orders from the Secretary of the Treasury).

160. See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983).

161. See *supra* note 97 and accompanying text.

162. See generally Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L.REV. 641 (1987).

shield against the nation, but made actionable only against the states, should be made actionable against the nation also. Thus, the selective incorporation of the Bill of Rights has had the broadest possible implications for civil rights litigation. The massive superstructure of defenses against and limitations upon civil rights claims are reactions to these developments.

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