February 1989

Section 1983 Discourse: The Move from Constitution to Tort

Sheldon Nahmod
IIT Chicago-Kent College of Law, snahmod@kentlaw.iit.edu

Section 1983 Discourse: The Move From Constitution to Tort

SHELDON NAHMOD*

> "[The] purpose [of Section 1983] is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.' "[1]
>
> "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[2]
>
> "[Section 1983] creates a species of tort liability . . . ."[3]
>
> "Section 1983 is a tort statute."[4]

INTRODUCTION

This Article will discuss the language used by the Supreme Court in § 1983 cases.[5] The language in these cases typically has included both constitutional rhetoric and tort rhetoric. Increasingly, however, the Court has moved from using constitutional rhetoric to emphasizing tort rhetoric. That is, the "background" of tort liability against which the Court interprets § 1983 has moved to the foreground of § 1983 discourse and now frequently occupies a central role in § 1983 jurisprudence. This shift in rhetoric has affected the particular substantive doctrines—the rules of law—associated with constitutional and tort law and has implications for the Court's view of federalism and political society as well.

Indeed, this shift in emphasis from constitutional rhetoric to tort rhetoric

---

* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. A.B., University of Chicago; J.D., LL.M. Harvard University. I would like to thank the following colleagues for their helpful comments on an earlier draft of this Article: Lewis Collens, Stuart Deutsch, Howard Eglit, David Gerber, Linda Hirshman, Gordon Hylton, Andrea Ravin, Joan Steinman, Margaret Stewart, and Richard Wright.

1. Monroe v. Pape, 365 U.S. 167, 171 (1961) (quoting 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1982)).
2. *Id.* at 187.
3. Imbler v. Pachtman, 424 U.S. 409, 417 (1976).
4. Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982) (Posner, J.).
5. 42 U.S.C. § 1983 reads as follows:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

may be understood as a deliberate and strategic exercise of judicial power by the Supreme Court. By determining the nature of § 1983 discourse, the Court can ensure that § 1983 issues are addressed in tort terms.[6] I argue that the Court, by using tort rhetoric, is attempting to marginalize § 1983 and to make it less protective of fourteenth amendment rights.[7] I further maintain that by couching § 1983 interpretation issues in tort rhetoric, the Court is able to send increasing numbers of proposed § 1983 actions to state courts to be disposed of on state law grounds.

In Part I of this Article, I describe the changing nature of the discourse used in important § 1983 cases decided by the Supreme Court. These cases illustrate the Court's increasing reliance on tort rhetoric to provide a framework for thinking about § 1983.

In Part II, I consider several theories of discourse which have their origins in the writings of Nietzsche. These theories have recently become prominent through the writings of, among others, Michel Foucault, a post-structuralist who has studied the discourses of madness, human sexuality, and knowledge. Foucault believes language structures the ways that we think about things. Under such a view, the Supreme Court's increased use of tort rhetoric in § 1983 jurisprudence will necessarily influence judges' decisions in § 1983 cases and lawyers' and scholars' perceptions of § 1983 actions.

In Part III, I evaluate several of the consequences of the Court's adoption of tort frames of analysis for deciding § 1983 cases. First, the increasing prominence of tort rhetoric in the § 1983 setting allows the Court to place more state conduct outside the scope of the fourteenth amendment. Second, using tort rhetoric enables the Court to decide § 1983 cases using tort law doctrines. Thus, the use of tort rhetoric allows the Court to manipulate tort doctrines and related cost-benefit analyses to limit the scope of § 1983. Finally, the use of tort rhetoric in § 1983 cases has subtle and deep implications for differing theories of federalism, for the state-citizen relationship, and for one's view of political society.

Curiously, the early characterization by commentators and courts of § 1983 actions as "constitutional torts"[8] has probably tended to encourage the use of tort rhetoric. Consider that the noun of the term is "tort" while

---

6. This analysis of § 1983 discourse includes only Supreme Court decisions. A thorough study would analyze the rhetoric of all important federal and state § 1983 decisions, as well as assess law review articles discussing § 1983. Nevertheless, because federal and state courts, lawyers, and commentators look to the Supreme Court for guidance regarding § 1983 issues, a study of Supreme Court discourse alone is useful.

7. This is the case even though it is often argued that if § 1983 is not narrowed, the fourteenth amendment will become a "font of tort law." *See* Paul v. Davis, 424 U.S. 693, 701 (1975) (protecting interest in reputation with fourteenth amendment would make amendment a "font of tort law to be superimposed upon whatever systems may already be administered by the States").

8. Justice Brennan, writing the majority opinion in Monell v. New York City Department of

the adjective is "constitutional." Describing § 1983 actions as "constitutional torts" suggests prominence for the noun and minimizes the adjective. This description also implies that the essence of a § 1983 action is a tort action even though this essence may have some constitutional significance. In retrospect, it would have been preferable to characterize § 1983 unambiguously as creating a fourteenth amendment action for damages.[9]

I. AN OVERVIEW OF § 1983 DISCOURSE

By virtue of its language, § 1983 does in some ways resemble a tort statute, and the Court has always taken that into consideration when deciding § 1983 cases.[10] However, the Court's recent tendency to liken § 1983 to a simple tort cause of action has allowed it to limit the range of "rights, privileges, or immunities" protected by the section. It is important to see how this recent tendency differs from the Court's initial focus with respect to § 1983, when it merely made reference to tort law. The increasing use of tort rhetoric has allowed the Court to transform § 1983, thereby diluting the protection it offers to persons whose constitutional rights have been violated.

A. CONSTITUTIONAL RHETORIC

This section examines three § 1983 cases in which the Court was especially solicitous of the plaintiffs. Although the Court in these cases occasionally

---

Social Services, 436 U.S. 658 (1978), used the term "constitutional tort." *Id.* at 691; *see also* Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965).

9. I do not mean to suggest that the term "constitutional tort" standing alone exerted a determinative influence on the Supreme Court's § 1983 discourse, but only that it was a factor in making the Court's shift to tort rhetoric somewhat easier than it might otherwise have been.

10. The language of § 1983 that can be characterized as constitutional rhetoric includes "color of [law]" and "to the deprivation of any rights, privileges, or immunities secured by the Constitution." The tort rhetoric is captured in "subjects, or causes to be subjected" and "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

Tenney v. Brandhove, 341 U.S. 367 (1951), is an example of an early use of tort rhetoric by the Court. Ten years before the seminal decision in *Monroe v. Pape,* discussed *infra* text accompanying notes 11-18, the *Tenney* Court gave priority to tort rhetoric and the common law tort doctrine of official immunity when it held that state legislators are absolutely immune from § 1983 damages liability. *Id.* at 376. However, the significance of *Tenney,* at least when it was decided, was minimal because the scope of the § 1983 cause of action itself was then so limited. This then-limited scope of § 1983 reflected a "[r]estrictive application of the state action doctrine, a narrow reading of the fourteenth amendment's privileges and immunities clause, a similarly narrow reading of § 1983's jurisdictional counterpart, and the Court's refusal to incorporate completely the provisions of the Bill of Rights." S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at § 2.02, at 74 (2d ed. 1986 & Supp. 1989) (citations omitted).

Still, *Tenney* should not be minimized. For the first time in a § 1983 setting, the Court expressly emphasized tort rhetoric. Ultimately, *Tenney*'s approach to interpreting § 1983 against a background of common law tort immunities may be viewed as a precursor to the Court's use of tort rhetoric in the late 1970s and 1980s. *See infra* note 127 and accompanying text (discussing use of tort doctrines to narrow scope of § 1983).

referred to tort law in its constitutional analyses, such references were incidental and did not limit the relief granted.

In 1961, the Court in *Monroe v. Pape*[11] gave life to § 1983 in holding that § 1983 provides a remedy for persons deprived of their fourteenth amendment rights by a state official's abuse of his position.[12] The Court thereby interpreted the phrase "under color of [law]" to include acts of state officials that are illegal under state law.[13] This decision was in large measure responsible for the treatment of § 1983 as the equivalent of a fourteenth amendment action for damages.

In *Monroe,* constitutional rhetoric dominated. The Supreme Court emphasized that even if a state law remedy existed for the § 1983 plaintiffs, the drafters of § 1983 meant to provide a supplemental federal remedy for cases in which states are either unwilling or unable to enforce fourteenth amendment rights.[14] In addition, the Court held that § 1983 does not require plaintiffs to exhaust state remedies before bringing a § 1983 action.[15]

Justice Harlan said it best when he asserted that § 1983 reflects the view that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[16]

Implicit in this view is the idea that § 1983 was enacted to enforce the fourteenth amendment, and that in many cases persons deprived of fourteenth amendment rights should receive relief different from and additional to what state courts would award for trespass or other common law torts.[17] States could not be relied on to ensure compliance with the fourteenth

---

11. 365 U.S. 167 (1961).

12. *Id.* at 172. In *Monroe,* petitioners alleged that 13 Chicago police officers broke into and ransacked their home. They further alleged that the officers arrested Mr. Monroe without a warrant and failed to take him before a magistrate. *Id.* at 169. The Illinois Constitution and Illinois law prohibited such unreasonable searches and seizures. *Id.* at 172 n.6.

13. *Id.* at 183. The Court's holding was significant: if "color of law" were *narrower* than the fourteenth amendment's state action requirement, then persons injured by official conduct violative of both the fourteenth amendment and state law could only seek damages under state law in state courts. I argue in this Article that because the use of tort rhetoric improperly tends to convert § 1983 actions into tort actions that could readily be decided in state courts using state law, the dominance of tort rhetoric amounts in a very real sense to the gradual overruling of *Monroe*'s "color of law" holding.

14. *Id.* at 174-76.

15. *Id.* at 183.

16. *Id.* at 196 (Harlan, J., concurring).

17. *Id.* at 196 n.5:

> There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right.

amendment, and a federal remedy was necessary in cases in which states were unwilling to prosecute state officials who had violated the fourteenth amendment. However, *Monroe* did not use constitutional rhetoric exclusively: tort rhetoric also played a role in its § 1983 interpretation. In particular, the Court insisted that § 1983 was to be interpreted against a "background of tort liability that makes a man responsible for the natural consequences of his actions."[18] Tort doctrines enabled the *Monroe* Court to conclude that the allegedly intentional conduct of the defendants was covered by § 1983.

The Court also emphasized constitutional rhetoric in *Monell v. New York City Department of Social Services,*[19] a 1978 decision in which the Court, overruling part of *Monroe,* held that local government entities may be sued under § 1983.[20] Most of Justice Brennan's majority opinion focuses on § 1983's legislative history in an effort to determine whether Congress intended local governments to be immune from suit under § 1983. In its discussion of legislative history, the Court emphasized constitutional rhetoric. For example, the Court quoted Representative Shellabarger's statement that the function of § 1983 was to provide a civil remedy for all persons "'where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.' "[21]

In addition, the Court stated that the municipalities in question could not assert that they acted in reliance on the prior law of absolute immunity.[22] The court affirmed that "municipalities simply cannot 'arrange their affairs' on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement."[23] Moreover, the Court emphasized that "there can be no doubt that section 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[24]

It is true that the Court in *Monell* described § 1983 as a "constitutional

18. *Id.* at 167 (majority opinion).

19. 436 U.S. 658 (1978).

20. *Id.* at 663. The Court overruled the portion of *Monroe* which held that the City of Chicago could not be liable under § 1983. *Monell,* 436 U.S. at 663. In *Monell* a class of female employees sued the New York City Board of Education for injunctive relief and back pay, claiming that they had been compelled to take unpaid leaves of absence during their pregnancies. *Id.* at 661. The employees' ability to recover damages under § 1983 turned on whether the city and the Board could be sued. *Id.* at 663.

21. *Id.* at 683.

22. *Id.* at 699-700.

23. *Id.* at 700.

24. *Id.* at 700-01.

tort"[25] and discussed the policies underlying the tort doctrine of respondeat superior. Nonetheless, the Court did not allow its use of tort language to determine the substantive result in the case; it ultimately ruled against the applicability of respondeat superior to § 1983 actions on two grounds.[26] First, the Court considered § 1983's "subjects, or causes to be subjected" language to be incompatible with respondeat superior liability.[27] Second, the Court reasoned that the policy objectives underlying respondeat superior liability in the tort setting had been rejected by the 42nd Congress.[28] Consequently, this tort doctrine was found by the Court to be inapplicable to § 1983.

Constitutional rhetoric was similarly dominant in *Owen v. City of Independence,*[29] in which the Court held that local governments are not protected by an immunity based on the good faith of their officers and agents.[30] After determining that there was no tradition at common law of qualified good faith immunity for local governments, the Court emphasized the significance of § 1983 as a remedy for the vindication of fourteenth amendment rights. It stated: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed."[31] The Court went on to observe that § 1983 was designed not only to compensate for past constitutional deprivations but "to serve as a deterrent against future constitutional deprivations, as well."[32] It also pointed out that local government liability without a qualified immunity protection "may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[33] Finally, the Court explained its individual qualified immunity cases as not understating the significance of constitutional compliance but rather as recognizing that "overriding considerations of public policy" require individual government officials to be afforded qualified immunity protection.[34] Those concerns, however, were

25. *Id.* at 691.
26. *Id.*
27. *Id.* at 692. Elsewhere, I have argued that the Court was incorrect on this point. *See* S. NAHMOD, *supra* note 10, § 6.07, at 350-51 (*Monell*'s conclusion is better put in no-duty terms).
28. *Monell,* 436 U.S. at 692. The Court referred to accident reduction and cost-spreading as two of the policy objectives underlying respondeat superior liability.
29. 445 U.S. 622 (1980).
30. *Id.* at 638. In *Owen,* the chief of police of Independence, Missouri, alleged that he had been discharged from his duties without a hearing in violation of his right to due process. *Id.* at 630.
31. *Id.* at 650-51.
32. *Id.*
33. *Id.* at 652 (citation omitted).
34. *Id.* at 653.

either inapplicable or not compelling with regard to local government liability.[35]

Even *Owen,* also authored by Justice Brennan, was not free of tort language. The Court at the end of its opinion maintained that insofar as doctrines of tort law had changed since § 1983 was enacted in 1871, "our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."[36] The Court concluded by asserting that its decisions in this and other immunity cases properly allocated the costs of constitutional violations among the victim, the officer causing the injury, and the public at large.[37] In so doing, the Court expressly sanctioned the use of cost-benefit analysis in § 1983 interpretation.

B. TORT RHETORIC

In *Monroe, Monell,* and *Owen,* the Court placed constitutional rhetoric in the foreground of § 1983 interpretation. In contrast, in the individual immunity cases that followed on the heels of *Monroe,* the Court increasingly used tort rhetoric to shape the outcome.[38] The Court also used tort rhetoric extensively in a case presenting the question of whether presumed damages are available in a § 1983 suit, and in § 1983 cases involving alleged due process violations, particularly those with prisoner plaintiffs.

Pierson v. Ray,[39] decided in 1967, involved the question of individual officer immunity. In *Pierson* plaintiffs sued a justice of the peace and police officers for arresting and convicting them under an unconstitutional statute.[40] The Court held that the justice of the peace was protected by absolute judicial immunity and further held that the police officers could defend on the ground that they acted in good faith and with probable cause in making an arrest under a statute they believed to be valid.[41]

Pierson is noteworthy because the Court relied exclusively on doctrines of common law tort immunity. In concluding that the justice of the peace was

---

35. *Id.* at 654-56.
36. *Id.* at 657.
37. *Id.*
38. It was actually in Tenney v. Brandhove, 341 U.S. 367 (1951), that the Court first interpreted § 1983 immunity law in light of common law tort immunity rules. Thus, a full ten years before *Monroe, Tenney* in a very real sense had laid the foundation for the shift in rhetoric that is the subject of this Article. *See supra* note 10 (*Tenney* use of tort rhetoric influenced Court's use of tort rhetoric in later cases). Significantly, *Tenney* was authored by Justice Frankfurter, the sole dissenter in *Monroe.*
39. 386 U.S. 547 (1967).
40. *Id.* at 550.
41. *Id.* at 554-55, 557.

protected by absolute judicial immunity, the Court relied on an earlier legislative immunity decision and asserted that § 1983 must be interpreted against a common law tort background of absolute judicial immunity.[42] The Court reasoned that had Congress intended to abolish wholesale this common law immunity when it enacted § 1983, it would have done so explicitly.[43] In ruling on the police officers' defense of good faith immunity, the Court similarly looked at § 1983's common law tort background and concluded: "Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."[44]

Consequently, a clear pattern emerged: the Court would begin its inquiry with the common law of torts and proceed to use tort law as the basis for the § 1983 officer immunity rules it would ultimately apply.[45] Indeed, with few exceptions, the Court has accepted defenses of immunity in § 1983 actions.[46] Thus, absolute immunity protects prosecutors from damages liability under § 1983, just as it does under common law, provided that the conduct at issue was advocative.[47] The same is true for legislators who engage in legislative conduct.[48] As at common law, however, school board and prison officials are protected only by qualified immunity from § 1983 damages liability.[49]

---

42. *Id.* at 554 (citing *Tenney,* 341 U.S. at 367).

43. *Pierson,* 386 U.S. at 554-55.

44. *Id.* at 556-57.

45. This sequence has important implications. First, it gives undue prominence to the common law tort background at the expense of § 1983 policies. Second, it structures the interpretation of § 1983 by setting out a presumption that the common law of torts will prevail unless somehow rebutted. Thus, the sequence "loads" the inquiry in favor of applying common law tort doctrines.

46. One notable exception is Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Court held that high-ranking state executives are protected only by a qualified immunity despite the common law, which affords them absolute immunity. Acknowledging the important policy considerations supporting absolute immunity for such executives, the Court nevertheless felt compelled to reach its qualified immunity result to avoid "drain[ing § 1983] of all meaning." *Id.* at 248. In *Scheuer,* the common law background and public policy collided with the language of § 1983. *Id.* at 248.

47. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (same considerations of public policy that underlie common law rule of absolute immunity for prosecutors apply to suits brought under § 1983). *See generally* S. NAHMOD, *supra* note 10, §§ 7.13 to 7.14 (discussing policy of prosecutorial immunity in Supreme Court and lower courts).

48. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 403 (1979) (immunity of legislators constantly recognized at common law and taken as matter of course by United States' founders); Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (legislator's immunity for what is said and done in legislative proceedings rooted in parliamentary struggles of 16th and 17th centuries). *See generally* S. NAHMOD, *supra* note 10, §§ 7.02 to 7.05 (discussing various approaches to determining immunity of legislators).

49. *See* Wood v. Strickland, 420 U.S. 308, 320-21 (1975) (immunity limited to good faith exercise of responsibilities). *See generally* S. NAHMOD, *supra* note 10, §§ 8.02 & 8.07 (discussing treatment of school boards by courts). For a discussion of prison officials' immunity, see Procunier v. Navarette, 434 U.S. 555, 561 (1978) (prison officials have qualified common law immunity); *see also* S. NAHMOD, *supra* note 10, §§ 8.09 to 8.10 (discussing treatment of prison officials by Supreme Court and lower courts).

In 1978 the Court held in *Carey v. Piphus*[50] that presumed damages are not available in § 1983 procedural due process cases.[51] This case similarly reflects the change in emphasis from constitutional rhetoric to tort rhetoric. The *Carey* Court first asserted that the basic purpose of § 1983 liability was "to compensate persons for injuries caused by the deprivation of constitutional rights."[52] It then went on to declare: "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect."[53] The Court's characterization of compensation as the basic purpose of § 1983 tends to understate the significance of complying with the fourteenth amendment. In addition, its assertion that constitutional rights do not exist in a vacuum suggests that they do not have intrinsic value. Further, the comparison between constitutional and "other" rights implies that constitutional rights do not occupy a place higher than those other rights.[54]

The Supreme Court's view that § 1983 "creates a species of tort liability"[55]

---

50. 435 U.S. 247 (1978).

51. *Id.* at 264. In *Carey* two students claimed that they had been suspended from school without due process of law. *Id.* at 250. Neither of the students presented proof at trial of any actual injury sustained by reason of the alleged denial of due process. *Id.* at 251-52. The Court agreed with the court of appeals that if the schools could prove that the students would have been suspended even if a hearing had been held, the students would not be entitled to recover any damages for injuries caused by the suspensions. *Id.* at 260. The Court then considered the students' argument that they were entitled to recover damages which "could be presumed to flow from every denial of due process." *Id.* at 261. In refusing to award damages in the absence of proof of injury, the Court stated: "In sum, then, although mental and emotional distress caused by the denial of due process itself is compensable under section 1983, we hold that neither the likelihood of such an injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury was actually caused." *Id.* at 264.

52. *Id.* at 254. The Court stated later in its opinion that "[t]o the extent that Congress intended that awards under Section 1983 should defer the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Id.* at 257 (citing Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J. concurring)).

53. *Id.* at 254.

54. That violations of constitutional rights do not merit the award of additional damages was made even clearer in the Court's decision in Memphis Community Schools v. Stachura, 477 U.S. 299 (1986), in which the Court confronted a claimed first amendment violation. In *Stachura,* the Court ruled the following instruction to be erroneous:

> The precise value you place upon any Constitutional right which you believe was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

Id. at 303. As in *Carey,* the Supreme Court in *Stachura* emphasized what it called the primary purpose of § 1983: to *compensate* for actual injuries. *Stachura,* 477 U.S. at 307.

55. Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

is especially apparent in § 1983 cases alleging violations of due process. In its 1976 decision in *Paul v. Davis,*[56] a significant due process case, the Court moved tort rhetoric to the foreground of its analysis. In *Paul* the plaintiff alleged that the defendant law enforcement officers had damaged his reputation by publicly branding him as an "active shoplifter."[57] Writing for the Court, Justice Rehnquist ruled that injury to reputation, standing alone, is not a liberty or property interest for procedural due process purposes.[58] It is the Court's reasoning, however, that is especially pertinent. The Court responded to the plaintiff's fourteenth amendment interpretation by observing that such an interpretation "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[59] The Court went on to characterize the plaintiff's interest in reputation simply as one of the many interests that states could protect through tort law, "providing a forum for vindication of those interests by means of damages actions."[60]

At first blush, the Court appears to have been concerned in *Paul* that § 1983 *not* become a kind of tort statute. That is, one might read *Paul* as upholding the special status of § 1983 as different in kind from tort law. However, this is not an accurate reading of the decision. The Court told the plaintiff that his proposed § 1983 action was not different from a defamation action.[61] With this holding, the Court revealed a strategy that would later dominate its § 1983 procedural due process jurisprudence. The Court first described the proposed § 1983 action as the functional equivalent of a state tort action and then declared that state remedies were adequate, sending the matter to state courts where it belonged. The Court was not really saving § 1983 for important cases but was rather using tort rhetoric to undermine § 1983.[62]

In later § 1983 due process cases, the Court has explicitly relied on tort rhetoric to achieve the results it wanted. In particular, the Court has at-

---

56. 424 U.S. 693 (1976).

57. *Id.* at 696.

58. *Id.* at 712. Further, the Court found that no specific constitutional guarantee protected the interest that respondent claimed the police officers had harmed. *Id.* at 700.

59. *Id.* at 701. The Court ruled that due process protections only applied to state action that affected a right or status previously recognized by state law. *Id.* at 711. Since Kentucky law did not extend any legal guarantee of "present enjoyment of reputation," any harm to respondent's reputation did not deprive him of liberty or property such that the safeguards of the due process clause applied. *Id.* at 712.

60. *Id.* at 712.

61. Justice Brennan, dissenting in *Paul,* appears to have had this in mind when he complained that the majority should not have "characterized the (shoplifting) allegation as mere defamation involving no infringement of constitutionally protected interests." *Id.* at 720 (Brennan, J., dissenting).

62. *See infra* notes 156-71 and accompanying text.

tached significant weight to potential state court remedies and to tort states of mind. For example, in *Parratt v. Taylor,*[63] a prisoner claimed that prison authorities negligently lost certain hobby kit materials he had ordered, thereby depriving him of his property without due process of law.[64] Treating this claim as alleging a procedural due process violation, the Court, again through Justice Rehnquist, agreed with the prisoner that the hobby kit materials, worth $23.50, amounted to a property interest, and that the alleged negligence on the part of the defendants was enough to constitute a deprivation of that property interest.[65] However, the Court ruled that an apparently adequate state post-deprivation remedy was available to the prisoner in the state courts, where he would have had a meaningful opportunity to be heard.[66] The Court therefore declined to find the defendants liable under § 1983.

The reasoning in *Parratt* was couched in tort rhetoric. The Court began by observing that a pre-deprivation hearing was not feasible where only negligence and a random, unauthorized act were charged.[67] For this reason, stated the Court, the defendants could only reasonably be expected to provide a post-deprivation hearing.[68] In the view of the Court, the availability of this post-deprivation hearing satisfied requirements of procedural due process.[69] However, the Court's use of tort rhetoric may have led it to ignore the possibility that the plaintiff's property loss could have been avoided, or at least that the risk of such a loss could have been reduced, through the establishment of prison procedures for handling incoming inmate packages.[70]

Parratt reflected the Court's apparent preference for sending many proposed § 1983 procedural due process cases to state court, so that state tort principles would be applied in a post-deprivation hearing. The Court appears to have believed that cases involving prisoners who challenge the loss of personal property do not belong in federal court, where they require the expenditure of scarce judicial resources. Further, the Court apparently believed that such cases are essentially tort actions because they involve negligence; thus, state courts, not federal courts, should decide them—and on state law grounds, not federal grounds.[71]

---

63. 451 U.S. 527 (1981).
64. *Id.* at 529.
65. *Id.* at 536-37.
66. *Id.* at 541.
67. *Id.*
68. *Id.*
69. *Id.* at 543.
70. *Cf. Owen,* 455 U.S. at 652 (1980) (local government liability without qualified immunity protection may "encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights").
71. There was, however, an important and related aspect of *Parratt* that was *not* addressed in tort rhetoric but rather in constitutional rhetoric: the holding that § 1983 does not contain a state of

Tort rhetoric also influenced the Court in *Daniels v. Williams,*[72] a 1986 due process case in which a prisoner claimed that he was deprived of his "liberty to be free from bodily injury" when he slipped on a pillow that had been left on some prison steps.[73] The Court, partially overruling *Parratt,* held that mere negligence by a state official is not enough to deprive a person of his liberty of property under the fourteenth amendment.[74] The Court did not make clear the minimum state of mind required of a defendant before due process guarantees apply.[75] It reasoned that the due process clause was meant to protect against governmental abuses of power and that, consequently, more than negligence is required before the Court will find that a state has deprived a person of life, liberty, or property without due process of law.[76]

Even though the Court used constitutional rhetoric to assert that the due process clause was meant to prevent abuses of power, it made the question of the state officials' state of mind determinative of the threshhold inquiry in due process cases: was there a deprivation of a life, liberty or property interest? In *Daniels,* the Court's response was negative because the plaintiff alleged only negligence; accordingly, the Court did not need to reach the question of the availability of state post-deprivation remedies. In this way, the Court used state of mind requirements derived from tort law to cut back the scope of due process and thereby similarly to cut back the scope of

---

mind requirement. *Id.* at 534-35. After noting that nothing limits § 1983 to intentional deprivations of constitutional rights, the Court reiterated the two essential elements of a § 1983 action: 1) whether the conduct complained of was committed by a person acting under color of state law; and 2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or other laws of the United States. *Id.* The Court was unable to reach any other defensible holding. *See* S. NAHMOD, *supra* note 10, at § 3.02 (discussing general principles of liability). Nevertheless, by using tort rhetoric to decide the procedural due process issue—a constitutional ruling that could not be overturned by Congress—the Court achieved the result that it desired: to remove these cases from the federal docket.

Recently, the Court decided City of Canton v. Harris, 109 S. Ct. 1197 (1989), which held that local governments can be held liable for their failures to train police officers when such failures to train are deliberately indifferent to the rights of persons with whom the police come into contact. *Id.* at 1206. Significantly, tort rhetoric dominated the Court's opinion. In addition, the Court's assertion in *City of Canton* that deliberate indifference is a statutory requirement for local government liability, apart from the constitutional violation alleged, directly conflicts with the *Parratt* holding that § 1983 has no state of mind requirement. For further analysis of this point, see S. NAHMOD, *supra* note 10, at § 6.13 (Supp. 1989). *See generally* Nahmod, *Constitutional Accountability in Section 1983 Litigation,* 68 IOWA L. REV. 1 (1982).

72. 474 U.S. 327 (1986).

73. *Id.* at 328. The prisoner further argued that because respondent claimed to be entitled to the defense of sovereign immunity in a state tort suit, he was left without an adequate state remedy. Therefore, he argued, state procedures sufficient to satisfy the due process clause did not exist. *Id.*

74. *Id.* at 330-31.

75. *Id.* at 334 n.3.

76. *Id.* at 330.

§ 1983.[77]

The remainder of this Article discusses the implications of the Court's move from constitutional rhetoric to tort rhetoric. In Part II, I evaluate discourse at a theoretical level in order to demonstrate that the assertion of a particular discourse is an assertion of power.[78] In the § 1983 setting, whoever controls the nature of § 1983 discourse—more than simply the holdings and dicta in the cases but the rhetoric as well—exercises considerable power to determine how judges and lawyers think about § 1983. In Part III, I analyze more closely the consequences of the Court's shift from constitutional rhetoric to tort rhetoric.

II. LANGUAGE AND DISCOURSE

A. NIETZSCHE

I begin with Nietzsche, perhaps (un)fashionably.[79] Nietzche's controversial formulations of knowledge and morality, and their relation to reality, are central to his position that language constitutes an attempt to bridge the chasm between reality and human perception.[80]

---

77. There are strategic advantages to using state of mind requirements in this way. First, the Court now has the flexibility to manipulate state of mind so as to expand or contract the scope of due process review as it sees fit. Second, when plaintiffs do not allege that the defendant possessed the required state of mind to deprive them of due process, the Court can send their cases to state court on the ground that they involve no more than garden-variety tort claims. This was not difficult for the Court to do in both *Parratt* and *Daniels* because these cases strike the casual reader as insubstantial.

Similar advantages in the use of state of mind requirements appear in City of Canton v. Harris, 109 S. Ct. 1197, 1206 (1989), which held that local governments can be held liable for their deliberately indifferent failures to train police officers.

78. Although it is the work of Jacques Derrida and Michel Foucault that emphasizes this point, I believe it is important to place them in context by first sketching the philosophical sources on which their analyses of language depend. Accordingly, I include the relevant views of Nietzsche and Saussere.

79. *See* A. BLOOM, THE CLOSING OF THE AMERICAN MIND 379 (1987) (criticizing deconstructionism as "fad" based upon "cheapened interpretation of Nietzsche").

80. Nietzsche is the originator of the idea that the world is aesthetically self-creating. *See* A. MEGILL, PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA 29-33 (1985) [hereinafter PROPHETS OF EXTREMITY]. Nietzsche challenges the philosophical search for origins and for being. In his view, especially in his later writings, all knowledge—metaphysics, science, religion, morality and art—is a manifestation of the will to lie and to power. F. NIETZSCHE, THE WILL TO POWER § 853 (W. Kaufmann & R.J. Hollingdale trans., W. Kaufmann ed. 1967). Concepts do not give a true, genuine knowledge of reality, nor do structures provide a genuine knowledge of concepts. F. NIETZSCHE, *On Truth and Falsity in an Extra-Moral Sense,* in Early Greek Philosophy and Other Essays 179 (M. Mugge trans. 1964) [hereinafter *On Truth and Falsity*]. Under his radical approach in which there are no absolutes—which is what he meant by the assertion that God is dead, F. NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR EVERYONE AND NO ONE §§ 2-3 (R.J. Hollingdale trans. 1961)—we can accord human knowledge only aesthetic status and recognize that it arises from an aesthetically creative human impulse. While aesthetics does not provide access to reality, it does allow us to live through the creation of myths

Nietzche believed that language does not express objective reality.[81] Language tells us little, if anything, about things as they actually are.[82] Words do not adequately express the reality of the objects they purport to describe. To use semiological terminology, the signifier can never adequately represent or describe the signified.[83] Language is fundamentally unstable and meanings of words are agreed-upon fictions that fabricate realities for people.[84] For Nietzsche, then, truth is a creation of the language we employ. What people call truth tells us only about the aesthetic apprehension of reality through "a mobile army of metaphors, metonymies and anthropomorphisms."[85] Language is thus an attempt to control or master the so-called real or experiential world.

Nietzsche's writings on language and myth laid the foundation for later work in structuralism and poststructuralism. His work provided a basis for Saussure's structuralist linguistics. It also served as the basis for the poststructuralist work of Derrida and Foucault, the former in deconstruction and the latter in discourse.

---

which provide a haven. *See generally* A. MEGILL, PROPHETS OF EXTREMITY, *supra,* ch.2 (on Nietzsche and myth).

According to Nietzsche, myths are a central element of culture because people need or wish them. Nietzsche, *On Truth and Falsity, supra,* at 188. For him, knowledge and truth are myths of the philosophers who present themselves as objective and disinterested searchers for truth but who, in reality, are not. F. NIETZSCHE, *Beyond Good and Evil: Prelude to a Philosophy of the Future* § 211 (W. Kaufmann trans.) in BASIC WRITINGS (W. Kaufmann ed. 1968). Unlike artists who create the world in their own image and admit it, Neitzsche believed that most philosophers create the world in their own image but do not admit that fact. Attacking objectivity, Nietzsche asserted that life means valuing and preferring. There are no moral phenomena, only moral interpretations. Nature, that is, is amoral; people invent morality. Nietzsche is consequently what might be termed a "joyful" nihilist: he maintains that humans are truly free because they create their own world. People must develop myths that make the world and life better for them. However, when those myths become outmoded, new, more useful myths should be created.

81. *See* F. NIETZSCHE, *On Truth and Falsity, supra* note 80, at 171.

82. *Id.* at 178.

83. R. BARTHES, ELEMENTS OF SEMIOLOGY 40 (Lavers & Smith trans. 1967). Saussure believes that language is a system of signs. Each sign is made up of a "signifier," which can be defined as "a sound image or its graphic equivalent," and a "signified," which is the concept or meaning the signifier is intended to represent. T. EAGLETON, LITERARY THEORY 96 (1983); *see infra* notes 86-92 and accompanying text.

84. *Id.*

85. F. NIETZSCHE, *supra* note 80, at 184. The quote continues:

> [I]n short a sum of human relations which have been poetically and rhetorically intensified, transposed, adorned, and after long usage seem to a nation fixed, canonical, and binding; truths are illusions of which one has forgotten that this is what they are; metaphors which have become worn out and have lost their sensual power; coins which have lost their pictures and now are no longer of account as coins but merely as metal.

Id.

B. STRUCTURALISM: SAUSSURE

Structural linguistics, as formulated by Ferdinand de Saussure, provides valuable insights into the Supreme Court's § 1983 jurisprudence. The range of doctrines, language, and modes of analysis that the Court uses to decide § 1983 cases can be seen as an isolable system. Tort rhetoric, though always a part of the system, was formerly unimportant and incidental to it. The move to tort rhetoric may thus be analyzed in this context and as part of a larger system of discourse.

Structuralists contend that structures predate or organize concrete personal and cultural experiences.[86] A structuralist linguist, like Saussure,[87] sees every word as existing only in relation to other words. That is, words have meaning only as part of a self-supporting system.[88] Saussure uses a synchronic study of language, in which the whole or structure is learned first at one given time.[89] This is in contrast to a diachronic study, in which language is studied historically or in parts over time.[90]

Saussure maintains that all signifiers—including extra-linguistic symbols that carry meaning, such as a flag—are arbitrary in two ways. First, they have only an arbitrary relation to the signified and, second, they have no necessary link to the natural world.[91] Because we require language in order to think—that is, we do not think the natural world but only its expression in language—it is these signs that frame and shape all knowledge. We see what our language permits us to see. Something does not exist for us unless there is a word for it.[92] It also follows that what is considered marginal in a language and in society is marginal only in relation to the particular linguistic

---

86. *See* Sturrock, *Introduction,* in STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA 2, 5-6 (J. Sturrock ed. 1979) [hereinafter STRUCTURALISM].

> [Structuralism] is simply a method of investigation, a particular way of approaching and, so structuralists maintain, of rationalizing the data belonging to a particular field of enquiry. . . .
>
> [A] true ('serious') structuralist is to be recognized by the use he makes of a number of technical terms, taken over, as it happens, from structural linguistics . . . . One of these terms . . . is *sign,* which is central to the 'lexicon of signification.'
>
> This lexicon derives from the work of the Swiss linguist Ferdinand de Saussere (1857-1913), whose theoretical work on natural or human language in the early years of the present century lies behind all of modern structuralism. . . . [This includes his] insights into . . . the basic unit of any language, the linguistic sign . . . . [A]ny word in a language is a sign, and that language functions as a system of signs.

87. *See* Culler, *Introduction,* in F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS, at xiv-xv n.1 (1959) (discussing Saussure's influence on what is now called structuralism and on Claude Levi-Strauss and Roland Barthes).

88. Sturrock, *supra* note 86, at 8-9.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* at 9 (translators discover that "each native language divides up in different ways the

structure.[93]

C. POST-STRUCTURALISM I: DERRIDA

Post-structualism is built on the work of Nietzche and Saussure, though it in many ways specifically uses the structuralist form of analysis to reject structuralism itself.[94] Specifically relevant to my analysis of the Supreme Court's § 1983 jurisprudence are Jacques Derrida and Michel Foucault.

In his philosophy, Jacques Derrida broadly attacks Western philosophy for mistakenly assuming that speech—the "word"—captures reality better than written language because it is immediate and does not have to be interpreted, while writing requires interpretation of texts.[95] He argues that this emphasis on speech in Western philosophy is a manifestation of the "metaphysics of presence": the idea of "seeing for oneself" is somehow more reliable than reading.[96] Derrida analyzes the implications of this hierarchy and explores the possibility of basing a theory of language not on speech but on

---

total field of what may be expressed in words" and that "[o]ne language has concepts that are absent from another").

93. Claude Levi-Strauss applies structuralist insights to anthropology. He contends that though social structure seems arbitrary, it can be understood within the context of a system. *See* Sperber, *Claude Levi-Strauss,* in STRUCTURALISM, *supra* note 86, at 19-51. He believes that the meanings of acts in any particular society cannot be understood without first examining the system of relationships that exist in the society. *Id.* Societies are made up of systems of signification in which signs are used to regulate relationships.

Levi-Strauss attempts to demonstrate that laws of social structure *necessarily* exist. *Id.* at 4. What might first appear to be unstructured is in reality governed by laws operating at a higher level of abstraction. *Id.*

94. *See* Sturrock, *supra* note 86, at 4 ("[Derrida] has become, willingly or not, the undisputed inspiration of that follow up to [structuralism] now known as 'post-structuralism', largely because an important part of his work has been to read carefully the theoretical work of his contemporaries and expose certain of their unexamined assumptions."). Another scholar observed that:

> [Derrida's] object is not to deny or invalidate the structuralist project but to show how its deepest implications lead on to a questioning of method more extreme and unsettling than these [structuralist] thinkers wish to admit. The very notion of 'structure' is shown to be a metaphor dependent, at the limit, on a willed forgetting of its own rhetorical status.

C. NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 79 (1982).

95. Sturrock, *supra* note 86, at 169-70:

> Derrida's claim is that the moment of speaking, where signifier and signified or sound and meaning seem to be given together, where the inner and the outer, the material and the non-material, seem for a moment to be fused, serves as the point of reference in relation to which all these distinctions ['oppositions such as outside/inside, transcendental/empirical, worldly/non-worldly'], which are essential to our metaphysics, can be posited. To tamper with the privilege of speech threatens the entire edifice.
>
> The moment of speech can play this kind of role because it seems to be the one point or instant in which form and meaning are simultaneously present . . . . Presence is the cornerstone of the theory of language and communication, and writing, defined in terms of presence, is seen as deficient or, at the very best, as an indirect restoration of a presence.

96. *Id.*

"generalized writing."[97]

Derrida's focus on inverting this textual hierarchy is called deconstruction.[98] Derrida's deconstructionist approach is based in part on the fundamental instability and indeterminacy of language emphasized by Nietzsche and on what Saussure calls the arbitrary relationship between the signifier and the signified. If signifiers and signified are only arbitrarily related, then the text has an existence separate from its author. Thus, the *presence* of the author cannot guarantee that the text reflects a definitive meaning.[99] There can be no *definitive* meaning; there are only meanings. In a famous passage, Derrida puts it this way:

> [R]eading . . . cannot legitimately transgress the text toward something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc.) or toward a signified outside the text whose content could take place, could have taken place outside of language, that is to say, in the sense that we give here to that word, outside of writing in general. . . . *There is nothing outside of the text.*[100]

A central strategy of deconstructive criticism is to discover and invert the "margins" of the text being criticized. Derrida is willing to make use of anything marginal—slightly inconsistent rhetoric, less than perfect word selection, or contradictory information that the author has attempted to hide in a footnote. He will then, against the author's intention, develop these margins to show the text's contradictory meanings and the ways in which any argument has the seeds of its opposing argument.[101]

---

97. *Id.* at 157-58. *See generally* J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1977) (discussion of relationship between writing, culture, and language).

98. According to Derrida, deconstruction is the practice "which brings low what was high, and the irruptive emergence of a new 'concept,' a concept that can no longer be, and never could be, included in the previous regime." J. DERRIDA, POSITIONS 42 (A. Bass trans. 1981). Thus, under deconstructionism, what is excluded by or marginalized in a particular structure is now emphasized and given prominence as a means of undermining that structure. Deconstruction can therefore be used by analogy in nontextual situations, including political and social contexts involving excluded or marginalized groups. Its use can thus have politically destabilizing implications for existing political and social institutions. On the other hand, as has occurred with literary theory in certain American universities, deconstruction can become unworldly and decidedly ahistorical with its emphasis on texts standing alone. To that extent, it can be neutral regarding the political and social status quo and thereby perpetuate it. *See* C. NORRIS, *supra* note 94, at 90-91 (Yale and Johns Hopkins Universities disseminate Derridean theory in its apolitical form).

99. According to Derrida, the interpretation of a writing can never be governed by authorial intention because an author can never write what he means to say. *See generally* J. DERRIDA, POSITIONS, *supra* note 98 (interview on June 17, 1971, with Jean-Louis Houdebine and Guy Scarpetta).

100. J. DERRIDA, *supra* note 97, at 158. Richard Rorty interprets this to mean that Derrida would like to root out the vocabulary of Kantian philosophy and notions of reference as the essence of language. *See* Rorty, *Philosophy as a Kind of Writing: An Essay on Derrida,* 10 NEW LITERARY HISTORY 141, 148 (1978). Rather, words take their meaning from other words. *Id.*

101. An example of how Derrida "reads the margins" of a text is in order. Derrida criticizes

This deconstruction of margins helps us to understand the relative ease of the previously described shift in emphasis from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 case law. Section 1983 contains constitutional rhetoric in the phrases "under color of [law]" and "to the deprivation of any rights, privileges, or immunities secured by the Constitution."[102] This constitutional rhetoric appears to occupy a central position in the title of § 1983: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[103]

Section 1983 also contains tort rhetoric in the phrases "subjects, or causes to be subjected," and "shall be liable to the party injured in an action at law." From a deconstructive perspective, this tort rhetoric has the potential to undermine the constitutional rhetoric.[104] I have demonstrated how tort rhetoric has increasingly moved toward the center of the Court's § 1983 discourse, while constitutional rhetoric has lost its central position. This shift in the kind of rhetoric used, and thus in § 1983 discourse, disguises a move away from a pro-plaintiff, pro-civil rights stance toward a pro-defendant, anti-civil rights stance.

D. POST-STRUCTURALISM II: FOUCAULT

Michel Foucault both criticizes and transcends Derrida's focus on separate and independent texts through an emphasis on discourse.[105] He defines dis-

---

Levi-Strauss's structural anthropology for its contention that preliterate societies are peaceful and nonviolent because they emphasize speech while literate societies are violent because they emphasize writing. J. DERRIDA, *supra* note 97, at 109. In Levi-Strauss's texts, Derrida finds support for a view opposite to the one explicitly taken by Levi-Strauss. Looking at the "margins" of the structures described by Levi-Strauss, he notes that Levi-Strauss's semiology requires that naming itself be a form of writing. Levi-Strauss assumes proper names to be somehow primitive, not heeding his own descriptions of their systemic origins. *Id.* For us to make sense of the notion of structural anthropology, the choice to name must be seen as a choice *in language.* Thus, if Levi-Strauss's ideas are fully fleshed-out, all preliterate societies that name—or that build structures at all—are "violent" in much the same way as literate societies. *Id.* at 111-12. Norris explains it this way:

> "Writing" in Levi-Strauss's sense is a merely derivative activity which always supervenes upon a culture already "written" through the forms of social existence. These include the codes of naming, rank, kinship and other such systematized constraints. Thus the violence described by Levi-Strauss presupposes . . . "the violence of the arche-writing, the violence of difference, of classification, and of the system of appellations."

C. NORRIS, *supra* note 94, at 39 (citing J. DERRIDA, *supra* note 97, at 110); *see also* STURROCK, *supra* note 86, at 168 (discussing deconstruction generally and explaining that "[i]t then becomes possible to show that what were conceived as the distinguishing characteristics of the marginal are in fact the defining qualities of the central object of consideration.").

102. 42 U.S.C. § 1983 (1982).

103. *Id.*

104. I admit that it is not necessary to "tease out" of § 1983 a tort interpretation inasmuch as tort rhetoric appears on the face of the statute. A deconstructive move here is easier than it might be in cases in which an alternative interpretation would require considerable imagination.

105. Speaking of Derrida's emphasis on texts, Foucault charges:

course to include the contexts in which texts are written, the relations among texts and what is excluded from texts due to the limitations of a particular discourse.[106] Strongly influenced by Nietzsche, Foucault concludes that knowledge cannot be separated from power.[107] For Foucault, there are different kinds of knowledge; each kind of knowledge—scientific, philosophical, medical, and so on—has its own discourse, within which certain ideas can or cannot be formulated. Those who claim the right to discourse must always struggle to center their discourse, marginalizing others whose discourse threatens their own. Foucault maintains that at any point in history there exists a set of power relationships that establish the conditions of discourse.[108]

Foucault thus believes that prevailing discourse reveals the nature of social power. Discourse, however, is not simply current wisdom; it also disguises and actually constricts the objects it discusses. For example, study of the history of madness demonstrates that its discourse is designed to allow those in power to control the mind.[109] Similarly, study of the history of sexuality

---

> I shall say that what can be seen here so visibly is a historically well-determined little pedagogy. A pedagogy which teaches the pupil that there is nothing outside the text, but that in it, in its gaps, its blanks and its silences, there reigns the reserve of its origin; that it is therefore unnecessary to search elsewhere, but that here, not in the words, certainly, but in the words under erasure, in their *grid,* the 'sense of being' is said. A pedagogy which gives conversely to the master's voice the limitless sovereignty which allows it to restate the text indefinitely.

Foucault, *My Body, This Paper, This Fire,* 4 OXFORD LITERARY REV. 9, 27 (1979) (emphasis in original).

106. *See* M. FOUCAULT, THE HISTORY OF SEXUALITY 17-35 (R. Hurley trans. 1980) (since the eighteenth century, discursive explosion concerning sexuality has created greater potential for those in power, including Christian pastors, to exercise greater control); White, *Michel Foucault,* in STRUCTURALISM, *supra* note 86, at 81-115 (analysis of Foucault's writings); A. MEGILL, PROPHETS OF EXTREMITY: NIETZSCHE, HEIDIGGER, FOUCAULT, DERRIDA 237-40 (1985) (Foucault views world "as if it were discourse"; battle for social change takes place within discourse itself).

107. *See supra* note 106.

108. *See* White, *supra* note 106, at 90-91 (describing Foucault's works MADNESS AND CIVILIZATION, BIRTH OF THE CLINIC, and THE ORDER OF THINGS as demonstrating "that the distinctions between madness and sanity, sickness and health, and truth and error [are] always a function of the modality of discourse prevailing in centres of social power at different periods."); *see also* M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-77, at 109-27 (C. Gordon ed. 1980) (interview with Alesandro Fontana and Pasquale Pasquino discussing Foucault's consideration of questions of power and knowledge).

109. *See* M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON x-xi (R. Howard trans. 1967):

> In the serene world of mental illness, modern man no longer communicates with the madman. . . . As for a common language, there is no such thing any longer; the constitution of madness as a mental illness at the end of the eighteenth century affords the existence of a broken dialogue, posits the separation as already effected, and thrusts into oblivion all those stammered, imperfect words without fixed syntax in which the exchange between madness and reason was made. The language of psychiatry, which is a monologue of reason about madness, has been established only on the basis of such a silence.

shows that it, too, has a discourse which, contrary to popular opinion, is not liberating but actually makes us more compulsive. Indeed, Foucault asserts that in allowing the disclosure of sexual desires and practices to others, the discourse of sexuality actually creates the potential for greater control by those in power.[110] Foucault raises significant questions regarding the legitimacy of discourse: who owns it and how is it controlled?

Inasmuch as we are unable to transcend our own discourse, it is very difficult for us to escape and criticize it. Foucault nevertheless undertakes to provide histories of various discourses in an attempt to free language from the "myth of signification."[111] He attempts to show that every rule or norm is arbitrary by studying texts whose discursive mode departs from the discursive mode of their predecessors.[112]

Foucault uses this theory of discourse to attack the status quo and to promote radical breaks in history. His strategy is wedded to an activist ideal of change, but there is nothing coherent about it beyond that. Indeed, there appears to be no prescriptive content to Foucault's utopianism.[113] It is nihilistic.

Yet it is not necessary to accept Foucault's nihilism to recognize the power of his approach to the nature of discourse. As applied to the move from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 jurisprudence, Foucault's approach suggests at the very least that an event of deep significance has occurred. It is to the implications of this event that I now turn.

III. THE IMPLICATIONS OF TORT RHETORIC

As I suggested earlier, the shift from constitutional rhetoric to tort rhetoric was foreshadowed by the Court's repeated use of the term "constitutional tort" in § 1983 cases. This term gives priority to "tort" while according secondary significance to "constitutional." And indeed, what was once marginal is now the central object of discussion. The Supreme Court has accomplished a considerable inversion of § 1983 discourse by manipulating

---

110. M. FOUCAULT, *supra* note 106, at 32-33 ("Since the eighteenth century, sex has not ceased to provoke a kind of generalized discursive erethism. And these discourses on sex did not multiply apart from or against power but in the very space and as a means of its exercise. Incitements to speak were orchestrated from all quarters, . . . sex was driven out of hiding and constrained to lead a discursive existence.")

111. White, *supra* note 108, at 88.

112. *See id.* at 99.

113. A. MEGILL, *supra* note 106, at 197-98:

> Foucault opposes the existing order of things, strategically attacking it at what he believes to be its weakest points. But he does so in the name of no other order that he intends or hopes will replace what exists. . . . Foucault thus opts for a peculiar brand of permanent revolution—permanent because it seeks to realize no image of an ideal society.

the language it uses to discuss § 1983. I now analyze some implications of this move.

A. THE IMPLICATIONS OF TORT RHETORIC: DOCTRINE

The shift from constitutional rhetoric to tort rhetoric operates at several different levels. The first and most obvious level is that of doctrine: tort rhetoric encourages the explicit use of tort doctrines to determine the scope of § 1983. A prime example, noted earlier, is the use of tort absolute immunity doctrines to insulate legislators, judges, and prosecutors from the threat of § 1983 litigation.[114] The rule that presumed damages are not available in § 1983 suits, which had its beginning in *Carey v. Piphus*[115] and culminated in *Memphis Community Schools v. Stachura,*[116] is another example. Still another example is the Court's use of proximate cause in *Martinez v. California,*[117] in which the majority found the harm to the § 1983 plaintiff to be too remote from the defendants' conduct to be actionable.[118]

To the extent the Court emphasizes tort rhetoric in § 1983 litigation, it tends to model § 1983 doctrines on tort concepts of fault. Recall that even in *Monroe v. Pape,*[119] the Court asserted that § 1983 was to be interpreted against a background of tort liability that makes a person responsible for the natural consequences of his or her conduct.[120]

A fault model, built on notions of individual responsibility, has proved especially difficult to apply in cases involving local government liability. On the one hand, the Court in *Monell*[121] ruled that an official policy or custom causing the deprivation of rights must exist before local governments will be held liable, a requirement that parallels the notion of individual responsibility in a fault model.[122] Yet in *Owen v. City of Independence,*[123] in justifying its holding that local governments are not protected by qualified immunity, the

---

114. *See supra* notes 39-49 and accompanying text (discussion of *Pierson v. Ray* and immunity of police officers and judges).

115. 435 U.S. 247 (1978).

116. 477 U.S. 299 (1986). The Court also relied on tort doctrines in Smith v. Wade, 461 U.S. 30 (1983). The majority's holding that malice is not a prerequisite for § 1983 punitive damages awards was based on its determination that the common law in 1871 did not require malice for such awards. *See id.* at 41. The dissenters' conclusion that malice should be a prerequisite to § 1983 punitive damages was based on their conclusion that the law in 1871 was in fact marked by this state of mind prerequisite for punitive damages. *See id.* at 56 (Rehnquist, J., dissenting).

117. 444 U.S. 277 (1980).

118. *Id.* at 285.

119. 365 U.S. 167 (1961).

120. *Id.* at 187.

121. 436 U.S. 658 (1978).

122. *See* Nahmod, *supra* note 71 (analogizing individual accountability to government accountability).

123. 445 U.S. 622 (1980).

Court explained that equitable loss spreading, a no fault concept, is an important consideration in interpreting § 1983.[124] This tension between fault and no fault, coupled with the difficulty of ascribing wrongful states of mind to government bodies,[125] illustrates the problems the Court continues to have in defining the proper standards of local government liability. Such problems are especially evident in attribution and failure to train cases.[126] The justices are divided over the appropriate model for § 1983 in these cases, with the majority, influenced by tort rhetoric, insisting upon a fault model.

Tort rhetoric also has had an impact on substantive constitutional law. Because § 1983 provides a remedy for violations of the fourteenth amendment, every decision narrowing the scope of the fourteenth amendment also narrows the scope of § 1983. I have already set forth examples of the effect of tort rhetoric on constitutional interpretation in § 1983 due process cases.[127] The same phenomenon has occurred as well in the Supreme Court's fourth amendment and eighth amendment jurisprudence.[128]

In addition, substantive due process/affirmative duty cases in the federal courts, virtually all of which have been decided against plaintiffs, regularly rely on the tort concept of "special relationship."[129] Tort doctrines, sup-

---

124. *Id.* at 657.

125. *See* Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (respondents failed to prove that discriminatory purpose was motivating factor in village's zoning decisions).

126. *See generally* S. NAHMOD, *supra* note 10, §§ 6.09-6.12 (discussing standards of local government liability based on acts of government officials, policy, and custom). In a recent decision predominantly using tort rhetoric, the Court held that local governments can be held liable for their failure to train police officers when such failures are deliberately indifferent to the rights of persons with whom the police officers come into contact. City of Canton v. Harris, 109 S. Ct. 1197, 1206 (1989). Deliberate indifference was considered a *statutory* requirement. *See supra* note 71.

127. *See supra* notes 55-77 and accompanying text (discussion of due process claims in *Paul v. Davis* and *Parratt v. Taylor*).

128. For an example of such a fourth amendment decision, see United States v. Leon, 468 U.S. 897 (1984) (exception to exclusionary rule when police rely in good faith on defective search warrant obtained from neutral and detached magistrate).

Two such eighth amendment decisions are Whitley v. Albers, 475 U.S. 312 (1986) (malicious and sadistic conduct required for eighth amendment violation in prison security setting), and Estelle v. Gamble 429 U.S. 97 (1976) (deliberate indifference required for eighth amendment violation in connection with providing medical services to prisoner). These two eighth amendment cases provide good examples of what might be described as a "variable," tort-based eighth amendment jurisprudence in which the state of mind requirement for liability depends in part on the particular factual situation in which the challenged conduct arises.

129. For example, in Wright v. City of Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983), the court stated:

> [G]enerally, the due process clause of the Constitution does not protect a member of the public at large from the criminal acts of a third person, even if the state was remiss in allowing the third person to be in a position in which he might cause harm to a member of the public, at least in the absence of a special relationship between the victim and the criminal or between the victim and the state.

ported by tort rhetoric, therefore play an increasingly prominent role in constitutional adjudication. Many of these fourth, eighth, and fourteenth amendment developments have occurred in the setting of § 1983 litigation.

B. THE IMPLICATIONS OF TORT RHETORIC: COST-BENEFIT ANALYSIS

Tort rhetoric also operates at a somewhat more subtle level than that of explicit doctrine: it facilitates the use of cost-benefit analysis. While it is true that there has been growing interest in, and scholarly support for, a "rights" approach to tort law,[130] one can fairly describe the current judicial perspective on tort law as a "law and economics" approach that emphasizes either efficiency, loss-spreading, or some combination thereof. Courts taking this latter approach only recognize those values that can be actually or theoretically quantified. Consequently, constitutional values are often discounted significantly.[131]

See also S. NAHMOD, *supra* note 10, at §§ 3.10 & 6.15 (collecting and analyzing affirmative duty cases). Such cases raise the difficult question of the extent to which the due process clause imposes affirmative duties on state and local governments to protect and rescue their citizens. As discussed later, the use of tort rhetoric implies a particular view of the state-citizen relationship. *See infra* notes 173-76 and accompanying text (use of tort rhetoric implies that state and citizen have no necessary relationship to one another).

The Supreme Court recently accepted this latter view of the state-citizen relationship in DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989), which held that county social service officials have no affirmative substantive due process duty to protect a child against physical abuse by his natural father, even when the officials once had custody of the child and had reason to suspect such abuse. *Id.* at 1007. The Court essentially adopted the proposition that the Constitution is a "charter of negative liberties," as discussed *infra* notes 171-75 and accompanying text in connection with the state-citizen relationship. It also found that no special relationship existed between the county officials and the child. *Id.* at 1006.

130. For a discussion of this "rights" approach to tort law, see Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151 (1973) (liability should be based upon harm caused in fact rather than subsequent determination of reasonableness); Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537 (1972) (postulating reciprocity and reasonableness as paradigms of tort liability); Weinreb, *Causation and Wrongdoing,* 63 CHI.-KENT L. REV. 407 (1987) (relationship between causation and wrongdoing intelligible without considering independently identifiable goals); Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure,* 21 U.C. DAVIS L. REV. 1141, 1179-1193 (1988) (discussing corrective justice theory of tort law).

131. *See* Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49 (exclusionary rule imposes penalties that oughtweigh costs of fourth amendment violations). This approach is inconsistent with the following declaration:

> [O]ne might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Similarly, in INS v. Chadha, 463 U.S. 919 (1983), the Court stated: "[I]t is crystal clear from the records of the convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." *Id.* at 944.

Harlow v. Fitzgerald[132] is the clearest illustration of the Court's use of cost-benefit analysis to determine the scope of § 1983 relief. In *Harlow* the Court's explicit cost-benefit analysis led it to adopt an objective qualified-immunity test that eliminated any subjective inquiry into a defendant's state of mind and instead focused strictly on whether the defendant violated clearly settled constitutional law at the time of the alleged act.[133] Notably, the Court did not address the loss resulting from the possible underdeterrence of constitutional violations.[134] Moreover, in *Anderson v. Creighton*,[135] the Court provided even more protection for § 1983 defendants by directing that the clearly settled constitutional law inquiry for qualified immunity should not be made at too general a level.[136]

C. THE IMPLICATIONS OF TORT RHETORIC: MARGINALIZATION THROUGH CHARACTERIZATION

Tort rhetoric operates at yet a third level: it marginalizes § 1983 by characterizing it as a tort statute. If § 1983 is viewed primarily as a tort statute, then it becomes easier to argue that § 1983 actions belong in state court because they are in reality no different from garden-variety tort actions. In addition, state courts have as much expertise as federal courts in adjudicating tort cases.

The debate about exhaustion of judicial and administrative remedies can perhaps best be understood at this level. Although *Monroe v. Pape*[137] explicitly ruled that § 1983 does not require plaintiffs to exhaust state *judicial* remedies, it was argued that there ought at least to be a requirement of exhausting *administrative* remedies in appropriate cases.[138] The Court effec-

---

132. 457 U.S. 800 (1982).

133. *Id.* at 813-14.

134. *See* Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. L. REV. 221, 246-250 (1984) (analyzing *Harlow* in terms of costs and benefits). The Court similarly used cost-benefit analysis in a procedural due process setting in Parratt v. Taylor, 451 U.S. 527 (1981). Applying the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), itself a form of cost-benefit analysis, *Parratt* held that where a pre-deprivation hearing is not feasible or practicable, a post-deprivation hearing provided by state law satisfies procedural due process. *Id.* at 540-41; *see also supra* notes 63-71 and accompanying text (adequate post-deprivaton procedures existed to address prisoner's loss of hobby kit materials). The balancing test of *Mathews* has been convincingly attacked for ignoring fairness as a value independent of efficiency. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1970).

135. 107 S. Ct. 3034 (1987).

136. *Id.* at 3038.

137. 365 U.S. 167 (1961).

138. *See, e.g.*, Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981) (en banc) (holding that exhaustion of administrative remedies is appropriate in certain § 1983 cases and setting out at length supporting policy considerations), *rev'd*, 457 U.S. 496 (1982).

tively settled this debate in *Patsy v. Board of Regents*[139] Stressing the distrust of state adjudication processes that is clearly reflected in § 1983's legislative history, the *Patsy* Court ruled that the section imposes no exhaustion requirement.[140] Nonetheless, in *Parratt v. Taylor*[141] the Court held that adequate state post-deprivation remedies eliminate procedural due process violations in certain circumstances.[142] This holding in fact bars plaintiffs from federal court more effectively than would an exhaustion requirement because under *Parratt* plaintiffs can *never* return to federal court. Thus, the Court, through constitutional interpretation, was able to end-run the clear no-exhaustion legislative history of § 1983 and send certain cases to the state courts.

With its decision in *Younger v. Harris,*[143] the Court was similarly able to ensure that certain § 1983 cases are conclusively sent to state courts. In *Younger,* on grounds of "our Federalism" and comity, the Court held that a § 1983 plaintiff cannot secure federal injunctive relief against pending state court criminal proceedings.[144] Such a plaintiff must remain a state defendant and raise any constitutional arguments in the state proceeding with only the remote possibility of certiorari in the Supreme Court.[145] The Court has applied *Younger* very strictly to § 1983 plaintiffs—exceptions are few and far between—and has extended the decision to cover pending civil proceedings involving important state interests.[146] Several justices have even suggested that *Younger* should apply to § 1983 damages actions when state proceedings are pending.[147]

Furthermore, characterizing § 1983 as a tort statute and thereby sanctioning tort rhetoric makes it easier to apply the tort concepts of absolute and qualified immunity to certain defendants. When a court holds that an individual defendant is protected by immunity, the defendant is exonerated from damages liability even though he or she may have violated the plaintiff's

---

139. 457 U.S. 496 (1982).
140. *Id.* at 516.
141. 451 U.S. 527 (1981).
142. *Id.* at 543.
143. 401 U.S. 37 (1971).
144. *Id.* at 41, 44.
145. *Id.* at 52.
146. *See generally* S. NAHMOD, *supra* note 10, at §§ 5.12-5.15 (discussing application of *Younger*).
147. *See* Tower v. Glover, 467 U.S. 914, 923 (1984). In *Tower,* § 1983 damages action against a public defender, the Court, in passing, asserted that because the plaintiff no longer had the opportunity to have his conviction set aside by the state court,

> [we] therefore have no occasion to decide if a Federal District Court should abstain from deciding a Section 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself.

Id. Justices Brennan, Marshall, Blackmun, and Stevens objected on the ground that this issue was never raised, briefed, or argued by the parties before the Court. *Id.* at 924 (Brennan, J., dissenting).

constitutional rights. Viewing the injury to the plaintiff as functionally comparable to a tort injury comports easily with the Court's use of the tort defense of immunity.

Tort rhetoric also supports the Court's pejorative descriptions of § 1983 actions and those who bring them. In *Harlow v. Fitzgerald,*[148] the Court made very clear that it viewed many *Bivens*[149] and § 1983 suits as "insubstantial."[150] Similarly, in *Anderson v. Creighton,*[151] the Court expressed concern with "harassing" litigation and "clever" § 1983 plaintiffs.[152]

It therefore is no coincidence that prisoners have brought many of the recent major § 1983 cases in which the Court either has cut back or at least refused to expand the scope of due process. Prisoners, whose constitutional rights the Court has gradually narrowed, are unappealing persons with whom the Court apparently identifies much § 1983 litigation.[153] To signal its view that many § 1983 suits waste time and resources, the Court has chosen to review § 1983 cases brought by prisoners—in particular, ostensibly trivial cases involving lost hobby-kit materials and injuries resulting from pillows left on prison stairs. From the Court's perspective, the prisoners who brought suit in *Parratt, Hudson, Daniels,* and *Davidson* used § 1983 as if it were a garden-variety tort statute.[154] The intended message is that little will be lost if the Court narrows the scope of § 1983 and due process.

---

148. 457 U.S. 800 (1982).

149. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In *Bivens,* the Court implied a fourth amendment action for damages against federal law enforcement officers. *Id.* at 397.

150. *Harlow,* 457 U.S. at 813. The dissenting justices in Butz v. Economou, 438 U.S. 478 (1978), voiced concern over weeding out insubstantial § 1983 claims. In *Butz* the Court held that members of the President's cabinet have only qualified immunity from *Bivens* liability. *Id.* at 500. The dissenters argued that even on summary judgment, courts would not be able to dispose of insubstantial claims because state of mind issues are typically disputed in qualified immunity cases. *Id.* at 527 (Rehnquist, J., concurring in part and dissenting in part).

The dissenters' position ultimately prevailed in *Harlow,* when the Court eliminated the subjective part of the qualified immunity test. The Court's view was that the subjective part did not "permit the defeat of insubstantial claims without resort to trial." *Harlow,* 457 U.S. at 813.

151. 107 S. Ct. 3034 (1987).

152. *Id.* at 3038, 3039 n.2.

153. For example, the fourth amendment has been held inapplicable to prisoners, Hudson v. Palmer, 468 U.S. 517 (1984), and eighth amendment standards for the excessive use of force by prison guards have been made more protective of defendants. *See* Whitley v. Albers, 475 U.S. 312 (1986) (malicious and sadistic conduct required for eighth amendment violation in prison setting).

154. *See* Davidson v. Cannon, 474 U.S. 344, 348 (1986) (no due process violation for allegedly negligent failure by prison authorities to act on plaintiff's warning that another prisoner threatened him); Daniels v. Williams, 474 U.S. 327, 330 (1986) (no denial of liberty when prisoner injured by pillows negligently left on prison steps); Hudson v. Palmer, 468 U.S. 517, 536 (1984) (applying *Parratt*'s postdeprivation remedy approach to intentional conduct of prison guard); Parratt v. Taylor, 451 U.S. 527, 541 (1981) (no due process violation for negligent loss of hobby-kit materials when adequate post-deprivation remedy available).

D. THE IMPLICATIONS OF TORT RHETORIC: FEDERALISM, THE STATE-CITIZEN RELATIONSHIP, AND POLITICAL SOCIETY

I contend in the final sections of this Article that the Court's increased use of tort rhetoric in § 1983 cases also implies that certain restraints should characterize the federal-state relationship, the state-citizen relationship, and the nature of political society.

1. Federalism

Our federal system, which is thought to promote experimentation, efficiency, individual liberty, and democracy,[155] is premised on several beliefs. One belief is that state courts should not be viewed as less competent than federal courts to deal with important constitutional issues.[156] Another is that the federal judiciary should strive to minimize its supervision of state and local government affairs.[157] On those occasions when some involvement by the federal judiciary in state affairs is unavoidable, the federal judiciary must be sensitive to the effects of its involvement on state and local government operations.[158]

Federalism concerns are often raised in § 1983 litigation because it is state and local governments or their employees who are § 1983 defendants. True, the fourteenth amendment was intended to bring about a dramatic shift in federal-state relations whereby the federal government became responsible for protecting individual rights in cases in which the states could not be re-

---

155. *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); THE FEDERALIST NOS. 45 AND 46 (J. Madison) (state and local governments, unlike remote national government, provide citizens with the opportunity to participate directly in government); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 123 (1986) ("By disabling the national government from acting on some subjects while allowing states to act in varying ways, federalism allows people to move from one area to another in order to select the kind of government policies they prefer."); Prichard, *Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade,* in FEDERALISM AND THE CANADIAN ECONOMIC UNION 6 (M. Trebilcock ed. 1983) (economic integration spreads "the risk of economic instability" and allows "cooperation in the provision of joint services . . . characterized by economies of scale.").

156. *See Younger,* 401 U.S. at 44.

157. *See* Rizzo v. Goode, 423 U.S. 362, 379 (1976) (reversing district court decree requiring city police department to establish procedures to adequately handle citizen complaints against city officers). In part, an interest in minimizing federal court supervision of state governments reflects the interest in protecting individual rights and liberties from a powerful centralized federal government, as well as the perceived interest—more evident before the fourteenth amendment was ratified—in having the states as protectors of such rights. *See* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341, 385-86, 388-89 (describing states as protectors of individual freedom "against a successful conversion of the federal government into a vehicle of the worst kind of oppression.").

158. *See* Rizzo v. Goode, 423 U.S. 362, 379 (1976) (district court's injunction was "sharp limitation on the [police] department's latitude in the dispatch of its own affairs.").

lied upon to do so.[159] It is also true that the legislative history of § 1983 rather clearly indicates that the 42nd Congress enacted § 1983 because of a profound distrust of state institutions.[160] Nevertheless, the current Supreme Court is very sensitive to federal-state issues in § 1983 litigation and has developed a host of judge-made doctrines that are designed to strengthen the role of states. This is true with regard to § 1983 injunctive-relief actions[161] and § 1983 damages actions.[162] Indeed, many of the Court's decisions appear to treat § 1983 as a symbol of antifederalism.[163]

The use of tort rhetoric encourages this strategy of promoting state power. To the extent the Court views § 1983 primarily as a tort statute, it is able, as noted earlier,[164] to send what might otherwise be § 1983 claims to state court. State courts have the requisite expertise and experience to deal with tort claims and can do so using state law. In addition, concern for the role of states in the federal system played a significant role in the Court's recent decisions interpreting the due process clause. *Parratt v. Taylor*'s[165] post-deprivation remedy approach for certain procedural due process cases, and *Daniels v. Williams*'s[166] insistence that more than negligence is required for due process violations, have the purpose and effect of sending many cases to the state courts.

Similarly, the use of the forum state's personal-injury statutes of limitations in § 1983 actions, together with the applicability of state preclusion rules to § 1983 actions, promotes state interests.[167] And at least four justices prefer to use state law to determine local government liability based on attribution from high-ranking officials.[168]

The current substantive due process case law regarding whether the government has an affirmative duty to provide rescue and other services to citi-

---

159. *See* Monroe v. Pape, 365 U.S. 167, 174 (1961) (purpose of § 1983 to provide federal remedy when state remedy, although adequate in theory, not adequate in practice).

160. *See id.* at 169-87 (1961). The Court discussed the legislative history of § 1983 and the 42nd Congress' apparent distrust of state institutions and concluded that exhaustion of state judicial remedies is not required as a condition precedent to filing § 1983 actions in federal court. *Id. See also* Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (exhaustion of state administrative remedies not required for § 1983 suit).

161. *See supra* notes 143-46 and accompanying text (discussing *Younger*).

162. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (plaintiff injured by chokehold applied by provoked officer has no standing to seek injunctive bar on chokehold because little likelihood that he will suffer a future arrest or subsequent similar injury).

163. Witness the Court's concern in Paul v. Davis, 424 U.S. 673 (1976), that the fourteenth amendment and § 1983 not become a "font of tort law." *Id.* at 701.

164. *See supra* notes 141-47 and accompanying text.

165. 451 U.S. 527 (1981) (discussed *supra* at notes 63-71 and accompanying text).

166. 474 U.S. 327 (discussed *supra* at notes 72-77 and accompanying text).

167. Wilson v. Garcia, 471 U.S. 261 (1985) (limitations); Migra v. Bd. of Educ., 465 U.S. 75 (1984) (preclusion); S. NAHMOD, *supra* note 10, §§ 4.14-4.17 and 5.17-5.19.

168. City of St. Louis v. Praprotnik, 108 S. Ct. 915, 924 (1988).

zens demonstrates the importance of federalism issues in § 1983 adjudication. From the beginning, federal courts have emphasized that the decision whether to provide services belongs to state and local governments and not to the federal courts.[169] These courts usually speak of the generally applicable tort rule that there is no affirmative duty in the absence of a special relationship.[170] Consequently, in virtually all of these § 1983 affirmative duty cases, federal courts have declined to find a duty.[171] They have been worried not only about the effect of federal judicial intervention on government finances but also about the displacement of state and local decisionmaking. Significantly, the Supreme Court recently articulated this position in *DeShaney v. Winnebago County Department of Social Services.*[172]

2. The State-Citizen Relationship

The affirmative duty cases and their use of tort rhetoric imply a particular view of the state-citizen relationship. Tort cases are usually bipolar; that is, they involve suits between two private parties in which public law issues ordinarily do not arise.[173] To the extent that tort rhetoric predominates in § 1983 litigation, courts tend to treat § 1983 plaintiffs and defendants as autonomous strangers who have no prior relationship with one another—even though the defendant is a government or government employee.[174] By analogy to the tort doctrine that strangers ordinarily owe no Good Samaritan affirmative duties to one another, tort rhetoric makes it easier for courts to

---

169. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1205 (7th Cir. 1983) (rejecting claim of affirmative duty of police and fire department personnel to rescue); Dollar v. Haralson County, 704 F.2d 1540, 1543-44 (11th Cir. 1983) (rejecting claim of affirmative due process duty to construct a bridge over a ford); S. NAHMOD, *supra* note 10, §§ 3.08 & 6.15 (affirmative duties of state and local governments limited to preventing "conduct which shocks the conscience" directed against persons under governmental control).

170. *See* Wright v. City of Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983) (special relationship required for affirmative duty to protect member of public at large from criminal acts of third person).

171. *See generally* S. NAHMOD, *supra* note 10, §§ 3.08 & 6.15 (simple negligent conduct will not give rise to federal due process claim; for example, there is no federally imposed due process duty to properly maintain railroad crossing, construct bridge, or protect member of public at large from criminal acts of third person).

172. 109 S. Ct. 998 (1989). *DeShaney* held that social service officials have no affirmative substantive due process duty to protect a child against physical abuse by his natural father, even when the officials once had custody of the child and reason to suspect such abuse. *Id.* at 1007. Essentially adopting the position that the Constitution is a charter of negative liberties, the Court also found no special relationship. *Id.* at 1006; *see supra* note 129.

173. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285-88 (1976).

174. For an interesting and comprehensive discussion of the relationship between what she calls modern "masculine" jurisprudence and the value of autonomy, see West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58 (1988) ("Rule of Law does not value intimacy—its offical value is autonomy.").

treat the Constitution as a charter of negative liberties, a position the Supreme Court has in fact recently taken.[175]

In contrast, when the Court applies a constitutional analysis independent of analogy to tort law, it becomes easier to ask—regardless of what the answer is—whether in a particular case the constitution imposes an affirmative duty upon the individual or government defendant. Tort rhetoric thus renders it more difficult to confront the constitutional duty issue head on and prompts courts to use tort concepts to determine the outcome.[176]

3. Political Society

The use of tort rhetoric in § 1983 cases also implies a choice among competing visions of political society—the same choice that resonated in the federalist-antifederalist debate of our early national history.[177] A bipolar, individual autonomy approach to § 1983 in which citizens and the state have no necessary relationship with one another implies a pluralist vision of political society. In such a society, interest groups, or factions, fight it out in the political marketplace for temporary supremacy in the same way that products fight for supremacy in the economic marketplace.[178]

In a pluralist society, people are basically selfish and use political processes

---

175. One of the most famous circuit court examples of this position is Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). In *Bowers,* the plaintiff, whose decedent was killed by a mentally ill person, sued various defendants for allegedly failing to keep the killer incarcerated. *Id.* at 618. Plaintiff alleged that the defendants knew that the killer was dangerous when they released him and that they acted recklessly in releasing him. *Id.* Ruling for the defendants, Judge Posner, writing for the court, stated:

> It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Id. As noted in the text, this portion was adopted by the Supreme Court in DeShaney v. Winnebago County Dep't of Soc. Serv., 109 S. Ct. 998, 1007 (1989); *see supra* note 172.

176. I once made this point in a somewhat different context. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L.J. 5, 12-13 (1974).

177. *See generally* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 5-17 (1986) (reviewing antifederalist critique and federalist response); Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985) (proper role of factions or interest groups was central feature of federalist-antifederalist debate).

178. *See generally* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (American democracy is political competition among groups and individuals); D. TRUMAN, THE GOVERNMENTAL PROCESS (1962) (interest groups are integral part of government process); Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (government regulation is sought by industry and is designed and operated primarily for its benefit); Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335 (1974) (comparing two models of government regulation: one as effort to correct market failures, and other as service provided to effective political interest groups).

for their own end. Factions are therefore inevitable. It is true that by analogy to the economic marketplace, some consider pluralist politics to be the best way to promote the public welfare.[179] Nonetheless, legislative outcomes under the pluralist model are the result of bargaining about individual preferences and are primarily a reflection of shifting political alliances.

This view of political society, reflected in the Court's use of tort rhetoric, assumes that the Constitution is a charter of negative liberties that prohibits federal courts from interfering with pluralist politics at the state and local levels.[180] Such a hands-off approach allows individuals and groups to attempt to use political muscle at those levels either to maintain the social and economic status quo or to attempt to change it.[181]

Classical and Madisonian republicanism, on the other hand, both assert that there is a public good apart from the clash of private interests and that individuals belong to a political community.[182] If the public good cannot be achieved through the deliberative processes of government, then courts using constitutional rhetoric could impose obligations on state and local governments to assist their citizens affirmatively.[183]

---

179. *See generally* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (democratic government acts rationally to maximize political support and win reelection); Becker, *A Theory of Competition Among Pressure Groups for Political Influence,* 98 Q.J. ECON. 371 (1983) (pressure group effectiveness related to societal costs and efficiencies of its agenda relative to other pressure groups).

180. Interference may, however, be warranted when certain groups are, or have been, excluded from the political process. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (legislation restricting access to political process may be subjected to more exacting judicial inquiry); *see generally* J. ELY, DEMOCRACY AND DISTRUST (1980) (courts should limit constitutional review to legislative acts that adversely affect participation of groups and individuals in political process).

This is not to suggest, however, that a pluralist vision inevitably compels a "negative liberties" approach to constitutional interpretation. To the contrary: such a vision could be thought to justify an active judicial role. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (some actions by legislatures cannot be considered a proper exercise of authority, even though their authority may not be expressly constrained by Constitution or law). Justice Chase's argument for judicial review in that case, based on natural law standards, might be premised on a pluralist vision. If so, the purpose of judicial review is to rely on natural law principles to promote the public good, discounting the temporary political supremacy of a majority.

181. However, if one makes the not unlikely assumption that those with political power will also have economic power, then a rigid adherence to the pluralist model may well perpetuate the status quo.

182. Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985). However, classical and Madisonian republicans disagree significantly about the best way to deal with factions, the value of direct citizen participation in self-government, and human nature. Classical republicans believe that factions can be avoided by direct citizen participation in self-government and that people can be educated to be virtuous. In contrast, Madisonian republicans believe that direct citizen participation is not an affirmative good, that people are inherently selfish and that the public good is best promoted by the deliberative processes of representative government. *Id.*

183. Constitutional rhetoric does not necessarily dictate imposing affirmative substantive due process duties. My point is simply that tort rhetoric is improperly outcome-determinative on this

Thus, the federal judiciary might adopt a § 1983 jurisprudence based on Madisonian republicanism[184] and thereby take a prominent role in promoting the public good. In doing so, courts could also fulfill classical republicanism's dictate that civil society should educate its citizens.[185] Because classical republicanism is concerned with civic virtue and its close relation to private virtue, a reading of the due process clause as imposing affirmative obligations on state and local governments to protect and rescue their citizens could serve as a model for the promotion of civic virtue and political community.

The use of tort rhetoric consequently implies a pluralist model of politics in which the Constitution is a charter of negative liberties and in which the federal judiciary should play a minimal role in protecting fourteenth amendment rights. In contrast, when the Court reasons in a framework of constitutional rhetoric, it becomes free to accept a republican model of political society with a correspondingly less restrained view of the proper federal judicial role in § 1983 and fourteenth amendment interpretation.

CONCLUSION

The Court's move from emphasizing constitutional rhetoric to emphasizing tort rhetoric in § 1983 litigation has profound implications for the scope of § 1983 and the fourteenth amendment. This shift has already resulted in the explicit use of tort doctrines to limit the scope of § 1983. It has also encouraged the use of cost-benefit analysis, which tends to devalue constitutional interests because they cannot be quantified. Thus, treating § 1983 as a tort statute marginalizes the important constitution interests it seeks to protect. Even more fundamentally, the use of tort rhetoric in the § 1983 setting

---

and other important § 1983 and constitutional issues. The use of constitutional rhetoric at least frees courts to concentrate on what is really at stake. Note, however, that the Supreme Court has recently accepted the position that the Constitution is a charter of negative liberties and that the due process clause in particular does not give rise to affirmative duties to protect persons. DeShaney v. Winnebago County Dep't of Soc. Serv., 109 S. Ct. 998, 1007 (1989); *see supra* notes 171, 172 & 175 and accompanying text.

184. Madisonian republicans applauded Supreme Court constitutional review of the kind sanctioned by Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803). They reacted favorably because they perceived that the Court could promote public good in circumstances in which the deliberative processes of the legislative branch had broken down. *See* THE FEDERALIST NO. 78 (A. Hamilton), *reprinted in* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 177, at 30 (judiciary governed by Constitution, which manifests will of people).

185. "Adhering to the traditional republican view, the antifederalists argued that civil society should operate as an educator, and not merely as a regulator of private conduct." Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29, 36 (1985). Admittedly, classical republicans would not appreciate having federal courts, a representative of a large, centralized federal government, making these kinds of public good decisions.

masks fundamental assumptions about federalism, the state-citizen relationship, and the nature of political society.

Studies of discourse make clear that institutional choices of language reflect exercises of power by the institution. In § 1983 cases, the use of tort rhetoric by the Court constitutes an exercise of judicial power that goes well beyond holdings and dicta. It enables the Court to structure the ways in which we think about § 1983 and the fourteenth amendment. More particularly, the Supreme Court has increasingly undermined and demeaned § 1983 with a tort rhetoric strategy designed to control the statute's text and interpretation. In order to respond effectively, judges, lawyers, and scholars must first recognize this use of tort rhetoric as a strategy.