INDIVIDUAL LIBERTIES V. FEDERALISM: ARE SECTION 1983 CIVIL RIGHTS CLAIMS UNDER ATTACK BY NEW FEDERALIST JUDGES?

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I. INTRODUCTION

For over a century, the Supreme Court has used the principles of federalism to erode the efficacy of federal civil rights statutes. Section 1983 is arguably one of the most important civil

rights statutes and is a key to civil rights claims. Created during the height of the Ku Klux Klan's reign, when Congress had little faith in the states' judicial systems to address constitutional violations, Section 1983 provides a federal remedy against state and local officials who act "under the color" of state law to deprive the plaintiff of a right, privilege, or immunity contained within the Constitution.[1]

During the Civil Rights Movement, Freedom Riders and other Civil Rights activists were subjected to violence from both police officers and white demonstrators protesting desegregation.[2] In the 1961 landmark case Monroe v. Pape, the Supreme Court adopted a new interpretation of § 1983 that protected individuals from state sanctioned violence.[3] That interpretation was and remains crucial for holding state government actors liable for tortious conduct that deprives citizens of their constitutional rights. Nevertheless, in cases since *Monroe*, the Court has narrowed § 1983's protections; and, now that Justice Gorsuch has joined the Court, there is a significant risk that those protections will essentially be unavailable.

This Comment will examine how the addition of Justice Gorsuch may affect § 1983 claims based on tortious actions by government officials. Part II addresses the history of 42 U.S.C. § 1983, discusses, *Monroe v. Pape*, and outlines the Court's interpretation of § 1983 in subsequent cases. Part III explores how the principles of federalism adhered to by Justices Gorsuch and Thomas narrowed the use of § 1983 for civil rights claims and could potentially lead to the reversal of *Monroe v. Pape*. Finally, Part IV examines the importance of § 1983 claims in society today and the implications of overturning *Monroe v. Pape*.

II. THE HISTORY OF SECTION 1983

A. THE KU KLUX KLAN ACT OF 1871 AND THE CASE FOR NATIONAL CITIZENSHIP

Prior to the Civil War, principles of federalism prevailed so that the Constitution regulated federal actions, and states were

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1. *See* Monroe v. Pape, 365 U.S. 167, 179-80 (1961).

2. JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN 333 (1999).

3. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 519 (1993).

in charge of protecting their own citizens from deprivations of life, liberty and property.[4] After the Civil War and during the creation of the Civil War Amendments,[5] racism and federalism obstructed the development of equality for Black people.[6] In fact, "all but the most radical of abolitionists agreed that each state government possessed the exclusive authority to protect the fundamental, natural rights of its own citizens."[7] Thus, strict federalism would allow states unfettered authority to restrict the rights of Black people with the state police powers.[8] For example, the first Civil Rights Bill of 1866[9] was vetoed by President Johnson, who feared federal government oversight into city and state affairs.[10] Fortunately, the majority of Congress did not share Johnson's fears, and rejected his presidential veto to pass the watershed legislation.[11] Next, the passage of the Fourteenth Amendment now obligated the federal government to protect *all* citizens from these deprivations and ensure them equal protection under the law.[12] Under Section Five of the Fourteenth Amendment, Congress enacted the Ku Klux Klan Act of 1871,[13] which grants Congress the power to enact legislation enforcing the amendment.[14]

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4. HOWARD, *supra* note 2, at 39.

5. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV, § 1 ("The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

6. HOWARD, *supra* note 2, at 39.

7. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS 1863-1869 32 (1990).

8. HOWARD, *supra* note 2, at 43.

9. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981-1982 (2012)).

10. HOWARD, *supra* note 2, at 54.

11. *Id.*

12. U.S. CONST. amend. XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

13. CHRISTIAN G. SAMITO, CHANGES IN LAW AND SOCIETY DURING THE CIVIL WAR AND RECONSTRUCTION 234 (2009).

14. U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

The southern states resisted Reconstruction.[15]In fact, many states passed laws that not only greatly hindered the rights of Black Americans, but also put their lives in jeopardy.[16] The Ku Klux Klan, through intimidation and murder, prevented Black Americans from exercising their newfound rights to vote, run for public office, and participate in the justice system.[17] Today, the actions of the Klan would be called domestic terrorism[18] Their actions were strategically designed to create their own legal regime.[19] For example, testimony during the Klan hearings repeatedly chronicled stories of men being awoken in the middle of the night to loud banging on the doors and being torn out of their houses only to be beaten and threatened by men in white hoods for exercising their right to vote.[20] In one instance, a local sheriff and 400 white supremacists killed twelve peaceful citizens who were participating in a Black election parade.[21] Even more frightening was a petition from Black Americans in Kentucky who relayed over one hundred acts of terror from 1867-1871 that included lynchings, school burnings, and repeated beatings by Klansmen.[22] Moreover, the state and local authorities were unable or unwilling to hold these abusers, murderers, and rapists accountable for their heinous acts against the many "unoffending American citizens" who were Black.[23] Consequently, President

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15. Reconstruction lasted from 1863 until 1877.

16. HOWARD, *supra* note 2, at 62. "It is said that the reason that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify" Monroe v. Pape, 365 U.S. 167, 173-174 (1961).

17. HOWARD, *supra* note 2, at 62; *see also The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (last visited March 13, 2021).

18. Domestic Terrorism are activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United State or of any State; appear to be intended—to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(5)(A)(B)(i)-(iii).

19. Eric A. Harrington, *Judicial Misuse of History and § 1983: Toward A Purpose-Based Approach*, 85 TEX. L. REV. 999, 1006 (2007).

20. SAMITO, *supra* note 13, at 229.

21. Colbert, *supra* note 3, at 516.

22. HOWARD, *supra* note 2, at 62-63.

23. Monroe v. Pape, 365 U.S. 167, 175 (1961) ("Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford

Grant called on Congress to act, stating: "[T]he power to correct these evils is beyond the control of the State authorities I do not doubt. . . . I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty and property, and the enforcement of law in all parts of the United States."[24] State and local officials were either participating in the violence or were complicit in it by failing to protect citizens' constitutional rights from white supremacists.[25] Consequently, the President and members of Congress knew that something had to be done to protect Black people and other citizens who supported Reconstruction policy.[26] Notably, Southern democrats resisted these measures by touting principles of federalism that focused on state rights and racism.[27]

It is crucial to understand that Congress had no faith in the judicial systems of the states.[28] After two years of Klan Hearings, Congress began passing Enforcement Acts to create federal remedies[29] where states failed to protect constitutionally secured rights.[30] The Ku Klux Klan Act of 1871[31] did not create a remedy against Klan members.[32] It created a remedy against the state and local officials who refused to protect their Black citizens from white supremacists.[33] The Act allowed for a plaintiff, whose

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protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.").

24. CONG. GLOBE, 42d Cong., 1st Sess. 244 (1873).

25. *See* Brian J. Gaj, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756, 758-59 (1985).

26. *Id.* at 759.

27. HOWARD, *supra* note 2, at 62.

28. *See* Gaj, *supra* note 26, at 758-59.

29. Eric A. Harrington*, Judicial Misuse of History and S 1983: Toward A Purpose-Based Approach*, 85 TEX. L. REV. 999, 1006 (2007).

30. HOWARD, *supra* note 2, at 64.

31. The relevant portion of the Ku Klux Klan Act of 1871 is Section 1 which stated:

> That any person who, under color of any law, statute, ordinance, regulation, custom of any State, shall subject, or cause to be subjected, any person with the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceedings to be prosecuted in the several district or circuit courts of the United States . . . . "

Ku Klux Klan Act, ch. 22, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2012)).

32. Monroe v. Pape, 365 U.S. 167, 175-76 (1961).

33. *Id.*

rights would be denied in a state court, to remove the action to federal court.[34] Importantly, the Act stipulated that persons acting "under the color of law"[35] could be prosecuted in federal court.[36] Thus, Black victims and Union sympathizers could now bring civil actions in federal court against local and state officials who had deprived them of any right, privilege, or immunity granted by the Constitution.[37] The intent of Congress was clear: individuals suffering a deprivation under the Fourteenth Amendment should be able to bring a civil suit in federal court regardless of whether it could also have been heard in a state court.[38] Moreover, principles of federalism had no place where there was not equal protection of all citizens from deprivations of their rights.

In five short years, over three thousand cases were brought under the Enforcement Acts[39] which resulted in over one thousand indictments against Klansman and night riders.[40] The Civil War Amendments and the Enforcement Acts,[41] "proved to be an effective instrument for breaking up the Klan and reducing the volume of terror."[42] Federal judges relied on the theory of "national citizenship" to supersede the authority of the state in hearing these cases.[43] Nevertheless, American federalism was still an important value in politics, and these principles created a constant struggle between the role of the federal government in guaranteeing constitutional rights and state sovereignty.[44]

Opponents of the Civil War Amendments and the Enforcement Acts took issue with the "revolutionary change in American federalism."[45] The Enforcement Acts had stolen the traditional state government's power and ceded it to the federal govern-

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34. HOWARD, *supra* note 2, at 65.

35. The interpretation of "Under the Color of Law" will be discussed in Part II.B.

36. SAMITO, *supra* note 13, at 234.

37. HOWARD, *supra* note 2, at 64-65.

38. *Id.*

39. *Id.* at 66.

40. *Id.* at 85.

41. These Acts include, the Enforcement Acts of 1870, Civil Rights Act of 1886, Civil Rights Act of 1875, and the Ku Klux Klan Act of 1871.

42. HOWARD, *supra* note 2, at 65.

43. *Id.* at 86.

44. MALTZ, *supra* note 7, at 29.

45. HOWARD, *supra* note 2, at 88.

ment.[46] As cases came to the Supreme Court questioning the constitutionality of the Enforcement Acts and the Civil War Amendments, the Court defended the principles of federalism and protected states' sovereignty.[47] While key parts of the Enforcement Acts were overturned and power was given back to state law enforcement, the portions of the Ku Klux Klan Act of 1871 that created a right against illegal state actors were upheld.[48] Nonetheless, when the Reconstruction Era ended and the federal government withdrew from the South, the Ku Klux Klan Act of 1871 fell into disuse, even while "antiblack terror became more ferocious."[49]

Section one of the Ku Klux Klan Act of 1871 authorizing civil suits against state actors became part of the Civil Rights Act § 1983.[50] However, between Reconstruction and 1961, the Supreme Court interpreted § 1983 to exclude claims against state and local officials unless the state had authorized the tortious conduct.[51] Obviously, it was extremely difficult for plaintiffs to prove that a state mandated police brutality.[52] Therefore, victims of violence by state actors were relegated to their local state courts and whatever civil law tort claims were available, such as battery or assault.[53] This interpretation exemplified the principle of federalism: states have inherent authority to remedy any action that is not based in a constitutional violation. Consequently, the Court's interpretation fell in stark contrast with the theory of national citizenship, which was the basis of the Ku Klux Klan Act of 1871. For these reasons, the Ku Klux Klan Act of 1871, i.e. Section

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46. MALTZ, *supra* note 7, at 157.

47. *See* HOWARD, *supra* note 2, at 111.

48. *Id.*

49. *Id.*

50. "Every person **who under color of any statute, ordinance, regulation custom or usage** of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added).

51. *See, e.g.*, Barney v. City of New York, 193 U.S. 430 (1904) (holding that unauthorized acts of state officials are not a state action within the meaning of the Fourteenth Amendment).

52. Colbert, *supra* note 3, at 519.

53. *Id.*

1983, remained unused for over ninety years, until the seminal case of *Monroe v, Pape* was decided in 1961.

B. *MONROE V. PAPE*

In the decade preceding *Monroe*, the nation again was grappling with racial injustice and ensuring equal protection of the laws. The civil rights movement, which has been called the "Second Reconstruction,"[54] again found Congress and the courts struggling to balance the ideals of equality with principles of federalism. In 1954, the Supreme Court held that "segregation is a denial of the equal protection of the laws."[55] Subsequently, the Civil Rights Act of 1957 was enacted to enforce the voting rights of Black people, which had been gravely suppressed in southern states through economic coercion.[56] This new Act was reminiscent of the Enforcement Acts of Reconstruction. The failure of the state court system was on full display in the case of fourteen-year-old Emmet Till.[57] In 1955, white vigilantes brutally murdered Till, who was visiting his relatives in Mississippi.[58] The kidnapping, beating and murder echoed acts that commonly occurred during the KKK's Reconstruction Era reign of terror. His killers were acquitted and soon after sold their confession for profit.[59] Soon after, racist public officials began committing blatantly tortious acts against racial protestors in southern cities.[60] In response to the demonstrations, which were led by Martin Luther King, Jr., police attacked non-violent protestors with police clubs, K9 dogs, and high pressure fire hoses.[61] Much like the political battle during Reconstruction, the fight for Black people equality had become a battle of federal government oversight against the state-sanctioned violations of citizens' rights.

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54. *Id.* at 518.

55. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495 (1954).

56. *Private Economic Coercion and the Civil Rights Act of 1957*, 71 YALE L.J. 537, 542 (1962).

57. Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2103 (2005).

58. *Id.*

59. *Id.* at 2106.

60. ROBERT D. LOEVY, THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 24 (1997).

61. *Id.*

There are striking parallels between the testimony of Black people living in the South during Reconstruction[62] and Mr. Monroe's own horrifying experiences with the Chicago police. In the middle of the night, Detective Pape broke through the doors of the Monroe family apartment with twelve Chicago police officers.[63] Notably, the officers had no search or arrest warrant to justify their intrusion, but their illegal conduct did not stop there.[64] Next, the officers made Mr. and Mrs. Monroe stand naked with their six children while the officers ransacked the house and called him racial slurs.[65] During this time, the officers also struck Mr. Monroe and his children.[66] After the illegal search of his house, Mr. Monroe was detained at the police station for ten hours and not allowed to contact an attorney or his family.[67] Finally, the police released Mr. Monroe and never charged him with a crime.[68] Mr. Monroe subsequently brought suit under the Civil Rights Act § 1983, seeking a civil remedy against the officers who had acted "under color of the statutes, ordinances, regulations, customs and usages of Illinois and the City of Chicago."[69] This was exactly the type of action that Congress had intended to protect national citizens against when it enacted § 1983.

In *Monroe v. Pape*, the Supreme Court considered the applicability of § 1983 to the constitutional violations by police officers as state actors.[70] In its analysis, the Court first reviewed the history of the Ku Klux Klan Act and the congressional intent of that time.[71] This review was extremely important because it revealed that the Ku Klux Klan Act was designed to combat the Klan activities that the state governments were unable to control.[72] Fur-

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62. *See supra* Part II.A. "When they came again I had a clock and it struck one, and I laid there, and the first thing I heard the yard was full of horses, and they were rearing and cursing. . .They started off with me, and they run in the house and cursed and tore and jerked my daughter out, and jerked my wife and my wife's son out of bed. . .They made us lie all lie down—my wife and all. They had us nearly naked." SAMITO, *supra* note 13, at 230.

63. Monroe v. Pape, 365 U.S. 167, 203 (1961) (Frankfurter, J., dissenting).

64. *Id.*

65. Monroe v. Pape, 365 U.S. 167, 203 (1961) (Frankfurter, J., dissenting).

66. *Id.*

67. *Id.* at 169.

68. *Id.*

69. *Id.*

70. *See id.* at 168.

71. *See Monroe*, 365 U.S. at 173-83.

72. *Id.* at 174-75.

ther, the rationale for providing a federal remedy even when state remedies were theoretically available was imperative for instances in which "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[73] The Court noted that opponents to the Ku Klux Klan Act were wary of transferring power that traditionally belonged to the state into the jurisdiction of the federal courts.[74] However, the Court rejected this fear of federalism shrinking the states' rights.[75] Instead, the Court justified the infringement on state's rights because all citizens should equally be "so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own."[76] The holding by the Court expanded § 1983. Thus, plaintiffs could proceed directly to federal courts because the Court had found § 1983 claims supplemental to any state law remedy.[77]

The Court then analyzed more recent legislative activity and its previous interpretation of the meaning "under color of" state law requiring states to authorize the acts of officials.[78] A similar term was used in 18 U.S.C. § 242, the criminal counterpart to § 1983 civil claims.[79] The Supreme Court had interpreted "under color of" law to include a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[80] Therefore, the Court found that § 1983 did provide a civil remedy where a government official acted beyond the scope of authority granted to him by the state.[81] As a result, it was inconsequential whether the police actions were not authorized by the city.[82] The police in *Monroe* were acting "under color of" law, because they were employees of the

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73. *Id.* at 180.

74. Monroe v. Pape, 365 U.S. 167, 179 (1961).

75. *Id.* at 182.

76. *Id*.

77. *Id*. at 183.

78. *See id*. at 184-86.

79. *Id.* at 184.

80. *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

81. *Id.* at 187.

82. *Id.* at 178.

City of Chicago and engaged in their jobs during the violation.[83] The Court, noted that § 1983 should provide tort liability and ensure that individuals are held responsible for their actions by making them personally liable for damages caused.[84] Most importantly for the purposes of this Comment, the Court claimed that even if a state has a remedy, it need not be sought or refused prior to a claim being brought in federal court under § 1983.[85] Thus, individuals who were victims of tortious actions by state and local officials could now seek redress in federal courts under § 1983.

C. THE PROGENY OF *MONROE*

After *Monroe*, civil rights claims flooded into the courts because of the newly available redressability of constitutional violations and the opportunity to recover monetary damages.[86] The most common claims were against law enforcement for false arrest,[87] unreasonable searches and seizures,[88] wrongful convictions,[89] and wrongful death in the case of excessive use of force.[90] Section 1983 also allowed plaintiffs to successfully litigate governmental restriction of free speech of whistleblowers,[91] equal protection claims,[92] education claims,[93] and claims of incarcerated persons.[94] The basic elements of a § 1983 claim require the plaintiff to establish a prima facia case that (1) the defendant acted under color of state law, and (2) the defendant's conduct caused

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83. *Id.*

84. Monroe v. Pape, 365 U.S. 167, 187 (1961).

85. *Id.* at 183. Ultimately, the Court held that the action against the City of Chicago should be dismissed because Chicago was not a "person; however, the claims against the individual police officers should go forward under a § 1983 claim." *Id.* at 192.

86. *See generally* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION (2d ed. 2008).

87. *See generally* Pierson v. Ray, 386 U.S. 547 (1967).

88. *See generally* Graham v. Connor, 490 U.S. 386 (1989).

89. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

90. *See generally* Tennessee v. Garner, 471 U.S. 1 (1985) (Section 1983 opened the door to seek punitive damages against law enforcement who had used excessive force resulting in the death of the individual).

91. *See generally* Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563 (1968).

92. *See generally* Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

93. *See generally* Ingraham v. Wright, 430 U.S. 651 (1977).

94. *See generally* Estelle v. Gamble, 429 U.S. 97 (1976); Farmer v. Brennan, 511 U.S. 825 (1994).

the plaintiff to be deprived of a right protected by the Constitution.[95] As more cases were brought, the Court began to define these elements, place limits on them, and provided a framework for a successful § 1983 claim.

Section 1983 begins with the clause that "every person" acting under the law that causes a deprivation will be held liable.[96] Initially, the Court construed "persons" to mean actual government officials and did not extend liability to cities, agencies, or local municipalities.[97] Soon after, the Court expanded the definition of "persons" in *Monell v. Dept. of Social Serv. Of City of New York*.[98] There, the Court considered whether, during the passage of the Ku Klux Klan Act, Congress intended to cover municipalities in the meaning of "persons." [99] In both *Monroe* and *Monell* , the Court found that municipalities and local government units were subject to civil liability because during Reconstruction, Congress was focused on providing a "broad remedy for violations of federally protected civil rights."[100] Thus, the expansion of "persons" allowed for potential plaintiffs to bring suit against local governments for policies that caused a violation of a citizen's constitutional rights.

Consequently, permitting suits against cities and municipalities for their tortious policies would allow plaintiffs to potentially recover greater damages, but more importantly, it could deter future illegal acts. However, the Court created a hurdle for a plaintiff to reach into the deep pockets of a city or government agency by requiring a causal connection between the defendant's actions and the harm suffered. The plaintiff must prove a direct "but for" cause between the defendant's actions and the resulting harm.[101] The Supreme Court interpreted this causation element to require that a city "policy" or "custom" be the direct cause of the alleged deprivation.[102] Recovery is appropriate only where, "but for" the

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95. Parratt v. Taylor, 451 U.S. 527, 535 (1981) ("[T]he initial inquiry must focus on whether the two essential elements to a § 1983 action are present.").

96. 42 U.S.C. § 1983.

97. Monroe v. Pape, 365 U.S. 167, 192 (1961) (The Court affirmed the dismissal of the suit against the City of Chicago because it was not a "person.").

98. *See generally* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978).

99. *Id.* at 685-86, 690.

100. *Id.*

101. *Monell*, 436 U.S. at 693.

102. *See* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 402-04 (1997); City of Canton v. Harris, 489 U.S. 378, 385-86 (1989).

breach of constitutional duty, the injury would not have occurred.[103] In most actions, no deliberative act, state of mind, or intent on the part of the government actor is required to cause a deprivation; however, there are certain exceptions for prison officials.[104] These include a showing of "deliberate indifference" on the part of a prison official that results in an injury to the plaintiff.[105]

For example, in *Farmer v. Brennan* the plaintiff was transgender and for that reason, another prisoner physically assaulted her.[106] The Supreme Court created a new test for liability of prison officials that hinged on whether the officials both knew of and disregarded an excessive risk to the health and safety of person who is incarcerated.[107] Furthermore, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[108] Ultimately, the Supreme Court held that prisoners have an Eighth Amendment right to be free from cruel and unusual punishment, which included protection from assaults by other prisoners when the officials pass the aforementioned test.[109] This same analysis is also used when a state fails to provide adequate medical care to persons who are incarcerated.[110]

As noted in Part II.B, even when government officials misuse their state-authorized power, the official can still be liable for deprivations of rights under the Constitution because they are acting "under the color of law." The key to this idea is that government officials must be engaged in tasks within the scope of their employment, and their actions must be made possible by the authority given to them by the state law.[111] For example, an off-duty police officer that remains in uniform and is working as a

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103. Martinez v. California, 444 U.S. 277, 284-85 (1980).

104. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). In cases where prison guards are the attackers, the plaintiff must actually show that the officer's applied malicious and sadistic force to cause harm. This is a very high standard, and difficult to prove. Hudson v. McMillian, 503 U.S. 1, 7-8 (1992).

105. Farmer v. Brennan, 511 U.S. 825 (1994).

106. *Id.* at 831.

107. *Id.* at 837.

108. *Id.*

109. *Id.*

110. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

111. West v. Atkins, 487 U.S. 42, 57 (1988).

private security personnel would be liable for constitutional deprivations because he is "clothed with the authority of state law."[112] Even private actors who are engaged in state actions can be liable under the Civil Rights Act.[113] In a variety of cases, individuals who are prisoners of the state have brought actions against private physicians for their deliberate indifference to medical needs.[114] These private physicians are in a contractual relationship with the state to provide medical care; therefore, their actions are under color of state law.[115]

When an official's actions deviate from acceptable practice, even if he takes actions because of the authority given to him by the state, he is liable.[116] In *Stengel v. Belcher*, two citizens were killed and another paralyzed because an overzealous police officer interfered with a dispute over a game of bowling.[117] Belcher was off-duty, dressed in plain clothes while on a date[118] and carrying a concealed can of mace and his issued gun.[119] The three unarmed victims were involved in a dispute, when Belcher, without identifying himself, inserted himself into the altercation.[120] The fight quickly escalated and after falling to the ground, Belcher drew his gun and shot one victim in the chest, a second through his spinal canal, and the last in the face outside the bar.[121] The chief of police testified that a police officer was required to take action for any criminal activity at any time of day.[122] This led the court

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112. Steve Libby, *When Off-Duty State Officials Act Under Color of State Law for the Purposes of Section 1983,* 22 MEM. ST. U. L. REV. 725, 731 (1992).

113. *West*, 487 U.S. at 57. In this case a private physician contracted with the state prison and, therefore, was acting under the color of state law.

114. *Id.*

115. *Id.*

116. Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975), *per curium* Belcher v. Stengel, 429 U.S. 118 (1976). The Supreme Court granted writ on the issue of whether "an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that person or another even though the officer is engaged in private conduct at the time, is an act 'under color of law', but after the case was fully briefed and argued, the Court found that the writ should have been denied because Belcher's actions were considered in the line of duty. Belcher v. Stengel, 429 U.S. 118, 119 (1976).

117. Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975).

118. *Id.*

119. *Id.* The police regulations required that he carry his gun at all times.

120. Stengel v. Belcher, 522 F.2d 438, 440 (6th Cir. 1975).

121. *Id.* at 441.

122. *Id.* at 441.

to find that Belcher was acting under color of law when he utilized poor judgment in his actions and used excessive force.[123]

Claims under § 1983 are important because they hold government officials accountable and hopefully deter similar actions. The claims also provide a remedy for plaintiffs to be made whole through monetary damages. While the statute is silent on monetary damages, the Court found that the purpose of a § 1983 claim is to compensate victims essentially in the same manner as common law torts.[124] Oftentimes, when plaintiffs suffered physical injuries at the hands of a government official, they brought § 1983 claims to recover through nominal, compensatory, or punitive damages.[125] Two subsequent acts and rulings significantly expanded § 1983 as a remedy that provided plaintiffs with more opportunities to recover their losses.

The first occurred when Congress passed the Civil Rights Attorneys Fees Awards Act of 1976.[126] The Act allowed the prevailing party, not the United States, to recover "reasonable attorney's fees."[127] Congress wanted to ensure that civil rights statutes could be enforced and protected by private plaintiffs, which would not be possible if attorney's fees were not available.[128] Congressional intent was clear that if the § 1983 claims were to be successfully brought, attorney's fees must be provided.[129] The second occurred when the Supreme Court held that, although § 1983 was a federal remedy, state courts could also hear these claims.[130] Consequently, a plaintiff could bring a § 1983 concurrently with other state law claims in a state court for strategic reasons in order to maximize recovery.[131]

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123. *Id.* at 442.

124. *See* Carey v. Piphus, 435 U.S. 247, 258-59 (1978).

125. *See generally* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION (2d ed. 2008).

126. 42 U.S.C.A. § 1988.

127. *Id.*

128. S. REP. NO. 94-1011, at 3 (1976) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts.").

129. S. REP. NO. 94-1011, at 3 (1976). "Without counsel fees the grant of Federal jurisdiction is but an empty gesture." *Id.* (citing Hall v. Cole, 412 U.S. 1 (1973).

130. *See, e.g.*, Martinez v. California, 444 U.S. 277, 283 n.7 (1980).

131. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 11 (1980) (stating that the attorneys' fee provision applies to § 1983 in federal or state court.).

Thus, the focus of both Congress and the Court during the decades following *Monroe* was to ensure plaintiffs a federal remedy for the deprivation of their constitutional rights. The expansion of "persons" guaranteed that individual officials would be held accountable and that municipalities and cities would be incentivized to protect their citizens. Moreover, the passage of the Civil Rights Attorneys Fees Awards Act of 1976 and the choice of courts rulings assured all their day in court –whether they were an incarcerated person, child, or person of color. The protection of constitutional rights of the citizens of the United States was more important than the sovereignty of an abusive state or its official actors.

III. FEDERALISM REEMERGES

Federalist concerns did not disappear with the Second Reconstruction.[132] In response to these concerns, the Court began curtailing certain rights that could be enforced under § 1983 through court-made legislation.[133] Today, these same concerns are echoed in the opinions of Justices Gorsuch and Thomas.[134] The patterns of the post-*Monroe* Court and the judicial opinions of Justices Gorsuch and Thomas provide a framework for how § 1983 can be attacked and potentially narrowed to its pre-*Monroe* interpretation.

A. WHAT DOES FEDERALISM MEAN TO JUSTICES GORSUCH AND THOMAS?

Justices Thomas and Gorsuch are strong proponents of federalism.[135] Federalism involves two countervailing principles of state sovereignty and federal supremacy both found in the Constitution.[136] Federalists bolster their arguments by citing the Tenth Amendment which states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the

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132. *Supra* Part II.B.

133. Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 767 (1992).

134. *Supra* Part III.A.

135. *See* Clarence Thomas et al., *The Second Annual William French Smith Memorial Lecture: A Conversation with Justice Clarence Thomas*, 37 PEPP. L. REV. 7, 18 (2009); *see also* Wood v. Milyard, 721 F.3d 1190, 1192 (10th Cir. 2013).

136. Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 694 (2005).

States, are reserved to the States respectively, or to the people."[137] Federalism, then, allows for the state and federal government to simultaneously govern its citizens without interfering "with each other's constitutionally permissible regulatory agenda."[138] Notably, the current conservative ideas on federalism often focus entirely on state sovereignty with which laws that intrude upon states' rights are struck down by the Court.[139]

As a judge on the Tenth Circuit Court of Appeals, Justice Gorsuch consistently maintained a pro-federalism position and often weighed the balance of federalism and comity.[140] Now, as a Supreme Court Justice, he has continued down this federalist path, championing states' rights and cautioning against Court decisions that do not uphold a federal government that is limited to its enumerated powers.[141] In his opinions, he intertwines the principles of federalism with the importance of individual liberties.[142] Thus, Justice Gorsuch consistently focuses on the need for the federal courts to abstain from exercising jurisdiction if there is no "compelling" reason.[143] Justice Gorsuch seems to call for this balance of federalism in every potential case, whereas Justice Thomas takes a slightly different approach.

Justice Thomas adheres to the principles of federalism,[144] and often cites to the Tenth Amendment in his opinions.[145] When balancing the state and federal authority, Justice Thomas has of-

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137. U.S. CONST. amend. X.

138. Nathaniel F. Sussman, *On Immigration, Information, and the New Jurisprudence of Federalism*, 93 S. CAL. L. REV. 129, 132 (2019).

139. *See id.*

140. Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 591–92 (2018); *see also* Wood v. Milyard, 721 F.3d 1190, 1192 (10th Cir. 2013) ("As a matter of comity and federalism, then, we will usually hold our tongues about any potential federal law violation lurking in the background of a state procedural default."); United States v. Reese, 505 F. App'x 733, 737 (10th Cir. 2012); Genova v. Banner Health, 734 F.3d 1095, 1103 (10th Cir. 2013); Hill v. Kemp, 478 F.3d 1236, 1257 (10th Cir. 2007).

141. Johnstone, *supra* note 140, at 592.

142. *See* Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1906 (2019).

143. Browder v. City of Albuquerque, 787 F.3d 1076, 1084 (10th Cir. 2015) ("Federal courts often abstain when they otherwise might proceed out of respect for comity and federalism and the absence of any compelling need for their services.").

144. Thomas et al., *supra* note 135, at 18 ("Whether it's federalism or separation of powers, it's so important that we realize that our great protection is that everyone stays within their assigned roles.").

145. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 217 (2009) (Thomas, J., dissenting).

ten stated that the imposition of the Civil War Amendments into the states' powers "exacts significant federalism costs."[146] These sentiments are echoed in federal habeas cases where Justice Thomas has argued against "federal intrusion into state criminal affairs."[147] Thus, it is no surprise that not long after Justice Thomas took the bench, he joined Justice Kennedy's concurrence concerning § 1983 and tortious acts by the state, which echoed the federalist concerns of Frankfurter in *Monroe*.[148]

In *Albright v. Oliver*, the Court held that an arrest without probable cause did not constitute a violation of substantive due process rights and should have been brought under a Fourth Amendment claim.[149] Alternatively, Justice Kennedy determined that the state provided a tort remedy for malicious prosecution. Therefore, the claim could not be sustained under a § 1983 due process claim.[150] Justice Kennedy's concurrence warned that opening up § 1983 claims to general tort law "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment."[151] Furthermore, Justice Kennedy argued that injuries caused by random and unauthorized acts by government officials were better remedied by state law; conversely, injuries caused by state law, policy, or procedure could be brought under § 1983.[152] This opinion perfectly aligned with the Frankfurter dissent in *Monroe*.

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146. *Id*. at 225 (Thomas, J., dissenting).

147. Davila v. Davis, 137 S. Ct. 2058, 2070 (2017).

148. *See generally* Albright v. Oliver, 510 U.S. 266 (1994). An informant told the defendant police officers that the plaintiff's father sold her cocaine and turned it over to the police, it was actually baking soda. Nevertheless, the defendants obtained an arrest warrant and went to the house where they found the named suspect to be an elderly man, who when questioned stated he had two sons. The defendants changed the name on the warrant to his son's name. The first son was in Chicago at the time of the alleged offense. The defendants then issued a warrant for the second son, the plaintiff. He turned himself in, posted bond and was ordered to not leave the state. The charges were subsequently dropped.

149. Albright v. Oliver, 510 U.S. 275 (1994).

150. *Id*. at 283 (Kennedy, J., concurring).

151. *Id.* at 284 (Kennedy, J., concurring) (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981)).

152. *Id.* at 283 (Kennedy, J., concurring).

Justice Frankfurter, the lone dissenter in *Monroe*, argued against the majority opinion because of federalism concerns.[153] Like the opponents of the Ku Klux Klan Act of 1871, Frankfurter disliked the idea of the federal courts being the primary mode of protecting the people and property of the states.[154] While the dissent reiterated the fact that the officers' actions were heinous, Justice Frankfurter reasoned that the state court should have been the first avenue for remedy.[155] Furthermore, the federal court should only be permitted to hear a § 1983 claim after the state has refused to redress the tortious act, or alternatively, if the state sanctioned the act by providing immunity.[156] Cautioning against federal intervention in states' rights, the dissent argued that the Majority's decision would allow the state legislatures to harm citizens because the legislatures would not feel responsible for their citizens' wellbeing.[157] Ultimately, Justice Frankfurter's trepidation about extending liability to government actors for rogue behavior laid a foundation for future Supreme Courts to limit accountability through judge-made legislation.

B. RESTRUCTURING SECTION 1983 IN THE FIGHT FOR FEDERALISM

Under the guise of public policy and need to remedy past courts' failures, the Supreme Court has restructured the use of § 1983.[158] The Court has engaged in legislative activity to create qualified immunity in order to protect government officials from suit due to fears regarding potential social costs.[159] Nowhere in the text of § 1983 is there mention of qualified immunity for government officials, yet the Court has upheld and expanded on this

153. Monroe v. Pape, 365 U.S. 167, 229 (1961) (Frankfurter, J., dissenting) ("Indeed, the Ku Klux Act as a whole encountered in the course of its passage strenuous constitutional objections which focused precisely upon an assertedly unauthorized extension of federal judicial power into areas of exclusive state competence.").

154. *Id.* at 231 (Frankfurter, J., dissenting).

155. *Id.* at 211 (Frankfurter, J., dissenting).

156. *Id.*

157. *Monroe*, 365 U.S. at 234 (Frankfurter, J., dissenting).

158. Lewis, *supra* note 133, at 764-65.

159. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). These costs include the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.*

judge- made rule for many years.[160] Justice Scalia argued that the invention of qualified immunity by the court was proper because it would help correct the errors of *Monroe*.[161] Basically, by expanding the definition of "persons" to include entities, the Court has broadened the spectrum of actors who may be held liable.[162] Conversely, the Court has made bringing a § 1983 claim against a state actor more difficult by limiting the official's liability only to circumstances when they're acting in accordance with an official policy, custom, or law.[163] Again, this was judicially created under the pretext of federalism for fear of "intrusive interference with vigorous state administration of public functions."[164] Conversely, Justice Gorsuch and Justice Thomas would appear to go beyond judge- made law and simply reverse years of precedent and stare decisis in regards to § 1983.

While serving on the Tenth Circuit Court of Appeals, Justice Gorsuch was quick to criticize § 1983 claims that plaintiffs could have brought in state courts. His criticism of *Monroe* first appeared in *SECSYS, LLC v. Vigil*.[165] There, the plaintiffs filed a § 1983 cause of action against two government actors for violation of the Equal Protection Clause.[166] The plaintiff's claim was based on a theory of extortion, which Justice Gorsuch seemed to find preposterous.[167] Furthermore, when analyzing the applicability of § 1983, Justice Gorsuch stated: "But, of course, that's exactly how § 1983 has been long read (though over the occasional objection)."[168] These occasional objections, to which Justice Gorsuch re-

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160. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803 (2018). "Section 1983 creates a species of tort liability that on its face admits of no immunities." Wyatt v. Cole, 504 U.S. 158, 163 (1992).

161. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (Justice Scalia's dissent argued that *Monroe v. Pape* was wrongly decided because it allowed claims against individuals who acted without the authority of law or even against the state law).

162. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978).

163. *Id.* "[T]o keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *Id.* at 693.

164. Lewis, *supra* note 133, at 801.

165. SECSYS, LLC v. Vigil, 666 F.3d 678, 684 (10th Cir. 2012).

166. *Id.* at 683.

167. *See id.* ("But until now, nearly 150 years after the Fourteenth Amendment's adoption, it's never been thought that extortion *also* violates the Constitution's Equal Protection Clause as a matter of course.").

168. *Id.* at 684 (citing Monroe v. Pape, 365 U.S. 167, 224–58 (1961) (Frankfurter, J., dissenting); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

fers, are opinions by the late Justice Scalia who was joined by Justice Thomas.[169]

Similarly, in *Browder v. City of Albuquerque*, Justice Gorsuch provided an analysis on § 1983 that could potentially lead to overturning *Monroe v. Pape*.[170] In a concurring opinion, Justice Gorsuch stated that the authority to provide a remedy does not always create a duty to do so.[171] Moreover, Justice Gorsuch called for the court to respect the ideas of federalism and defer to the state when there is no compelling need to infringe upon state courts.[172] In the opinion, he proposed that unless it can be shown that the state court is acting discriminately towards certain claims, the federal court should not hear cases with a state law remedy.[173] Alarmingly, Justice Gorsuch seemed to ignore the history of § 1983 and the failure of state courts to remedy the many wrongs perpetuated by the Ku Klux Klan when he stated that "we have state courts ready and willing to vindicate those same [constitutional] rights using a deep and rich common law that's been battle tested through the centuries."[174]

Justice Thomas has stated his willingness to diverge from precedent in his desire to uphold principles of Federalism and the Constitution.[175] His addition to the Court in the 1990s has seen him "rip up whole fields of American law, especially to reduce the scope of federal regulation."[176] For example, while he has noted the "importance of stare decisis to the stability of our Nation's legal system," Justice Thomas has also stated that "stare decisis is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means."[177] In fact, Justice Thomas's method for overturning precedent is systematic: he starts by examining the text of the statute, then the history and traditions behind it, then finally revisits earlier precedents to find the true mean-

169. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

170. *See* Browder v. City of Albuquerque, 787 F.3d 1076 (10th Cir. 2015).

171. *Id.* at 1084.

172. *See id.* (citing Younger v. Harris, 401 U.S. 37, 44 (1971)).

173. *Browder*, 787 F.3d at 1084. Justice Gorsuch also stated that if a state created a statutory immunity that was not recognized by the Constitution that a claim could be brought in federal court. *Id.*

174. *Id.*

175. Thomas et al., *supra* note 135, at 20.

176. Emily Bazelon, *How Will Trump's Supreme Court Remake America?,* N.Y. TIMES (Feb. 28, 2020), https://nyti.ms/2wUtN7D.

177. McDonald v. City of Chicago, Ill., 561 U.S. 742, 812 (2010).

ing.[178] Moreover, his willingness to overturn major legislation and precedent is based on the theory that past Supreme Courts came to the wrong conclusions of law and allowed Congress to legislate beyond their power.[179]

Recently, Justice Gorsuch joined in Justice Thomas's concurring opinion, putting their radical views on display.[180] In *Hernandez v. Mesa*, a fifteen- year- old child was playing a game with his friends that involved running between the border of Mexico and the United States.[181] The defendant, a border patrol agent, saw the boys playing in the culvert and went to detain them when they crossed onto the United States side to touch the border fence.[182] The boys quickly ran back to the Mexico side and the defendant shot one of them in the face.[183] Both the Executive Branch and the courts declined to pursue either criminal charges or extradition; thus, the parents brought suit under § 1983 for violation of Fourth and Fifth Amendment rights.[184] The Majority refused to extend *Bivens*[185] to a cross border shooting that implicated both foreign relations and national security; therefore, the claim was dismissed.[186]

The concurrence analyzed the Court's history and found that subsequent decisions have rejected the extension of *Bivens.*[187] Citing a variety of cases that further narrowed Bivens and its applicability, Justice Thomas argued that the precedential value is useless because the foundation and scope have been undermined.[188] Notably, Justice Thomas would have gone further to re-

178. Thomas et al., *supra* note 135, at 20.

179. *Id.* at 23-24.

180. *See* Hernandez v. Mesa, 140 S. Ct. 735 (2020) (Thomas, J., concurring).

181. *Hernandez*, 140 S. Ct. at 753 (Ginsberg, J., dissenting).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Bivens v. Six Unknown Fed. Agents of the Federal Bureau of Narcotics*, is a case that was similar to *Monroe v. Pape*, except for the tortious acts were committed by federal agents. 403 U.S. 388, 394 (1971). It created the concept of a "constitutional tort." Consequently, after this decision when federal officials acted unconstitutionally and violated a citizen's rights, they could now be liable not just their tortious activity, but for their constitutional violations of the Fifth Amendment's Due Process Clause and the Eighth Amendment's ban against cruel and unusual punishment. *Id.*

186. *Hernandez*, 140 S. Ct. at 750.

187. *Id.* (Thomas, J., concurring).

188. *Id.* (Thomas, J., concurring).

verse *Bivens*.[189] Justice Thomas stated that "[s]tare decisis provides no 'veneer of respectability to our continued application of these demonstrably incorrect precedents."[190] Consequently, Justice Thomas concluded that *Bivens* was wrongly decided and had been curtailed by successive decisions; consequently, the Court should overrule it.[191] This opinion sheds light on a strategy that Justice Gorsuch and Justice Thomas could employ in order to overrule Monroe.

C. THE NEW FEDERALIST COURT AND THE THREAT TO *MONROE*

Justice Thomas has made it clear that he is willing to overrule precedent that he feels was wrongly decided.[192] Importantly, Justice Scalia's dissenting opinion in *Crawford-El v. Britton*, which Justice Thomas joined, claimed that § 1983 was a judicially created statute.[193] This is the same opinion that Justice Gorsuch has cited to in his Tenth Circuit Court of Appeals opinions.[194] As a federalist and staunch textualist, Justice Thomas would likely view *Monroe* as wrongly decided. Consequently, Justice Thomas has cautioned against forging ahead when prior Supreme Courts have arrived at incorrect conclusions.[195] Likewise, Justice Gorsuch would only allow federal court jurisdiction to a § 1983 claim if there was a history of discrimination by the state towards that type of claim.[196] Juxtaposing these two ideas, it is highly likely that Justices Gorsuch and Thomas would seek to overturn the holding in *Monroe* that allows for a federal remedy to be supplementary to any state law remedy. Moreover, both Justices believe that the federal government should abstain where there is no enumerated power. Thus, it seems likely that Justice Thomas could argue that the Court should return to a pre-*Monroe* interpretation of Section 1983, where unauthorized acts by a state or government official would not be implicated under the Fourteenth Amendment's Section Five power.[197]

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189. *Id.* (Thomas, J., concurring).

190. *Id.* (Thomas, J., concurring) (quoting Gamble v. United States, 139 S. Ct. 1960 (2019) (Thomas, J., concurring)).

191. Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring).

192. *Supra* Part III.B.

193. Crawford-El v. Britton, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting).

194. *See* SECSYS, LLC v. Vigil, 666 F.3d 678, 684 (10th Cir. 2012).

195. *Supra* Part III.B.

196. *Id.*

197. Barney v. City of New York, 193 U.S. 430 (1904); *see supra* Part III.B.

Potentially, a future § 1983 claim that alleges tortious misconduct by a state actor, where a state remedy is available, could provide an opportunity for Justices Gorsuch and Thomas to reverse *Monroe*. Obviously, two Justices would not be sufficient for a majority opinion; however, the addition of two more federalists, Justices Kavanaugh and Amy Coney Barrett, could pave the way for this disastrous change. Justice Kavanaugh has had limited involvement with § 1983 claims while serving in the D.C. Circuit Court of Appeals, but he has stated that "the separation of powers and federalism-are not mere matters of etiquette or architecture, but are essential to protecting individual liberty."[198] Furthermore, both Justices Kavanaugh and Barret have labeled themselves strict textualists[199] following in the footsteps of Justice Scalia,[200] another opponent of *Monroe*. Similarly, Justice Amy Coney Barrett has had limited involvement with § 1983 claims as she was nominated in 2017 to the Seventh Circuit. Notably, in an article exploring whether the Supreme Court should overturn precedent, Justice Barrett stated "that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."[201] Accordingly, with the addition of these more recent textualist judges, there is reason to be concerned that § 1983 is in danger.

It is of note that all three Justices mentioned in this Comment are members of The Federalist Society,[202] a conservative legal group "dedicated to reforming the current legal order."[203] The

198. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017).

199. "The text of a law is the law. As Justice Kagan recently stated, 'we're all textualists now.'" *Id.* at 1910.

200. *Id.*; Justice Barrett clerked for the late-Justice Scalia and in her address to the Senate called herself a textualist. Alex Swoyer, *Amy Coney Barrett Tells Senators She's an Originalist*, WASH. TIMES (Oct. 13, 2020), https://www.washingtontimes.com/news/2020/oct/13/amy-coney-barrett-tells-senators-shes-originalist/.

201. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013).

202. Lawrence Baum & Neal Devins, *The Federalist Society Majority*, SLATE (July 06, 2018), https://slate.com/news-and-politics/2018/07/the-federalist-society-will-soon-have-a-5-4-stranglehold-on-the-supreme-court.html.

203. *Background*, FEDERALIST SOC'Y, https://fedsoc.org/our-background (last visited March 13, 2021). "We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say

society was founded on the belief that the Constitution relies on a separation of powers, where the individual states are empowered to preserve freedom.[204] The mission of The Federalist Society is two-fold. First, to ensure that the principles of federalism are paramount in the judiciary. Second, that the judiciary engages in statutory interpretation "to say what the law is, not what it should be."[205] The following analysis will focus on how these two ideals are actually maintained in the current interpretation of § 1983, as read in *Monroe*. Furthermore, Part IV will discuss the consequences of returning to the Pre-*Monroe* Era.

IV. THE LEGAL AND SOCIETAL CONSEQUENCE OF RETURNING TO PRE-*MONROE* ERA

A. THE HISTORICAL CONTEXT OF *MONROE V. PAPE*

In *Monroe*, the Court gave three reasons why a § 1983 remedy should be available regardless of the availability of a state court remedy.[206] It looked to the historical purpose of enactment such as (1) to redress unconstitutional state laws; (2) to provide a federal forum where there was no state court remedy; and (3) to provide a federal remedy when the state remedy was only available in theory, not in practice.[207] Frankfurter's dissent, so often quoted by federalist judges today, takes these three aims and twists them to fit the narrative that where a state remedy is available, a § 1983 claim is not proper.[208] However, while Frankfurter explained the facts thoroughly, he failed to see the broader systemic practice of police torture that was perpetuated by Pape and his officers during the same time period.

The Chicago police force faced many charges of racism, police brutality, and illegal interrogations during this era.[209] Mr. Monroe was attacked in 1958, ten years before Pape committed a sim-

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what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities." *Id.*

204. *About Us*, FEDERALIST SOC'Y, https://fedsoc.org/about-us (last visited May 2, 2020).

205. *Id.*

206. Monroe v. Pape, 365 U.S. 167, 173 (1961).

207. *Id.* at 273-74.

208. *Supra* Part III.A.

209. MEG MARIE ADAMS, THE PATROLMEN'S REVOLT: CHICAGO POLICE AND THE LABOR AND URBAN CRISIS OF THE LATE TWENTIETH CENTURY 49-50 (2012), https://digitalassets.lib.berkeley.edu/etd/ucb/text/Adams_berkeley _0028E_12894.pdf.

ilar assault on Renoro Lolli.[210] There were two other instances of Pape[211] and his officers arresting individuals and torturing them until they confessed.[212] The difference between Mr. Monroe and these men is that they made confessions during these torturous interrogations.[213] During their trials, they attempted to persuade the judges and juries that the officers tortured them until they confessed; however, all three trials resulted in convictions.[214] These stories demonstrate that systemic violations are often imperceptible and deny victims of state- sanctioned violence a remedy.

These stories are imperative for Justices to consider when interpreting the law. Justice Gorsuch believes that, unless the state has a pattern of discrimination in rejecting certain claims, potential § 1983 plaintiffs should first proceed to state law remedies for the tortious conduct of government officials.[215] However, the historical context of *Monroe* shows just how difficult it can be to prove a habit of discrimination. The issues that were prevalent during *Monroe,* including police corruption, have not faded in the past fifty years.[216] In 2020 the brutal deaths of George Floyd[217], Breonna Taylor[218], and Ahmaud Arbery[219] prove that Black

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210. Elizabeth Dale, *Monroe v. Pape & Police Torture,* PATTERN & PRACTICE: RECLAIMING THE LOST HISTORY OF POLICE TORTURE IN CHICAGO, 1871-1971 (June 2, 2017), https://patternpractice.org/2017/06/02/monroe-v-pape-police-torture/.

211. In 1954, Pape set up an ambush to catch a burglary suspect who had killed a police officer. He told his men that he wanted him dead or alive and ultimately shot him from a second-floor window. Amedo, the fugitive, was killed by subsequent officers also firing. At the scene, Pape stated: "We had a score to settle." Stephan Benzkofer, *Legendary Lawmen, Part 6: Frank Pape*, CHI. TRIBUNE (Jan. 1, 2012), https://www.chicagotribune.com/ct-per-flash-lawmen-frankpape-0101-20120102-story.html.

212. Dale, *supra* note 210.

213. *Id.*

214. *Id.*

215. *Supra* Part III.B.

216. *Supra* Part IV. B.

217. Bill Chappell, *Chauvin And 3 Former Officers Face New Charges Over George Floyd's Death*, NPR (June 3, 2020), https://web.archive.org/web/20200605200715/https://www.npr.org/2020/06/03/868910542/chauvin-and-3-former-officers-face-new-charges-over-george-floyds-death.

218. Richard A. Oppel Jr., Derrick Bryson Taylor and Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death,* N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/article/breonna-taylor-police.html.

219. Janelle Griffith, *Ahmaud Arbery Shooting: A Timeline of the Case*, NBC NEWS (May 11, 2020), https://www.nbcnews.com/news/us-news/ahmaud-arbery-shooting-timeline-case-n1204306.

Americans are still being subjected to state- sanctioned violence just like Mr. Monroe and Emmett Till. States and their officials continue to deprive citizens of their constitutional rights through their tortious acts, which is why vulnerable citizens of the United States need protections as national citizens first and foremost.

B. THE CASE FOR PROTECTIONS OF INDIVIDUAL LIBERTIES FOR NATIONAL CITIZENS

Over one hundred years have passed since Congress wrote § 1983; it would, therefore, behoove the Court to take a holistic approach to its interpretation. It appears that certain federalist judges would like to return to a pre-*Monroe* era,[220] which placed state sovereignty over the protection of its citizens. However, the Fourteenth Amendment was enacted to protect the enumerated rights of citizens from a controlling state.[221] Furthermore, the Fourteenth Amendment gave Congress more power to protect its citizens because, prior to enaction, the federal government had no enforcement mechanism.[222] In essence, the federalist argument places states' rights over the individual liberties of U.S. citizens.

Critics of federalism have often noted that throughout American history, the beneficiaries of federalism have been white racists because federalist principles allow individual states the choice of whose liberties to protect and whose liberties to oppress.[223] Federalists would argue that because U.S. citizens can move between the states, citizens are free to find a state with policies that align with their beliefs.[224] In this way, federalism works to promote autonomy and restrains majoritarianism by protecting "geographically-based group interests."[225] The principles of civil

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220. *Supra* Part III.B.

221. Kurt T. Lash, *Federalism and the Original Fourteenth Amendment,* 42 HARV. J.L. & PUB. POL'Y 69, 75 (2019)

222. *Id.* at 72.

223. Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1291 (2019) ("As the leading political scientist William Riker famously put it in 1964, '[t]he main beneficiary [of federalism] throughout American history has been the Southern whites, who have been given the freedom to oppress Negroes False [I]f in the United States one approves of Southern white racists, then one should approve of American federalism.'").

224. Nathaniel F. Sussman, *On Immigration, Information, and the New Jurisprudence of Federalism*, 93 S. CAL. L. REV. 129, 132 (2019).

225. James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1300 (1994).

rights are similar in that statutes like § 1983 protect individual autonomy from majoritarianism rule of states' racist, sexist, and classist policies that deprive individuals of their constitutional rights.[226] Again, the purpose behind the Reconstruction and the Civil War Amendments was to protect the fundamental rights of all people from state infringement by granting authority to the federal government.[227] Instead of viewing § 1983 as an encroachment on states' rights, Justices Gorsuch and Thomas should view it as a protection of the individual liberties of people as national citizens.

These Justices should also give deference to the Monroe Court's interpretation. Justice Thomas has spoken multiple times on statutory interpretation and has stated that, "you'd start with the text, you'd go to history, you'd go to tradition, you'd go back to the earlier precedents, you'd work your way through it as systematically as you can."[228] The *Monroe* Court followed this path in pursuing a statutory interpretation that balanced the actual text, the legislative history, the law's underlying purpose, and the context in which the statute was created.[229] Textualists, like Justices Gorsuch, Thomas, and Kavanaugh, adhere to the principle that the legislative history is often unclear and subjective.[230] Ironically, even the most stringent textualists often refer to what Congress would have wanted in their opinions. For example, Justice Scalia wrote "[a]pplying normal common-law rules to the statute that Monroe created would carry us further and further from what any sane Congress could have enacted."[231] Purporting to be a textualist but then imputing your own interpretation on what a sane Congress would have written hardly seems consistent.[232]

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226. *Id.*

227. Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1451 (2019).

228. Thomas et al., *supra* note 135, at 20.

229. Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims,* 77 FORDHAM L. REV. 775, 803-04 (2008).

230. Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims,* 77 FORDHAM L. REV. 775, 803 (2008).

231. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

232. "That is nothing new. Originalism usually goes AWOL when the issue is whether the government may grant preferences to historically disadvantaged

It is important that the current Court remember the following: Section 1983 was enacted to enforce the Civil War Amendments because the state courts were failing to protect their citizens. While conservative members of the Court might adhere to a theory of textualism, the statute plainly states:

> Every person who under color of any statute, ordinance, regulation custom or usage of any State. . .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.[233]

Plainly read, the statute does not say, "but if there is a state remedy go to state court." Therefore, it is clear that the Supreme Court's holding in *Monroe* was correct. Infringing upon the idea that victims of state violence are allowed redress under § 1983, would cut against both textualism and the will of Congress.[234]

Notably, in the years since *Monroe*, Congress continued to show its support of the *Monroe* interpretation by both expanding and limiting certain parts of the statute. In one such expansion, the Civil Rights Attorney's Fees Award Act of 1976 allowed for a prevailing plaintiff to recover their attorney's fees and the prevailing defendant to recover these fees only if the action was frivolous, unreasonable or without foundation.[235] Conversely, Congress passed the Prison Litigation Reform Act (PRLA) in 1996 to reduce the wave of allegedly frivolous lawsuits filed by individuals in prison.[236] PRLA required plaintiffs to exhaust all administrative remedies within the prison system prior to bringing suit.[237] PRLA's limiting nature directly addresses Justice Gor-

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groups." Brackeen v. Haaland, No. 18-11479, 2021 WL 1263721, at *146 (5th Cir. Apr. 6, 2021) (Costa, G., concurring in part and dissenting in part).

233. 42 U.S.C. § 1983.

234. Tower v. Glover, 467 U.S. 914, 923 (1984) ("It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.).

235. 42 U.S.C.A. § 1988.

236. 42 U.S.C.A. § 1997(e).

237. *Id.* ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

such's argument for overturning *Monroe*.[238] His argument is that if a state remedy exists, a § 1983 claim should not be brought; however, Congress could easily pass an act similar to the PRLA that would require exhaustion of state remedies prior to bringing a claim under § 1983. The fact that Congress has not overturned *Monroe* to limit these tortious claims indicates that these Justices would be in error if they attempted to reverse precedent.

C. IMPLICATIONS OF RETURNING TO PRE-*MONROE*

While federalists like Justice Gorsuch want to see explicit systematic violations by the state in order to open the federal courts, too often violations are nuanced and difficult to see within that moment in time.[239] If the federal courts were to wait for an exhaustion of state remedies for tortious activity, citizens could be waiting for years for their injuries to be redressed. The Court explicitly stated that § 1983 affords a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[240]

Of utmost concern, Justice Gorsuch assumes that constitutional injuries only occur at the hands of one rogue state actor[241] and ignores the history of government sanctioned violations.

Throughout U.S. history, both federal and state governments have deprived citizens of their constitutional rights. While some may assume that violations such as segregation, forced sterilization, and acts of violence perpetrated by the police are in the past,

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238. *Supra* Part III.B.

239. *See supra* Part IV.A.

240. Monroe v. Pape, 365 U.S. 167, 180 (1961). ("Representative Lowe of the 42nd Congress is illustrative 'While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrators have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime and the records of public tribunals are searched in vain for any evidence of effective redress.'").

241. *See* Browder v. City of Albuquerque, 787 F.3d 1076, 1084 (10th Cir. 2015) ("But when a rogue state official acting in defiance of state law causes a constitutional injury there's every reason to suppose an established state tort law remedy would do as much as a novel federal remedy might and no reason exists to duplicate the effort.").

this is far from the truth. As recently as 2017, a Tennessee program shortened people's jail sentences if they agreed to sterilization.[242] Eventually, after incarcerated individuals brought several § 1983, the state legislature introduced a statute banning sterilizations as part of plea bargains or sentences and a federal court ended the program in 2019.[243] Without § 1983 and the subsequent provisions allowing for reasonable attorney's fees, it is unlikely that a prisoner would be able to afford an attorney to bring a state tort claim against these practices.

Section 1983 claims are imperative for state- sanctioned deprivations of U.S. citizens' constitutional rights. Since 2012, ICE has arrested and released more than 1,480 U.S. citizens.[244] Over three dozen false arrest lawsuits have been brought for people who have been illegally held in custody from a day to more than three years.[245] Furthermore, the Department of Justice has recently curtailed their investigations into local police department even after multiple reports of "systematic constitutional violations."[246] For example, police shot and killed 1,004 people in 2019.[247] Police brutality victims and their families often find a civil remedy in § 1983 claims against police officers for excessive use of force.[248] These egregious actions by local, state, and federal

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242. Debra Cassens Weiss, *Suit Claims Reduced-Sentence Offer for Birth Control and Sterilization was 'Eugenics with a Twist'*, ABA J. (Aug. 21, 2017), http://www.abajournal.com/news/article/suit_claims_reduced_sentence_offer_for_birth_control_and_sterilization_was/.

243. *Id.*; *see generally* Sullivan v. Benningfield, No. 2:17-CV-0052, 2018 WL 3020461 (M.D. Tenn. June 18, 2018), *rev'd and remanded*, 920 F.3d 401 (6th Cir. 2019); Ward v. Shoupe, No. 2:17-cv-00047, 2017 WL 3592560 (M.D. Tenn. 2017).

244. Paige St. John & Joel Rubin, *Must Reads: ICE Held an American man in custody for 1,273 Days. He's not the Only One Who Had to Prove His Citizenship,* L.A. TIMES (Apr. 27, 2018), https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html. The agents oftentimes ignore evidence brought by family members such as passports and birth certificates to prove citizenship.

245. *Id.* ICE often settles these claims for false imprisonment out of court.

246. *United States: Events of 2018*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2019/country-chapters/united-states (last visited May 3, 2020).

247. Julie Tate et al., *Fatal Force: Data Police Shootings*, WASH. POST (May 1, 2020), https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019.

248. *See* Stamps v. Town of Framingham, 813 F.3d 27 (1st Cir. 2016) (Unarmed innocent, elderly African-American man shot and killed.); Callahan v. Wilson, 863 F.3d 144 (2d Cir. 2017) (Unarmed victim in his own house shot multiple times and killed); Russell v. Richardson, 905 F.3d 239 (3d Cir. 2018) (Unarmed teenage victim killed in his house); Estate of Jones by Jones v. City of Martinsburg, W. Virginia, 726 F. App'x 173 (4th Cir. 2018) (Victim, who had a knife, was shot twenty-two times

officials exemplify the underlying theme of why § 1983 claims were created: to protect citizens and provide a remedy for tortious behavior by government actors. Many states have passed laws that limit damages,[249] and almost every state has enacted a statutory scheme that provides certain immunity for government officials and entities.[250] Thus, while the federalist view is that state autonomy and interstate mobility allows for citizens to move to a

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after being stopped for walking on the street resulting in him being tasered and placed in a choke-hold while surrounded by five officers); Darden v. City of Fort Worth, Texas, 880 F.3d 722 (5th Cir. 2018) (Unarmed victim repeatedly punched and kicked in the face, tasered multiple times, leading to a heart attack an death); Kent v. Oakland Cty., 810 F.3d 384, 387 (6th Cir. 2016) (Unarmed victim tasered by police in his own home with his hands in the air); Williams v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015) (Suicidal individual shot and killed when law enforcement officers attempted to subdue him.); N.S. v. Kansas City Bd. of Police Commissioners, 933 F.3d 967, 969 (8th Cir. 2019) (Unarmed victim shot three times in the back); Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1127 (9th Cir. 2017) (victim continuously tasered for over ninety seconds leading to his death); Estate of Ceballos v. Husk, 919 F.3d 1204, 1210 (10th Cir. 2019) (Police responding to a disturbance call shot and killed intoxicated victim who had a bat); Mighty v. Miami-Dade Cty., 659 F. App'x 969 (11th Cir. 2016) (unarmed victim was shot in the back by police after coming home from work).

249. *See* Ala. Code § 6-11-26 Alaska Stat. § 09.50.280; Ariz. Rev. Stat. Ann. §12-820.04; Ark. Stat. Ann. §21-9-203; Cal. Gov't Code § 818; Colo. Rev. Stat. Ann. § 24-10-114; Ga. Code Ann. § 50-21-30; Idaho Code Ann. § 6-918; Ind. Code Ann. § 34-13-3-4; Kan. Stat. Ann. §75-6109; Me. Rev. Stat. tit. 14, § 8105; Md. Code Ann., Cts. & Jud. Proc. § 5-522; Miss. Code Ann. §11-46-15; Mo. Ann. Stat. § 537.610; Mont. Code. Ann. § 2-9-105; Nev. Rev. St. § 41.035; N.H. Rev. Stat. Ann. § 541-B:14; N.J. Rev. Stat. §59:9-2; N.M. Stat. Ann. §41-4-19; N.D. Cent. Code § 32-12.2-02; Okla. Stat. tit. 51, §154; Or. Rev. Stat. § 30.269; Pa. Cons. Stat. Ann. tit. 42, § 8528; S.C. Code Ann. § 15-78-120; Tenn. Code Ann. § 9-8-307; Tex. Civ. Prac. & Rem. Code Ann. § 101.023; Utah Code. Ann. § 63G-7-603; Va. Code §8.01-195.3; Wyo. Stat. §1-39-118.

250. *See* Ala. Code §41-9-60; Alaska Stat. § 09.50.250; Ariz. Rev. Stat. Ann. § 12-820; Ark. Stat. Ann. § 21-9-201; Cal. Gov't Code § 815; Colo. Rev. Stat. § 24-10-101; Conn. Gen. Stat. Ann. §4-141; Del. Code Ann. tit. 10, § 4001; D.C. Code Ann. § 2-401; Fla. Stat. Ann. §768.28; Ga. Code § 50-21-20; Idaho Code Ann. § 6-903; 745 Ill. Comp. Stat. Ann. 10/2-202; Ind. Code Ann. § 34-13-3-3; Iowa Code Ann. § 669.5; Kan. Stat. Ann. §75-6103; Me. Rev. Stat. tit. 14, § 8103; Md. Code Ann., Cts. & Jud. Proc. § 5-522; Mass. Gen. Laws Ann. ch. 258, § 2; Mich. Comp. Laws Ann. § 691.1407; Minn. Stat. Ann. § 3.736; Miss. Code. Ann. § 11-46-3; Mo. Ann. Stat. §§537.600; Mont. Code Ann. §§2-9-102; Neb. Rev. St. § 81-8,209; Nev. Rev. Stat. Ann. § 41.031; N.H. Rev. Stat. Ann. § 541-B:9-a; N.J. Rev. Stat. § 59:1-1; N.M. Stat. Ann. § 41-4-1; N.Y. Ct. Cl. Act § 8 (McKinney); N.C. Gen. Stat. Ann. § 143-291; N.D. Cent. Code Ann. § 32-12.2-01; Ohio Rev. Code Ann. § 2743.01; Okla. Stat. Ann. tit. 51, § 151; Or. Rev. Stat. Ann. § 30.265; 35 Pa. Stat. and Cons. Stat. Ann. § 7704; 9 R.I. Gen. Laws Ann. § 9-31-1; S.C. Code Ann. § 15-78-10; S.D. Codified Laws § 21-32-1; Tenn. Code Ann. § 20-13-102; Tex. Civ. Prac. & Rem. Code Ann. § 101.021; Utah Code. Ann. § 63G-7-101; Vt. Stat. Ann. tit. 12, § 5601; Va. Code § 8.01-195.1; Wash. Rev. Code Ann. § 4.92.005; W. Va. Code Ann. § 14-2-1; Wis. Stat. Ann. § 775.01; Wyo. Stat. § 1-39-101.

state where their interests aligned, it can be argued that citizens should not have to move to ensure that their constitutional rights as U.S. citizens are enforced.

The idea that citizens are free to move between states to find a home where policies align with their beliefs is erroneous and is detrimental to the most vulnerable populations in our society. This idea should continue to concern U.S. citizens because the United States has not yet developed into a post-racial society; thus, constitutional deprivations still occur as a result of racist beliefs. The discrepancy between the states' tort remedies and immunity schemes result in inequitable protections for deprivations of constitutional rights. It is for this reason that § 1983 is integral to the protection of individual freedoms for all U.S. citizens.

The Court is heading in a direction that would effectively eliminate this federal remedy for occasions where government actors perpetrate tortious acts. It seems that Justices Thomas and Gorsuch are more fearful of the multitude of suits, instead of fearing for the well-being of the citizens and their constitutional rights. Instead of trying to prevent and deter state and local officials from harming citizens, these Justices are attempting to "prevent the Constitution from degenerating into a general tort law."[251] The recent opinion by Justice Thomas explaining why and how *Bivens* should be overruled is important because it outlines how the Court could also attack the precedent in *Monroe*. As explained in Part III, the Court has narrowed § 1983 claims in a variety of ways since *Monroe* and it appears that staunch federalists such as Justices Thomas and Gorsuch, aided by the most recent additions to the Court, could potentially go so far to overrule it as well.

VII. CONCLUSION

The Court has stretched, constricted, strengthened, and weakened § 1983 throughout the past fifty years. While the approach of the Court has created random rules and varying doctrines that when taken as a whole seem incoherent, it would be erroneous to change the holding in *Monroe* and solely entrust the individual states with the authority to protect the very citizens harmed by their actions. Arguments for federalism, textualism, or

251. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

judicial efficiency cannot overcome the argument that all forms of government, including state, municipal, and federal, should be held accountable for injuring their citizens. All the current Justices described in this Comment have touted the importance of federalism and individual liberties.[252] Thus, it is imperative that in their desire to promote principles of federalism they do not forget the importance of protecting the individual liberties of American citizens guaranteed in the Constitution by upholding *Monroe*. While it would be naïve to believe the Supreme Court upholds law and justice, the Founders created the Constitution to protect citizens from tyrannical government and it is further proof that § 1983 claims are an integral method for citizens to protect their rights and their liberty.

252. Kavanaugh, *supra* note 198, at 1909 ("Remember that the structural provisions of the Constitution—the separation of powers and federalism—are not mere matters of etiquette or architecture, but are essential to protecting individual liberty."); *see* Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1906 (2019); McDonald v. City of Chicago, Ill., 561 U.S. 742, 858 (2010) (Thomas, J., concurring in part).