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Immunity under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will

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LEGAL THEORY

IMMUNITY UNDER 42 U.S.C. § 1983: INTERPRETIVE APPROACH AND THE SEARCH FOR THE LEGISLATIVE WILL

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INTRODUCTION

For more than forty years,[1] the Supreme Court has struggled with immunity under 42 U.S.C. § 1983.[2] The issue is an important one. Section 1983 is the principal statutory vehicle used to remedy constitutional violations committed by state and local officials. Expansion or contraction of official immunity under the statute effectively decreases or increases officials' incentives to avoid those violations. A broader immunity doctrine will lead to more constitutional violations.[3] However, it will also lead to a greater willingness to attempt potentially useful inno-

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The author was an attorney for the petitioner in two of the cases mentioned in this article: Owen v. City of Independence, 445 U.S. 622 (1980), and McDonald v. City of West Branch, 466 U.S. 284 (1984).

[1] The first modern Supreme Court decision on immunity was Tenney v. Brandhove, 341 U.S. 367 (1951). In Myers v. Anderson, 238 U.S. 368 (1915), the Court affirmed a lower court decision that had held that § 1983 plaintiffs need not plead that defendants acted "willfully, maliciously, fraudulently, or corruptly." Anderson v. Myers, 182 F. 223, 229 (C.C.D. Md. 1910). However, the Supreme Court did not discuss the immunity issue.

[2] Section 1983 provides:

> 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.

42 U.S.C. § 1983 (1988). Section 1983 is derived from section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Act), Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The Ku Klux Act was enacted by the 42nd Congress.

[3] A broader immunity from damages decreases the cost of unconstitutional or questionably constitutional action. It also reduces the incentives for officials to anticipate constitutional change.

vations whose constitutionality has not yet been determined.[4] A narrower immunity doctrine will reduce the number of constitutional violations.[5] However, it will also reduce officials' willingness to experiment. Thus, the scope of official immunity under § 1983 has significant effects on the level of practical protection provided by the Constitution and on the willingness of public officials to innovate.

Despite the issue's importance, and despite more than two dozen decisions, the Supreme Court has been unable to create a stable body of immunity law. For example, during the 1980s alone, litigants were forced to deal with at least three different formulations of the qualified immunity standard.[6] Courts continue to struggle with the issue of whether private individuals are sometimes entitled to "official" immunity.[7] The Court has indicated that its previous holding that "municipalities have no immunity from [compensatory] damages liability flowing from their constitutional violations"[8] may soon be drastically modified to

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Finally, it reduces the incentive for plaintiffs to challenge questionably constitutional actions even where injunctive relief might be available.

[4] Innovation will be encouraged by reducing the cost of failing to predict developments in constitutional law.

[5] In addition to reducing the number of constitutional violations, it will also reduce the amount of *uncompensated* constitutional harm. When a constitutional wrong is committed, a narrower immunity doctrine will make it more likely that the victim will be compensated. This shifting of the cost of constitutional harm does not decrease the total cost to society of constitutional violations. However, it may allocate that cost in a more equitable way.

[6] The current formulation of qualified immunity protects even the minimally competent official: an official is immune unless *no* reasonably competent official in the defendant's position would have believed the conduct to be constitutional. Malley v. Briggs, 475 U.S. 335, 341 (1986). From 1982 through 1985, qualified immunity was somewhat less protective. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (officials immune unless they violated clearly established rights of which a reasonable person should have been aware). Until 1982, qualified immunity protected officials only if they acted in both subjective and objective good faith. Wood v. Strickland, 420 U.S. 308 (1975) (officials immune unless they acted with malicious intent to injure the plaintiff or acted with knowledge or reason to know that their actions violated constitutional rights).

[7] *Compare, e.g.*, Dennis v. Sparks, 449 U.S. 24 (1980) (no immunity for private individuals even if conspiring with absolutely immune official); Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) (no good faith immunity for private individuals) *and* Downs v. Sawtelle, 574 F.2d 1, 15 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) (no immunity for private individual even if conspiring with official protected by qualified immunity) *with* Lugar v. Edmundson Oil Co., 457 U.S. 922, 942 n.23 (1982) (arguably reserving the issue of whether private defendants may be entitled to some form of immunity in certain circumstances); DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 722 (10th Cir. 1988), *cert. denied*, 111 S. Ct. 799 (1991) (private party defendants entitled to assert qualified immunity); Buller v. Buechler, 706 F.2d 844, 850-52 (8th Cir. 1983) (same); *and* Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. 1982) (same).

The Supreme Court has recently granted certiorari to resolve this issue. Wyatt v. Cole, 928 F.2d 718 (5th Cir.), *cert. granted*, 60 U.S.L.W. 3257 (U.S. Oct. 7, 1991) (No. 91-126).

[8] Owen v. City of Independence, 445 U.S. 622, 657 (1980). There are passages from *Owen* that can be read as precluding municipal immunity only if that immunity is based on an official's subjective good faith. *Id.* at 638, 641, 643, 650. However, the decision has generally been understood as holding that municipalities are entitled to "no immunity whatsoever." Bass v. Attardi, 868 F.2d 45, 51 (3d Cir. 1989). *See also* Warren v. City of Lincoln, 816 F.2d 1254, 1262 (8th Cir. 1987) (munici-

provide immunity whenever a new decision "clearly breaks with precedent."[9]

The instability in immunity doctrine has not resulted from new historical insights casting doubt on previous beliefs about the intent of the enacting Congress. In fact, when new insights have been suggested, the Justices have frequently ignored them or found them to be outweighed by considerations of stare decisis.[10] Instead, this instability has resulted from inconsistent views of the Court's interpretive function.[11] At various times, Justices have utilized at least five different approaches to determine § 1983 immunity issues. Yet their decisions contain only the most limited discussion of the basis for selecting one approach rather than another. The Justices have neither attempted to determine the enacting Congress's intent about interpretive approach, nor explained, on general jurisprudential grounds, their own choice of approach. Instead, they have either assumed that a particular approach was self-evidently correct or else justified it by its use in previous cases.

This Article suggests that none of the five approaches is consistent with the intent of the enacting Congress. Part I describes the Justices' five interpretive approaches and explains why each is inconsistent with the legislative will.

Part II proposes an alternative interpretive approach which focuses on the values of the enacting Congress. Under that approach, the Court may consider current societal conditions in deciding immunity issues under § 1983. However, it must do so to implement the value structure of the 42nd Congress rather than the current Justices' own values. Part II demonstrates that the 42nd Congress had a hierarchical value structure in which protection of individual rights was a hierarchically superior goal, *i.e.*, one which must be accomplished as fully as possible before other goals are even considered. For members of the 42nd Congress, the obligation to protect individual rights was not merely one laudable objec-

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palities "are in no way immune from liability"); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681 (9th Cir. 1984) (municipalities "enjoy no immunity under § 1983 for damages"). *Cf.* Kentucky v. Graham, 473 U.S. 159, 167 (1985) (neither qualified nor absolute immunity available to officials sued in their official capacity); *Bass*, 868 F.2d at 51 (holding planning board liable as an entity despite absolute immunity of its officials); Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 133 (5th Cir. 1986) (same as to school board).

[9] American Trucking Ass'n v. Smith, 110 S. Ct. 2323, 2334 (1990). While not explicitly calling for a modification of *Owen*, Justice O'Connor's decision expressly states that *Owen*'s rationale would not apply in such a situation.

[10] *Compare, e.g.*, Briscoe v. LaHue, 460 U.S. 325, 341 n.26 (1983) *and id.* at 346 (Brennan, J., dissenting) (refusing to recognize civil liability for certain officials in the judicial process on the grounds of stare decisis) *with id.* at 356-63 (Marshall, J., dissenting) (arguing that the legislative history shows that Congress did not intend to provide absolute immunity to the officials).

[11] In recent years, it has also been the result of the current dominance of the Delegation Approach which permits the Court to decide immunity issues based on its own view of sound public policy under current societal conditions. *See infra* notes 231-86 and accompanying text for a discussion of the Delegation Approach.

tive to be balanced against others. Rather, it was an indefeasible duty which must be fulfilled on pain of dissolution of the moral basis of government.[12] To implement the Congressional will, the Court should recognize only those immunities that would be consistent with that value structure.

PART I

The Justices have utilized five different interpretive approaches to decide § 1983 cases. While each approach will be discussed and then criticized in the following sections, a preliminary summary of the approaches may be helpful.

The Literalist Approach.[13] Justices Douglas and Marshall each unsuccessfully advocated an approach under which there would be no absolute immunities under § 1983. Their approach focused on the text of the statute itself and certain statements in its legislative history. They argued that the text's imposition of liability on "every person" demonstrated that *no* defendants were intended to be immune from suit. In addition, they argued that statements made during the legislative debates on the statute and its predecessor demonstrated an intention to abrogate common-law immunities.

The Golden Rule Approach.[14] In many decisions, various Justices (often representing the majority of the Court) articulated an approach under which immunities would be recognized only if they were firmly embedded in nineteenth-century common law and were consistent with the purposes of § 1983. This approach treated the unqualified "every person" language of the statute as creating a strong presumption against recognizing an immunity defense. However, that presumption was qualified by the "golden rule" that a statute should not be read literally when doing so would lead to a construction that the legislature could not have intended. Under this approach, some immunities were viewed as so deeply entrenched in the common law and so consistent with the purposes of § 1983 that it was impossible to believe that Congress would have intended to abrogate them without doing so explicitly. Under the Golden Rule Approach, those immunities—but only those immunities—were recognized under § 1983.

The Static Incorporation Approach.[15] In a number of opinions, Justices have argued that the presumption of the Golden Rule Approach should be reversed—that every immunity which was recognized in common-law tort actions in 1871 (regardless of whether it was well estab-

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[12] *See infra* notes 303-60 and accompanying text.

[13] The Literalist Approach is discussed in section A. *See infra* text accompanying notes 19-97.

[14] The Golden Rule Approach is discussed in section B. *See infra* text accompanying notes 98-172.

[15] The Static Incorporation Approach is discussed in section C. *See infra* text accompanying notes 173-96.

lished at that time) should presumptively be incorporated under § 1983. They argued that, since the 42nd Congress was familiar with existing common-law concepts, it must have intended to adopt those concepts as part of § 1983 unless doing so would affirmatively impair the statute's effectiveness.

The Dynamic Incorporation Approach.[16] In other opinions, Justices have implicitly imported modern immunity defenses into § 1983 even though those defenses were unknown to the common law in 1871. Under this approach, any immunity recognized in contemporary common-law tort actions should also be recognized under § 1983, unless doing so would undermine the statute's purposes. Unlike the three previous approaches—which treated § 1983 immunities as immutably determined by Congress—this approach sees § 1983 immunity doctrine as an evolving body of law. Nevertheless, under this view, new immunity principles can be recognized under § 1983 only if they have already been adopted as part of the general common law of torts.

The Delegation Approach.[17] Under the currently dominant approach, Justices implicitly treat the statute as having authorized the Court to develop principles of immunity under § 1983 based solely on its own view of sound public policy. Under this approach, neither the text nor the common law is seen as significantly restricting the Court's freedom to expand or contract the contours of § 1983 immunity doctrine.

These approaches represent a continuum of diminishing jurisprudential conservatism. As one moves along that continuum from the Literalist Approach to the Delegation Approach, one sees less deference to statutory language and congressional intent, less belief that law is fixed and unchanging, and less commitment to the notion that the judicial function is a merely mechanical one of "finding" the law. One sees greater willingness to let decisions be affected by changing societal needs and by the Justices' individual views of sound public policy.

However, movement along the same continuum leads to *increasingly* conservative substantive outcomes. The jurisprudentially conservative Literalist Approach gives the greatest scope for § 1983's protection of constitutional rights. On the other hand, the jurisprudentially liberal Delegation Approach has restricted that protection in an effort to serve other values.[18]

The following Sections A through E will describe each approach in

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[16] The Dynamic Incorporation Approach is discussed in section D. *See infra* text accompanying notes 197-230.

[17] The Delegation Approach is discussed in section E. *See infra* text accompanying notes 231-86.

[18] It is not inevitable that adoption of the Delegation Approach would have that effect. However, it is likely that, when a substantively conservative Court adopts that approach, it will reach substantively conservative results. In the hands of a substantively liberal Court, adoption of the approach would have the opposite effect.

detail and explain why each is inconsistent with the legislative will of the 42nd Congress.

A. The Literalist Approach

1. Justices Douglas[19] and Marshall[20] each argued powerfully that no officials should have absolute immunity under § 1983. That argument began with the language of the statute itself. The statutory language says nothing about immunity. It makes no distinctions between classes of defendants. It provides that "[e]very person" who, acting under color of state law, deprives another of certain rights "shall be liable to the party injured."[21] In ordinary usage, "every person" does not mean "every person except for those entitled to absolute or qualified immunity."[22] Thus, the language of the statute itself provides no basis for granting absolute immunity to any class of potential defendants.

Of course, even a textualist may find that the statutory language is not conclusive when there is a "clearly expressed legislative intention to the contrary."[23] But Justice Douglas argued that, in the case of immunity under § 1983, the legislative history reinforces rather than undermines the plain language of the statute.[24] There is not a single statement in the legislative history of section 1 of the Civil Rights Act of 1871 (from which § 1983 was derived)[25] indicating that some classes of defendants would be immune from liability. To the contrary, opponents of the statute specifically stated that section 1 would impose liability—regardless of good faith—on officials who would be immune under state law.[26] Despite being challenged to do so, no supporter of the Act denied that it would have that effect.[27]

For example, Senator Thurman of Ohio[28] argued that section 1

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19 Pierson v. Ray, 386 U.S. 547, 558-67 (1967) (Douglas, J., dissenting).

20 Briscoe v. LaHue, 460 U.S. 325, 356-63 (1983) (Marshall, J., dissenting). In light of Tenney v. Brandhove, 341 U.S. 367 (1951), Justice Marshall was willing to make an exception for state legislators. *Briscoe*, 460 U.S. at 363-64.

21 42 U.S.C. § 1983.

22 *See, e.g., Pierson*, 386 U.S. at 559 (Douglas, J., dissenting).

23 Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). Justice Rehnquist wrote the opinion for the Court.

24 This Article's description of the legislative history argument for rejecting absolute immunity includes some material that supports Justice Douglas's position but on which he did not himself rely.

25 *See supra* note 2.

26 *See infra* text accompanying notes 29 and 35-39.

27 *See infra* text accompanying notes 30-39.

28 Democratic Senator Allen G. Thurman was "one of the leading lawyers of the Senate." SHELBY M. CULLOM, FIFTY YEARS OF PUBLIC SERVICE 219 (2d ed. 1911). He was among the dominant figures on the Judiciary Committee, *id.* at 207, later served as its chair, *id.* at 219, 353, and was the unsuccessful Democratic candidate for Vice President in 1888, *id.* at 219.

would override the immunity of state legislators and challenged the bill's Senate manager to deny it:

> Now, I put it to the member of the committee who has this bill in charge [Senator Edmunds], does [section 1] include the legislators of a State? And when he comes to address the Senate I hope he will tell us what his interpretation is. It is a deprivation under color of law, a deprivation which some one shall inflict or cause to be inflicted upon some other; and now if the legislators of a State pass a law which, in the judgment of some person, deprives him of some right, privilege, or immunity, and a district judge of the United States should be of the same opinion, I put it to the Senator, where is the clause that exempts those legislators from the action that is provided in this section of the bill? I do not know what answer can be given to this. They pass the law, and they are therefore the very persons who do cause the man to be deprived of what is held to be his privilege.[29]

Senator Edmunds[30] was present during Thurman's speech.[31] In extensive concluding remarks the next day,[32] he responded at length to several of Thurman's arguments.[33] However, neither he nor any other senator ever challenged Thurman's statement that state legislators could be held liable under the Act.[34]

In the House of Representatives, William Arthur of Kentucky made a similar assertion that the Act would subject state legislators to liability if they enacted a law subsequently held unconstitutional.[35] None of the supporters of the Act denied his interpretation.

Assertions that the Act would override other officials' immunities also went unchallenged. Opponents of the Act asserted that it would impose liability on state judges,[36] governors,[37] sheriffs,[38] and other state officials.[39] At no time were any of these assertions denied by the Act's

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29 CONG. GLOBE, 42d Cong., 1st Sess. App. 217 (1871) [hereinafter GLOBE APP.].

30 George Edmunds, Senator from Vermont, was the manager of the bill in the Senate. Edmunds was "one of the foremost lawyers of the American bar," CULLOM, *supra* note 28, at 207, and was considered the Senate's "leading lawyer." *Id.* He had an active practice as an advocate before the Supreme Court. *Id.* at 297-308. From 1870 to 1899, his name appears more than 100 times as counsel in that Court. A committed believer in individual rights, his last argument before the Court challenged a county's funding of an all-white high school while refusing to fund high school education for African-Americans. Cummings v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

31 In fact, he engaged in a brief colloquy with Senator Thurman during that speech. GLOBE APP., *supra* note 29, at 223. The House sponsor of the bill, Representative Shellabarger, was present when similar statements were made about judicial officers and he similarly failed to respond. Briscoe v. LaHue, 460 U.S. 325, 362 n.25 (1983) (Marshall, J., dissenting).

32 CONG. GLOBE, 42d Cong., 1st Sess. 691-702 (1871) [hereinafter GLOBE].

33 *See, e.g., id.* at 695-99.

34 Senator Edmunds also did not respond to the portion of the speech in which Senator Thurman stated that state judges would be liable under the Act.

35 GLOBE, *supra* note 32, at 365.

36 GLOBE APP., *supra* note 29, at 217 (statement of Sen. Thurman); GLOBE, *supra* note 32, at 385 (statement of Rep. Lewis); *id.* at 365-66 (statement of Rep. Arthur).

37 GLOBE, *supra* note 32, at 365 (statement of Rep. Arthur).

38 *Id.*; *cf. id.* at 385 (ministerial officials may be liable for serving process).

39 *Id.* at 366 (statement of Rep. Arthur).

supporters. Their consistent failure to respond to pointed allegations that the statute would override common-law immunities strongly implies that the supporters of the Act agreed that it would have that effect.

Justice Marshall argued[40] that this inference was reinforced by the legislative history of the 1871 Act's acknowledged predecessor, the Civil Rights Act of 1866.[41] The proponents of the 1871 Act stated repeatedly that it was based on section 2 of the 1866 Act.[42] For example, in his opening speech, Representative Shellabarger[43] stated that section 2 of the 1866 Act "provides a criminal proceeding in identically the same case as [section 1 of the 1871 Act] provides a civil remedy for."[44] The legislative history of the 1866 Act demonstrates that both supporters and opponents of section 2 of that Act understood that it would expose judges and other participants in the judicial process to criminal penalties.[45] Justice Marshall argued that, since Congress was willing to subject judges to the more severe criminal penalties provided by section 2 of the 1866 Act, there was no reason to believe that Congress would have wanted judges to be immune from the "mild" civil cause of action provided by section 1 of the 1871 Act.[46]

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40 Briscoe v. LaHue, 460 U.S. 325, 356-63 (1983) (Marshall, J., dissenting). This Article's description of the legislative history of the 1866 Act includes some supporting material on which Justice Marshall did not rely.

41 Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

42 *See, e.g.*, GLOBE, *supra* note 32, at 461 (statement of Rep. Coburn); GLOBE APP., *supra* note 29, at 68 (statement of Rep. Shellabarger). Representative Coburn referred to "the penal provision based upon the first section" of the 1866 Act. GLOBE, *supra* note 32, at 461 (statement of Rep. Coburn). Section 1 of the 1866 Act declares certain rights while section 2 of that Act contains the penal provisions for enforcement of those rights.

43 Representative Samuel Shellabarger of Ohio reported the 1871 Act for the select committee that drafted it. GLOBE, *supra* note 32, at 317. The Justices have frequently treated his discussion of the Act as highly persuasive evidence of its intent. *E.g.*, Dennis v. Higgins, 111 S. Ct. 865, 868 n.4 (1991) (describing Shellabarger as "one of the principal sponsors of the statute"); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 116 (1989) (Kennedy, J., dissenting) (describing Shellabarger as the bill's sponsor); Briscoe v. LaHue, 460 U.S. at 357 (Marshall, J., dissenting) (describing Shellabarger as the "author" of § 1); Allen v. McCurry, 449 U.S. 90, 109 (1980) (Blackmun, J., dissenting) (describing Shellabarger as the bill's sponsor); Monroe v. Pape, 365 U.S. 167, 185 (1961) (describing Shellabarger as the representative who "report[ed] out the bill").

44 GLOBE APP., *supra* note 29, at 68.

45 *See, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. 1758 (1866) (statement of Sen. Trumbull, 1866 Act's sponsor) (stating that "a ministerial officer or a judge" could be punished under the 1866 Act); *id.* at 1836-37 (statement of Sen. Lawrence, 1866 Act supporter) (acknowledging that the 1866 Act would permit prosecution of judicial officers); *id.* at 1778 (statement of Sen. Johnson, 1866 Act opponent) (stating that judges could be indicted "and punished by fine, or imprisonment, or both" under the 1866 Act); *id.* at 1783 (statement of Sen. Cowan, 1866 Act opponent) (warning that judges would be "indicted and punished" under the 1866 Act). For additional examples, see Briscoe v. LaHue, 460 U.S. at 358-60, 358 n.18 (Marshall, J., dissenting). There were two unsuccessful efforts to make state judges immune from the criminal liability imposed by section 2. Don B. Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U. L. REV. 615, 622 & n.27 (1970).

46 *Briscoe*, 460 U.S. at 362 (Marshall, J. dissenting) (quoting GLOBE, *supra* note 32, at 482).

2. These are powerful arguments that directly appeal to the Court's obligation to respect the legislative will. One would expect the Court to have responded to them; instead, it has ignored them. The opinion of the Court in *Pierson v. Ray*[47] literally never mentions Douglas's dissent.[48] Subsequent opinions refer to Douglas's dissent as if it were an idiosyncratic aberration.[49] Justice Marshall's dissent in *Briscoe v. LaHue*[50] received only slightly greater attention and was rejected on stare decisis grounds.[51] The majority's failure to respond to the arguments of Justices Douglas and Marshall has lent credibility to the Literalist Approach.

Nonetheless, that approach has three fundamental flaws. First, it gives inappropriate significance to the failure of the Act's supporters to respond to claims that it would abrogate common-law immunities.[52] Second, it misconstrues the relationship between section 1 of the 1871 Act and section 2 of the 1866 Act. Third, it misreads the text of § 1983. The first two problems will be discussed below. The third, which is shared by the Golden Rule Approach, will be discussed in Section B.[53]

As indicated above,[54] in his dissent in *Pierson*, Justice Douglas relied heavily on the fact that supporters of the Act never contradicted statements that the Act would subject various officials to liability despite their common-law immunity.[55] This argument from silence fails to recognize that members of the 42nd Congress would have expected construing courts to *ignore* the legislative debates and, therefore, would have felt no need to clarify the legislative record.

Nineteenth-century legislators' understanding of the role of legislative debate was quite different than that of contemporary legislators. In the late twentieth century, members of Congress engage in debate well aware (and often intending) that their statements may have a significant effect on subsequent judicial interpretation of the statute.[56] But in the

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47 386 U.S. 547 (1967).

48 If it makes any response at all to the dissent it is the bald statement that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554.

49 *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 417 & n.11 (1976).

50 460 U.S. at 346-69.

51 *Id.* at 341 n.26; *id.* at 346 (Brennan, J., dissenting).

52 *Cf.* NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964) (warning against relying on the interpretation of a bill by its opponents since those opponents have an incentive to exaggerate the bill's effects).

53 *See infra* notes 137-72 and accompanying text.

54 *See supra* notes 22-39 and accompanying text.

55 For an argument similar to Justice Douglas's, see Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 328 & nn.39-40 (1969).

56 HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 196, 216 n.114 (1967); Alfred F. Conard, *New Ways to Write Laws*, 56 YALE L.J. 458, 461 (1947); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 429-30 (1989); *cf.* Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and

nineteenth century, it was a frequently reiterated canon of statutory construction that statements made by members of Congress during debates on a statute could *not* be used to establish the statute's meaning or Congress's intent.[57] The principle was stated explicitly in *Aldridge v. Williams*:[58]

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.[59]

As a result, a nineteenth-century member of Congress debated in order to influence his colleagues—not the courts.[60] He selected his arguments with an eye toward their effect on the enactment of legislation—not its interpretation. This fact does not prevent congressional debates from illuminating the legislators' understanding of the statute. (After all, a candid photograph may portray a subject more accurately than a posed portrait, and a wiretap may reveal more than a deposition.) However, changing the reasons that members of Congress might choose to speak or remain silent changes the angle of illumination. For example, Senator Edmunds would never have expected the courts to peruse the *Congressional Globe* to determine the meaning of section 1 of the 1871 Act. Therefore, he would not have felt that, in order to avoid a judicial misunderstanding of his silence, he needed to respond to Senator Thurman's

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concurring in the judgment) (stating that insertions in committee reports were designed to influence judicial construction).

57 *See, e.g.*, Maxwell v. Dow, 176 U.S. 581, 601-02 (1900); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897); United States v. Union Pacific R.R., 91 U.S. 72, 79 (1875); Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845); Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 498-99 (C.C.D. Me. 1843) (No. 9662) (Story, Circuit Justice). The rule was occasionally relaxed to permit the limited consideration of committee reports. *See* Binns v. United States, 194 U.S. 486, 495 (1904) (suggesting Church of the Holy Trinity v. United States, 143 U.S. 457, 464 (1892) as an example); Blake v. National Banks, 90 U.S. (23 Wall.) 307, 318 (1874). By the early twentieth century, "statements made by the committee chairman in charge of [the bill]" were also given limited consideration. United States v. St. Paul, Mpls. & Man. Ry., 247 U.S. 310, 318 (1918). For a general discussion of the use of legislative history by nineteenth-century courts, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1266-67 (tentative ed. 1958). For a discussion of the treatment of legislative history by nineteenth- and early twentieth-century treatises, see Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1064-68, 1084 (1991).

58 44 U.S. (3 How.) 9 (1845).

59 *Id.* at 24.

60 It is also likely that members of Congress used debates to increase the chances of their own reelection. This may explain the vituperative nature of many of the speeches. However, since official immunity is hardly a stirring campaign issue, it seems unlikely that reelection concerns would give House members any appreciable incentive to respond to charges that § 1 would eliminate that immunity. Senators might have more incentive to respond—particularly with regard to legislative immunity—since those Senators were, of course, selected by their state legislators. U.S. CONST. art. I, § 3, cl. 1.

assertions about the Act's effect on official immunities. He would have felt a need to respond only if he believed that those assertions jeopardized the bill's chances of passage.

In addition, there are at least three reasons why Edmunds and other supporters of the Act would have thought that such a response would be counterproductive.[61] First, they may have considered the argument insignificant. Only one senator and two representatives claimed that officials could be held liable under the Act.[62] Even those three spent relatively little time on the issue. Their discussion of it was overshadowed by their arguments that section 1 was unconstitutional,[63] that its protection of "rights, privileges or immunities" was overly vague,[64] and that its provision for federal jurisdiction (and the absence of a jurisdictional amount)[65] would lead to expensive and vexatious litigation.[66] Their discussion was also overshadowed by their much more extensive attacks on the other sections of the bill.[67]

Second, the Act's supporters may have considered section 1 sufficiently uncontroversial that they chose to expend their rhetorical resources on the more hotly contested portions of the bill. Section 1 provoked relatively little debate[68] and was passed without amendment.[69] Proponents of the Act expected little opposition to it,[70] and opponents indicated that it was the "least objectionable" section of the bill.[71] Cru-

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61 The Act's supporters also may have simply failed to hear or understand the claim or may have forgotten to respond to it. Even in formal collegiate debate, in which any failure to respond to an issue can lead to defeat, it is not uncommon for a team to miss an issue raised by its opponents.

62 The three were Senator Thurman, GLOBE APP., *supra* note 29, at 217; Representative Arthur, GLOBE, *supra* note 32, at 365-66; and Representative Lewis, *id.* at 385. *See supra* notes 28-39 and accompanying text.

63 GLOBE, *supra* note 32, at 365 (statement of Rep. Arthur); *id.* at 385 (statement of Rep. Lewis).

64 GLOBE APP., *supra* note 29, at 216-17 (statement of Sen. Thurman).

65 *Id.* at 216 (statement of Sen. Thurman).

66 *Id.*; GLOBE, *supra* note 32, at 365 (statement of Rep. Arthur); *see also id.* at 395 (statement of Rep. Rice).

67 For example, Representative Lewis devoted only one short paragraph to § 1. GLOBE, *supra* note 32, at 385. Even Senator Thurman spent only slightly more than one page of his eight page speech on the section. GLOBE APP., *supra* note 29, at 216-17.

68 *See, e.g.*, City of Newport v. Fact Concerts, 453 U.S. 247, 264 (1981); Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978); GLOBE APP., *supra* note 29, at 310 (statement of Rep. Maynard) ("Pray, tell me who objects to [§ 1]? I suppose there is not much objection to it, from the fact that so far there has been very little said about it.").

69 *See Monell*, 436 U.S. at 665.

70 *See, e.g.*, GLOBE, *supra* note 32, at 568 (statement of Sen. Edmunds) ("The first section is one that I believe nobody objects to . . . ."); *id.* at 482 (statement of Rep. Wilson) (noting that the objections to the bill were primarily aimed at §§ 3 and 4 rather than at §§ 1 and 2); GLOBE APP., *supra* note 29, at 310 (statement of Rep. Maynard) (questioning whether anyone really objected to § 1).

71 GLOBE APP., *supra* note 29, at 86 (statement of Rep. Storm). *See also, id.* at 220 (statement of Sen. Thurman) (stating that his objections to § 1 "are really small compared to those which [he had] to the third and fourth sections").

cial swing legislators, who insisted on amendments to other sections, were untroubled by section 1.[72]

From the perspective of the 1990s, it is easy to forget that § 1983 was among the least radical parts of the 1871 Act.[73] It proposed a "mild remedy"[74] compared, for example, to section 3, which permitted the President to send troops into the states to suppress the Klan,[75] or to section 4, which permitted the President to suspend the writ of habeas corpus.[76] Proponents of the bill understandably spent most of their time defending and explaining the more extreme sections of the Act since those were the sections most likely to lead to its defeat.[77]

Third, the Act's supporters may have considered their opponents' position so self-evidently incorrect that it should not be legitimized by a response. Senator Thurman himself had admitted that he did not know whether his interpretation of section 1 reflected the bill's real intent.[78] He and the two representatives who raised similar arguments were deeply committed opponents of the bill.[79] Their claim that section 1 would override all common-law immunities may have been seen as such an obvious distortion that it would be believed only by those who would vote against the bill in any event.

It is still, of course, possible that the proponents of the Act were silent because they agreed that the Act would override common-law immunities. However, in light of the nineteenth-century understanding of the role of legislative debates, these alternative explanations of their silence are at least equally plausible.

The argument that the proponents' silence indicated agreement with

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72 *See* GLOBE APP., *supra* note 29, at 113 (statement of Rep. Farnsworth) ("I do not know that I have any opposition to the first section . . . ."). *Compare id.* at 153 (statement of Rep. Garfield) ("[Section 1] is a wise and salutary provision, and plainly within the power of Congress.") *with id.* at 153 (statement of Rep. Garfield) (explaining that his support of the bill was contingent on amendments to § 2) *and id.* at 154 (statement of Rep. Garfield) (suggesting that § 4 needed to be amended to limit the length of time citizens could be imprisoned while habeas corpus had been suspended). Both Rep. Farnsworth and Rep. Garfield successfully proposed amendments to the bill and voted for it as amended. GLOBE, *supra* note 32, at 515, 522.

73 For a representative contemporaneous editorial attacking the bill as a whole but expressing no objections to § 1, see *The Force Bill*, THE NATION, Apr. 20, 1871, at 268-70.

74 GLOBE, *supra* note 32, at 482 (statement of Rep. Wilson).

75 Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 13 (codified as amended at 10 U.S.C. § 333 (1988)).

76 *Id.* § 4 (expired by its own terms at the end of the "the next regular session of [the 42nd] Congress").

77 *See* Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978).

78 GLOBE APP., *supra* note 29, at 217.

79 Each of the three congressmen vigorously attacked the bill on numerous grounds. *See, e.g., id.* at 216-24 (Rep. Thurman); GLOBE, *supra* note 32, at 695-96 (Rep. Thurman); *id.* at 364-67 (Rep. Arthur); *id.* at 384-86 (Rep. Lewis). Each voted against it at every opportunity. *Id.* at 522, 709, 779, 808. It is unlikely that anyone, after hearing the congressmen's scathing attacks on the bill, would have thought that their votes could be changed by convincing them that the bill would *not* override official immunities.

the opponents' interpretation of the Act suffers from another difficulty. If it were correct, it would prove a broader proposition than even Justice Douglas was willing to accept:[80] that there should be *no* immunities—absolute or qualified—under § 1983.[81] Senator Thurman, Representative Arthur, and Representative Lewis argued that the Act would make officials personally liable, not only for intentional constitutional deprivations, but also for reasonable errors made in complete good faith. Senator Thurman argued that the bill would make a legislator liable for enacting a law that "some district judge" subsequently held unconstitutional even though the legislator acted "in strict accordance with what he conscientiously believed to be the true meaning of [the Constitution]."[82] Mr. Arthur argued that state officials would be subject to ruinous damages "even though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment."[83] Mr. Lewis argued that a state court judge could be held personally liable under the Act for rendering an unconstitutional decision "however honest and conscientious that decision may be."[84]

Thus, no Act opponent ever suggested that the Act would override absolute immunity but leave qualified immunity intact. Instead, they argued that it would abolish all immunities. Unless one is willing to accept the proposition that Congress intended to abolish both absolute and qualified immunity—a proposition never accepted by any member of the Court—the statements of Thurman, Arthur, and Lewis cannot be treated as accurate statements of the 42nd Congress's understanding of the statute.[85]

Justice Marshall's additional argument, based on the history of section 2 of the 1866 Act,[86] also fails to support the Literalist Approach.

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80 While Justice Douglas objected to absolute immunity, he thought that judges (and presumably legislators) should be immune from damages for their "honest mistakes." Pierson v. Ray, 386 U.S. 547, 566-67 (1967) (Douglas, J., dissenting). Justice Marshall has also been implicitly willing to recognize qualified immunity. Briscoe v. LaHue, 460 U.S. 325, 368 (1983) (Marshall, J., dissenting).

81 Defendants entitled to absolute immunity are protected from damage awards even if they act with malice and even if they violate clearly established rights. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). Defendants with qualified immunity lose that protection if their actions violate clearly established federally protected rights of which a reasonably competent official should have been aware. *See* cases cited *supra* note 6.

82 GLOBE APP., *supra* note 29, at 217.

83 GLOBE, *supra* note 32, at 365.

84 *Id.* at 385. Senator Thurman similarly argued that state court judges would be held liable simply because they conscientiously rendered opinions with which federal judges subsequently disagreed. GLOBE APP., *supra* note 29, at 217.

85 The Literalist Approach's analysis of the text suffers from a similar difficulty. While the statute says nothing about absolute immunity it also says nothing about qualified immunity. It sets forth only two conditions for liability: the defendant must have acted under color of state law and must have deprived the plaintiff of federally protected "rights, privileges or immunities." The statutory language provides no exception for "honest mistakes."

86 *See supra* text accompanying notes 40-46.

First, it is not at all clear from the legislative history of section 1 of the 1871 Act that Congress intended it to impose civil liability whenever section 2 of the 1866 Act imposed criminal liability. Representative Shellabarger's statement that section 1 would provide a civil remedy for "identically the same case as" section 2 of the earlier act[87] was meant to state the constitutional authority for enacting the section—not to explain its precise scope.[88] In context, it is most naturally read in a more limited sense: both sections provided a remedy for deprivations of the same rights.[89] To say that the two provide remedies for the same wrongs does not mean that the elements of proof or the defenses applicable to the criminal remedy are identical to those applicable to the civil remedy.[90] For example, as discussed below, conviction under section 2 requires a willful deprivation; liability under § 1983 does not.

Second, the debates on the 1866 Act explicitly recognized that there were immunities available in common-law civil actions which were not available in criminal cases. Senator Lawrence stated:

> [T]here are two legal modes of meeting any and every willful deprivation of these rights: one by action for damages at common-law in the courts, *which, however, will not lie against judicial officers*; and another by making it a penal offense, as the second section of this bill does . . . .[91]

Third, the proponents of section 2 of the 1866 Act explicitly recognized that a conviction under that section required that the deprivation of rights be willful.[92] While President Andrew Johnson[93] and the oppo-

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87 GLOBE APP., *supra* note 29, at 68.

88 The first sentence of the paragraph provides the context in which Representative Shellabarger's statement was made. "My first inquiry is as to the warrant which we have for enacting such a section as this." *Id.* The point is reinforced in the following paragraph. "It is absolutely plain that if it was constitutional to pass the second section of the civil rights bill, then it is equally competent to pass into law the first section of this bill. Why do I say that? Because the same exact right is involved in each case." *Id.*

Taken in context, Representative Coburn's statement was similarly intended to establish the legality of § 1 rather than its scope. GLOBE, *supra* note 32, at 461 ("If this penal section is valid, and no one dares controvert it, the civil remedy is legal and unquestionable. This, too, is built upon the solid rock of precedent.").

89 *See supra* note 88.

90 The other legislative statements on which Marshall relies, Briscoe v. LaHue, 460 U.S. 325, 360-61 (1983), provide even less support for his position. Neither Senator Edmunds' statement that § 1 of the 1871 Act "carr[ied] out the principles of [§ 2 of the 1866 Act]," GLOBE, *supra* note 32, at 568, nor Representative Coburn's statement that the remedies provided by the two sections are "parallel," *id.* at 461, even suggest that the defenses available under the two sections would be identical. *See also supra* note 88. The statements by opponents that § 1 of the 1871 Act was "cumulative," GLOBE, *supra* note 32, at 365, or that it was an "amendment of [the 1866 Act]," *id.* at 429, are equally unilluminating.

91 CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (emphasis added).

92 *See, e.g., id.* at 1758 (statement of Sen. Trumbull) (defendants liable only if they acted with a "vicious will"); *id.* at 1837 (statement of Sen. Lawrence) (criminal punishment only for "willful wrong[s]").

93 *Veto Message*, CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866) (§ 2 would criminalize "error[s] of judgment, no matter how conscientious").

nents of the bill[94] asserted that it would criminalize conduct by conscientious state officials, the bill's proponents denied those assertions.[95] If the 1866 Act defines the elements and defenses applicable to § 1983, then liability under § 1983 would also require "a purpose to deprive a person of a specific constitutional right."[96] Not only would this create an extremely broad form of immunity for all defendants under § 1983, it would be contrary to the Supreme Court's holdings that there is no independent state of mind requirement for liability under that statute.[97]

Thus, like the debates on the 1871 Act itself, the debates on the 1866 Act do not support the position of Justices Douglas and Marshall that there should be no absolute immunities under § 1983.

B. Golden Rule Approach[98]

1. In many respects, the Golden Rule Approach is similar to the Literalist Approach taken by Justices Douglas and Marshall. It treats immunity issues under § 1983 as matters of statutory construction[99] rather than as policy judgments.[100] Its analysis starts with the "absolute and unqualified"[101] language of the statute—language that "admits of no immunities."[102] It emphasizes the fact that the statutory language "does

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94 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1778 (1866) (statement of Sen. Johnson) (conviction possible without willfulness since "[t]he intention is presumed from the offense"); *id.* at 1783 (statement of Sen. Cowan) (criminal punishment for one who "honestly and conscientiously discharge[s] his duty").

95 *See supra* note 92.

96 Screws v. United States, 325 U.S. 91, 101 (1945) (construing the successor to § 2 of the 1866 Act).

97 Daniels v. Williams, 474 U.S. 327, 329-30 (1986) (overruling Parratt v. Taylor, 451 U.S. 527, 534-35 (1981) on other issues but explicitly adhering to *Parratt* on this issue).

98 The "golden rule" was the name given by nineteenth-century English courts to the rule that statutes should be read literally unless such an interpretation would lead to a result so absurd or unjust that it was "perfectly clear that the legislature did not intend it." J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 299 (1935). *See, e.g.*, Mattison v. Hart, 139 Eng. Rep. 147, 159, 14 C.B. 357, 385 (C.P. 1854); Arnold v. Ridge, 138 Eng. Rep. 1394, 1401, 13 C.B. 745, 762-63 (C.P. 1853); Becke v. Smith, 150 Eng. Rep. 724, 726, 2 M & W 191, 195 (Ex. 1836). *See also* HART & SACKS, *supra* note 57, at 1146-48; William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 813-15 (1985).

99 *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 342 (1986); Owen v. City of Independence, 445 U.S. 622, 635 (1980); Wood v. Strickland, 420 U.S. 308, 314, 316 (1975); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

100 *See, e.g.*, *Malley*, 475 U.S. at 342 (Court's "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice"); Tower v. Glover, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."); Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (immunity decisions are not the result of "judicial fiat"); *see also* Burns v. Reed, 111 S. Ct. 1934, 1945 (1991) (Scalia, J., concurring in part and dissenting in part).

101 *Owen*, 445 U.S. at 635; *Cf.*, *Burns*, 111 S. Ct. at 1945 (Scalia, J., concurring in part and dissenting in part) (referring to the "categorical language of the statute").

102 *Malley*, 475 U.S. at 339; *Tower*, 467 U.S. at 920; *Owen*, 445 U.S. at 635; *Imbler*, 424 U.S. at 417.

not provide for *any* immunities,"[103] but instead imposes liability on "*every person*" who, under color of state law, violates certain rights.[104]

However, the approach does not stop with the language of the statute. Instead, it subjects that language to the "golden rule" that a statute should not be read literally if doing so would lead to a result which Congress could not have intended. Applying that rule, it concludes that some common-law immunities[105] were so well established in 1871 that Congress could not have intended to override them by "covert inclusion in the general language" of § 1983.[106]

The seminal case using this approach was *Tenney v. Brandhove*.[107] In the midst of the McCarthy era, the Court faced a suit alleging that the members of California's Senate Fact Finding Committee on Un-American Activities had conducted hearings for the purpose of deterring the exercise of First Amendment rights.[108] The Court avoided what it saw as difficult constitutional issues[109] by finding the state legislators immune from liability. The Court first rehearsed the extensive tradition of legislative immunity in England and the United States.[110] Then, in a much criticized[111] passage, it concluded that Congress could not have intended to break with that tradition:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England By Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47 (3) of Title 8—were not spelled out in debate. We cannot believe that Con-

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103 *Malley*, 475 U.S. at 342.

104 *Owen*, 445 U.S. at 635 ("[T]he Act imposes liability on '*every person*' who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.' ") (omissions in the original); *see also Burns*, 111 S. Ct at 1945 (Scalia, J., concurring in part and dissenting in part).

105 *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (state court judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators).

106 *Tenney*, 341 U.S. at 376; *accord* Briscoe v. LaHue, 460 U.S. 325, 334 (1983); *Owen*, 445 U.S. at 637; Quern v. Jordan, 440 U.S. 332, 343 (1979); *Imbler*, 424 U.S. at 418; Wood v. Strickland, 420 U.S. 308, 318 (1975).

107 341 U.S. 367 (1951).

108 *Id.* at 371.

109 *Id.* at 372.

110 *Id.* at 372-75.

111 *See, e.g.*, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 491-97 (1982); Seth R. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 607 (1985).

> gress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.[112]

Thus, *Tenney* determined that § 1983 should not be interpreted as abrogating the well-recognized and deeply entrenched tradition of legislative immunity. But, it is also important to recognize what *Tenney* did *not* do. It did not hold that § 1983 incorporated the entire common law, nor did it indicate that "if the Congress had intended to impose liability incommensurate with the common law of 1871, it would have said so."[113]

The Court's argument was more narrow and more defensible. The 42nd Congress did not act in a contextual vacuum. Legislative immunity was not an insignificant rule of the common law, known only to the most scholarly members of the legal profession. It was a fundamental political principle deeply embedded in Anglo-American history. It was one of a cluster of protections for the independence and power of the legislative branch. Reconstruction-era Congresses were jealous guardians of those protections and strong proponents of legislative supremacy.[114] Even when enacting radically new legislation such as § 1983, it is difficult to imagine that Congress would make such a drastic change without doing so expressly. The implicit precept of statutory construction is a narrow one:[115] that a few legal principles are so well known that Congress must have been aware of them and so well established and consistent with Congress's goals that Congress would not have abrogated them without doing so expressly.[116]

Since the recognition of an immunity is seen as a judicial rejection of the plain language of the statute, it can be justified only in limited circumstances. The immunity must have existed in 1871.[117] While con-

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112 *Tenney*, 341 U.S. at 376.

113 Kreimer, *supra* note 111, at 607.

114 For a discussion of Congress's efforts to assert control over the Supreme Court, see *infra* text accompanying notes 259-66. Efforts to assert control over the executive branch included the Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), and culminated in the impeachment and trial of President Andrew Johnson.

115 Corry, *supra* note 98, at 299 ("[T]he words might be modified so as to avoid a result which the legislature could never have intended. But it must have been an absurdity so great as to make it perfectly clear that the legislature did not intend it.").

116 Of course, it may well be that even this narrow argument is fundamentally flawed. Reconstruction-era Congresses were concerned about the supremacy of the national legislature—not the prerogatives of state legislatures. It is certainly not self-evident that a Congress that was willing to authorize martial law and the suspension of habeas corpus would have been unwilling to hold members of Southern legislatures personally liable for unconstitutional actions. However, the fact that the narrow argument may also be flawed does not detract from the fact that it is a different and more defensible argument than the broader one.

117 Burns v. Reed, 111 S. Ct. 1934, 1945 (1991) (Scalia, J., concurring in part and dissenting in part) (existence of a common-law tradition of absolute immunity as of 1871 is a necessary condition for absolute immunity under § 1983); Malley v. Briggs, 475 U.S. 335, 340 (1986) (Court must first determine whether the official " 'was accorded immunity from tort actions at common law when the

gressional silence may not have abrogated existing immunities, it could not have created new ones.[118] The immunity must have been a well-established one.[119] It is far more difficult to conclude that Congress intended to abrogate an immunity having taproots deep in Anglo-American legal and political history than one merely mentioned in an occasional state court decision. The immunity must have been consistent with the purposes of § 1983.[120] If a particular immunity would interfere with those purposes, it would be irrational to conclude that Congress could not have meant to abrogate it. Thus, an immunity will be recognized if, but only if, it meets both conditions: it must have been a well-established common-law immunity in 1871 and its existence must be compatible with the purposes of § 1983.[121]

The Golden Rule Approach represents a type of interpretation with which the lawyers in the 42nd Congress would have been familiar. It was frequently utilized in the early nineteenth century.[122] For example, in 1818, Chief Justice Marshall refused to give a literal construction to the phrase "any person or persons" in a piracy statute.[123] Although the words were "broad enough to comprehend every human being," the Chief Justice held that Congress could not have intended the statute to apply to foreign nationals committing crimes on foreign flag ships.[124] "[G]eneral words must . . . be limited to cases . . . to which the legislature intended to apply them."[125] Only two years before § 1983 was enacted, the Supreme Court explicitly approved golden rule interpretation: "Gen-

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Civil Rights Act was enacted in 1871' ") (quoting Tower v. Glover, 467 U.S. 914, 920 (1984)); Briscoe v. LaHue, 460 U.S. 325, 355 n.15 (1983) (Marshall, J., dissenting) (common-law developments after 1871 are "plainly irrelevant") Owen v. City of Independence, 445 U.S. 622, 638 (1980) (an immunity may be recognized only if it was "well established at common law at the time § 1983 was enacted"); *cf.*, Smith v. Wade, 461 U.S. 30, 65-66 (1983) (Rehnquist, J., dissenting) (state court decisions after 1871 are "largely irrelevant" in determining the proper standard for punitive damages under § 1983).

118 *Burns*, 111 S. Ct at 1945 (Scalia, J., concurring in part and dissenting in part) ("That is so because the presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute.").

119 *See, e.g.*, Gomez v. Toledo, 446 U.S. 635, 639 (1980); *Owen*, 445 U.S. at 638; Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951). The Court's belief that an immunity was well established in 1871 has not always had a secure historical foundation. *Compare* Pierson v. Ray, 386 U.S. 547, 553-54 (1967) *with* Briscoe v. LaHue, 460 U.S. 325, 350-55 (1983) (Marshall, J., dissenting) (arguing that witness immunity was not well established in 1871) *and* Note, *supra* note 55, at 325-29 (same).

120 *Burns*, 111 S. Ct. at 1945 (Scalia, J., concurring in part and dissenting in part) (quoting *Malley*, 475 U.S. at 339-40); *Malley*, 475 U.S. at 340; Tower v. Glover, 467 U.S. 914, 920-21 (1984); *Gomez*, 446 U.S. at 639; Imbler v. Pachtman, 424 U.S. 409, 424 (1976).

121 *Malley*, 475 U.S. at 339-40, 342; City of Newport v. Fact Concerts, 453 U.S. 247, 258-59 (1981); *Gomez*, 446 U.S. at 639 (both elements required); *Owen*, 445 U.S. at 637-38; *Imbler* 424 U.S. at 435 (White, J., concurring in the judgment).

122 For a discussion of English antecedents, see *supra* note 98.

123 United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630-34 (1818).

124 *Id.* at 631.

125 *Id.* For more recent articulations of the "golden rule," *see, e.g.*, Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940); Sorrells v. United States, 287 U.S. 435, 446 (1932).

eral terms should be so limited in their application as not to lead to injustice, oppression or absurd consequences. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character."[126] And the nineteenth century Supreme Court frequently acknowledged that it would reject literal interpretation of statutory language when such an interpretation would be inconsistent with its view of the congressional intent.[127]

The approach is also based on a truth about ordinary language. Most apparently unqualified general commands have unspoken exceptions[128] which apply unless nullified by specific language. For example, if a lawyer says, "I have a brief due tomorrow. Hold all my calls," his secretary may still understand that he should interrupt if the lawyer's spouse should call. If the lawyer adds the phrase, "even if my family calls," he is not being redundant. He is changing his instructions. The additional phrase is necessary to eliminate what he and his secretary both recognize would otherwise have been an unspoken exception to his literally absolute language.[129] Similarly, the Golden Rule Approach treats

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126 United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1869). In *Kirby*, a local sheriff arrested a mail carrier on a state murder charge. A federal grand jury then indicted the sheriff for knowingly and willfully obstructing the United States mail. While the decision could be read as one creating an immunity for state officials acting in good faith, it is probably more accurately read as one holding that the incidental obstruction created by the arrest was not willful.

127 *E.g.*, Rector of Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."); United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845) ("A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter."). For more recent examples of a similar approach, see, *e.g.*, Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1989) (non-literal, restrictive interpretations permssible in "rare cases"); Public Citizen v. Department of Justice, 491 U.S. 440, 454 (1989) (literal interpretation should be avoided when it would lead to "odd" result); United States v. Ron Pair Enters., 489 U.S. 235, 240 (1989) (same); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (non-literal, restrictive interpretations permissible in "rare cases"). *See also* Chapman v. United States, 111 S. Ct. 1919, 1933 (1991) (Stevens, J., dissenting) (Court should reject construction that would lead to absurd result).

128 United States v. Kirby, 74 U.S. (7 Wall.) at 487 (quoting Plowden's statement that a law against jail break does not apply to a prisoner who breaks out to avoid a fire since "he is not to be hanged because he would not stay to be burnt"); *cf.* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 27-30 (R. Mersky & J. Jacobstein reprint ed. 1970) (1st ed. 1839). At least one prominent member of the 42nd Congress was quite familiar with Lieber's work. Charles Sumner and Lieber had maintained an extensive correspondence and Sumner made frequent efforts to advance Lieber's career. DAVID H. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 24 (1960). *See generally* Frank B. Friedel, *Francis Lieber, Charles Sumner and Slavery*, 9 J. SOUTHERN HIST. 75 (1943). Lieber was a well-known figure and had provided various congressmen with a group of proposed constitutional amendments, one of which was the basis for the second section of the Fourteenth Amendment. FRANK B. FRIEDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL 378 (1947).

129 For an example of the difficulty involved in determining whether an implicit exception was intended, see LAURA INGALLS WILDER, LITTLE HOUSE ON THE PRAIRIE 133-46 (1971 ed.) (1935), in which two daughters try to determine whether their father's direction to keep the watchdog chained was intended to apply even if apparently hostile Native Americans came to the house.

certain common-law immunities as unspoken exceptions to the statutory language—exceptions which Congress would expect the Court to understand and apply absent specific language to the contrary.

2. While the Golden Rule Approach represents a type of statutory construction with which the 42nd Congress would have been familiar, it is an unlikely method for deciding immunity issues under § 1983. First, like the Literalist Approach, it rests on the erroneous belief that recognition of immunities is inconsistent with a literal reading of the statutory language. Second, it fails to recognize the evidence that Congress did not intend to resolve immunity issues itself, but rather intended to give the Court some discretion to do so on a case-by-case basis. Third, it fails to appreciate the 42nd Congress's understanding of the dynamic and multifaceted nature of the common law. The present section will discuss the first two points. The third will be deferred to Section C.[130]

For both the Literalist and Golden Rule Approaches, the "absolute and unqualified"[131] nature of the text—the fact that it "admits of no immunities"[132] but instead provides liability for "[e]very person"[133]—is crucial.[134] For Douglas and Marshall's Literalist Approach, it provides the necessary predicate for the conclusion that the text (reinforced by the legislative history) permits no immunities. For the Golden Rule Approach, it is the necessary predicate for the presumption against immunities—for the requirement that immunities be recognized only if they were so clearly established at common law that Congress could not have intended to abolish them.[135] Both approaches focus on the first two words of the statute, "[e]very person,"[136] and argue that these words suggest a textual rejection of immunity.[137]

However, those two words simply cannot bear the weight placed upon them. They describe the parties subject to suit under the statute, but they say nothing about the defenses available to those parties.

Immunity doctrines define the permissible remedies rather than the permissible defendants. They are the functional converse of the rules subordinating equitable remedies:[138] instead of remitting a plaintiff to his

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130 *See infra* text accompanying notes 186-91.

131 *See supra* note 101.

132 *See supra* note 102.

133 *See supra* notes 21 and 104.

134 *See supra* text accompanying notes 21 and 101-04.

135 The "golden rule" is intended to identify and limit the situations in which one can reject a literal reading of the statutory language. If no rejection is necessary, the rule is irrelevant.

136 As originally enacted, the initial words were "[a]ny person." Civil Rights Act of 1871 § 1.

137 *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325, 330, 347-48, 347 n.2 (1983) (Marshall, J., dissenting); Owen v. City of Independence, 445 U.S. 622, 635 (1980); Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting).

138 Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 717-18 (1990).

legal remedies, immunities remit him to his equitable ones. Immune defendants are not immune from all remedies.[139] They are persons subject to suit for all forms of relief except damages.[140] Qualified immunity prevents the award of compensatory or punitive damages but does not bar injunctive or declaratory relief.[141] Municipalities are immune only from suits for punitive damages.[142] "Absolutely" immune prosecutors are nonetheless "natural [and proper] targets for § 1983 injunctive suits" and can be sued for declaratory relief.[143] Similarly, judges can be sued for injunctive relief.[144]

Moreover, absolutely immune defendants are "persons" subject to suit when not acting in the particular capacity to which the immunity attaches.[145] Even state legislators, who are immune from all forms of relief for their legislative actions, may be "persons" subject to suit for unconstitutional hiring or firing of staff.[146] Immunity protects the function rather than the party.[147] Finally, defendants entitled to assert qualified immunity are liable for damages for a broad range of constitutional wrongs even when performing "immune" functions.[148] Despite their immunity, they are "persons" subject to suit for conduct that violates clearly established constitutional rights of which competent officials should have been aware.[149]

The phrase "shall be liable"[150] is similarly indeterminate. It is no more plausible to read the phrase as meaning "shall be liable *regardless of* common law tort immunities," than to read it as meaning "shall be liable

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139 State legislators may represent a limited exception. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). *But see infra* text accompanying note 146.

140 *See infra* notes 141-44.

141 Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975).

142 City of Newport v. Fact Concerts, 435 U.S. 247 (1981). *But cf.* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (holding that municipalities cannot be held liable on a respondeat superior basis).

143 Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736-37 (1980).

144 Pulliam v. Allen, 466 U.S. 522, 541-42 (1984).

145 *See* Burns v. Reed, 111 S. Ct. 1934, 1942 (1991) (prosecutors not absolutely immune for advice to police); Forrester v. White, 484 U.S. 219 (1988) (judges entitled only to qualified immunity for decisions involving the hiring and firing of their staff); Briscoe v. LaHue, 460 U.S. 325, 342 (1983) (police officers have absolute immunity for testimony but only qualified immunity when performing other tasks); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (prosecutors may not have absolute immunity when acting in administrative and investigative role).

146 *Cf.* Forrester v. White, 484 U.S. 219, 224 (1988) (judge entitled to assert qualified but not absolute immunity in § 1983 action challenging employment decisions); Davis v. Passman, 442 U.S. 228 (1979) (*Bivens* action against member of Congress for sex discrimination not barred by absolute immunity; qualified immunity issue reserved).

147 Forrester v. White, 484 U.S. 219 (1988).

148 Harlow v. Fitzgerald, 457 U.S. 800 (1982).

149 Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1985); *Harlow*, 457 U.S. 800 (1982).

150 "Every person . . . *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1988) (emphasis added).

subject to common law tort immunities."[151] The most literal reading is that it means neither—that it says nothing one way or the other on the issue.[152]

Thus, as to choice of remedy, the statutory text is simply neutral.[153] It provides no guidance as to whether any of the "persons" subject to suit should or should not be entitled to assert immunity defenses. It justifies neither a presumption against immunities nor one in favor of them.

If anything, the statutory text affirmatively indicates that the 42nd Congress did not itself decide when defendants should be liable for damages and when they should be subject only to equitable relief. Congress's use of the disjunctive "or" in the statement that defendants shall be liable "in an action at law, suit in equity, *or* other proper proceeding for redress"[154] indicates that it intended to refer that issue to the courts. The use of the disjunctive is most easily read as giving the Court authority to determine which[155] of the three remedies—actions at law for damages, suits in equity for injunctive relief, or other proceedings for redress—would be allowed in particular situations.[156] So interpreted, the language of the statute authorizes the courts to decide when damages should be available—the basic issue raised by immunity defenses.[157]

The general nature of the statutory language reinforces this conclusion. A legislature's decision to use vague[158] or open-textured[159] language implies that it has not itself resolved an issue and that it intends to

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151 To read it in the first way would logically require one also to read the statute as authorizing injunctions regardless of equitable defenses such as laches or unclean hands and regardless of whether the plaintiff had an adequate remedy at law.

152 As discussed below, the text is most plausibly read as referring the issue to the courts for future resolution. *See infra* text accompanying notes 154-71.

153 On the other hand, the phrase "shall be liable" creates a strong presumption that *some* remedy should be available—that the various common-law and equitable defenses not deprive plaintiff of all relief.

154 42 U.S.C. § 1983 (1988) (emphasis added).

155 Of course, the court could decide that multiple or alternative remedies would be allowed and the plaintiff could choose to forgo one or more permissible remedies.

156 It is also possible to read the statute as giving the injured party an unfettered choice of remedy. However, that reading seems strained. A criminal statute providing for fine or imprisonment is not ordinarily interpreted to give the choice of punishment to the prosecutor. In addition, such a reading would lead to the unlikely conclusion that Congress intended to permit a plaintiff to choose injunctive relief even if he had an adequate remedy at law or was unlikely to suffer irreparable injury. *Cf.* Los Angeles v. Lyons, 461 U.S. 95 (1983). As discussed above, immunity principles are the functional converse of the equitable subordination doctrines such as the irreparable injury rule. The language of the statute provides no more basis for overriding one than the other.

157 As discussed in section E and Part II, the statutory language does not give the Court unfettered discretion to decide the issue based on the Justices' individual views of sound public policy.

158 *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 238-239 (1975); FRIENDLY, BENCHMARKS, *supra* note 56, at 47; Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 627 (1975); Ernst Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437, 438 (1921); Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23, 23-24, 30, 35 (1956).

159 *See* ROBERT BORK, THE ANTITRUST PARADOX 72 (1978); Danzig, *supra* note 158, at 634-35;

give the courts some latitude to do so. A similar inference can be drawn from a legislature's decision to speak in general terms rather than to provide a detailed code of rules.[160] The bare language of § 1983 is an example of this sort of vague, generally drafted statute.[161]

The inference would be weaker if the Reconstruction-era Congresses were always so vague on remedial issues. However, they were not. They frequently enacted codes with detailed remedial schemes. For example, the essentially contemporaneous Enforcement Act of 1870[162] specified in detail the appropriate remedies for violations of its various provisions. Some sections authorized actions on the case for a penal sum, costs, and attorneys' fees.[163] Others provided solely for criminal remedies.[164] One authorized a suit "to recover possession of [unlawfully withheld public] office."[165] Still another provided for no private cause of action, but authorized the United States Attorney to seek a writ of quo warranto to remove persons unlawfully holding public office.[166] The Revised Patent Code[167] contained a similarly detailed schedule of remedial provisions.[168]

Even in less comprehensive statutes, Reconstruction-era Congresses frequently identified the specific remedy they intended to provide. The 1871 Civil Rights Act itself provides two examples. Under section 2, persons injured by certain illegal conspiracies could recover "the damages occasioned by such injury" from "any one or more of the persons engaged in such conspiracy."[169] Under section 6, persons injured by the failure of public officials to prevent such conspiracies could bring an ac-

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William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1063 (1989).

160 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545-47 (1983).

161 *See, e.g.*, Eskridge, *supra* note 159, at 1052; Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting).

162 Act of May 31, 1870, ch. 114, 16 Stat. 140. Also known as the Civil Rights Act of 1870, the Enforcement Act provided causes of action for various deprivations of constitutional rights, especially the right to vote. The 1870 Act is perhaps best known for its § 18 which reenacted the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

163 *Id.* §§ 2-4. Those sections also provided for criminal prosecution.

164 *Id.* §§ 5, 6, 11, 15, 19, 20, and 22.

165 *Id.* § 23.

166 *Id.* § 14.

167 Act of July 8, 1870, ch. 230, 16 Stat. 198.

168 *E.g., id.* § 39 (falsely marking item as patented; penal sum to be divided between injured party and the United States); §§ 55, 59 (infringement of patent; choice between a suit in equity for injunction, accounting and discretionary treble damages, or an action on the case for damages and discretionary treble damages); § 79 (wrongful use of another's trademark; compensatory damages, injunction and restitution but no provision for treble damages); § 82 (wrongful registration of trademark; compensatory damages only); § 99 (unlicensed publication of copyrighted books; forfeiture of existing copies and compensatory damages); § 100 (unlicensed publication of certain other copyrighted materials; forfeiture of existing copies and the plates from which they were printed, plus a penal sum to be divided between the copyright holder and the United States).

169 Act of April 20, 1871, ch. 22, 17 Stat. 13, (codified as amended at 42 U.S.C. § 1985 (1988)). Section 2 also provided for criminal remedies.

tion on the case to recover "all damages caused by any such wrongful act which [the official] by reasonable diligence could have prevented."[170] Thus, the language of each of these two sections leaves little doubt that Congress had itself determined the appropriate remedy in those situations and was not delegating decisionmaking on those remedial issues to the courts.[171]

Thus, Reconstruction-era Congresses were quite capable of enacting code-like statutes with elaborate menus of carefully calibrated remedies. They were equally capable of enacting simple statutes that specified the intended remedy. The 42nd Congress's decision to do neither in § 1983 suggests that it intended to leave remedial issues for future case-by-case resolution by the Court.

To say that the Court has authority to determine the permissible remedies does not mean that the Justices are free to choose the goals they should seek to achieve in exercising that authority. To some, it will seem self-evident that the decision should be influenced only by the Justices' judgment as to which remedies will best compensate the injured party and deter future constitutional wrongs. To others, it will be equally self-evident that the Justices should also consider the total effect of a particular remedy, such as whether it would lead to excessive official timidity or would prevent qualified persons from seeking public office. Neither is self-evidently correct. While the statutory language suggests that the Court should choose the remedy, it does not indicate what values the Court should consider in making that choice.[172] That question can be answered only by examining the goals of the 42nd Congress. That examination will be deferred to Part II.

C. The Static Incorporation Approach[173]

1. The third interpretive approach to immunity issues, the Static Incorporation Approach, is most closely associated with Justice Blackmun. In a number of opinions, Justice Blackmun suggested that the statute should be read as presumptively incorporating all common-law

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[170] *Id.* § 6 (codified as amended at 42 U.S.C. § 1986 (1988)). This section also specifically provided that damages could be recovered for wrongful death and placed a limit on those damages. *Id.*

[171] Section 2 of the Civil Rights Act of 1875, ch. 114, 18 Stat. 336 (1875), demonstrates a similar intention to decide, rather than to delegate, remedial issues. For an essentially contemporaneous private law example of congressional specification of remedy, see Act of April 22, 1870, ch. 59, 16 Stat. 91 (usurious lender to forfeit all unpaid interest; borrower may recover interest already paid).

[172] Section E will demonstrate that the 42nd Congress did not intend to give the Justices the authority to implement their own values. *See infra* text accompanying notes 251-86.

[173] The distinction between static and dynamic incorporation is similar to the historical distinction between static and dynamic conformity in federal civil procedure. The former required conformity to state procedures as of a specified date. The latter required the federal courts to follow whatever state procedures were in force at the time the federal court sat. FLEMING JAMES & GEOFFREY C. HAZARD, CIVIL PROCEDURE 19 (3rd ed. 1985).

immunities existing at the time of § 1983's enactment.[174] This presumption could be rebutted by a showing that incorporation would be inconsistent with the goals of § 1983.[175] However, subject to that condition, every immunity defense that was available in common-law tort actions in 1871—whether or not it was well established—is presumed to be available under § 1983.

Justice Blackmun summarized the justification for this approach in *City of Newport v. Fact Concerts*[176]: "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."[177] Thus, Justice Blackmun treats common-law immunity defenses as a set of background understandings that Congress intended to apply under the statute unless doing so would undermine the statutory purpose.[178]

Both the Static Incorporation Approach and the Golden Rule Approach require the Court to focus on the common law as it existed at the date of enactment.[179] But the two approaches differ radically in the way they view the relationship of that common law to the text. The Golden Rule Approach sees the plain language of the text as presumptively controlling. The common law overrides that language only in "limited circumstances"[180]—where it is inconceivable that Congress meant what the text says.[181] But the Static Incorporation Approach reverses the presumption. The plain language of the text is permitted to change common-law doctrines only where those doctrines are affirmatively shown[182]

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174 Pulliam v. Allen, 466 U.S. 522, 529 (1984) (Blackmun, J.); Briscoe v. LaHue, 460 U.S. 325, 369 (1983) (Blackmun, J., dissenting); City of Newport v. Fact Concerts, 453 U.S. 247, 258 (1981) (Blackmun, J.). *But see Briscoe*, 460 U.S. at 369 (Blackmun, J., dissenting) (suggesting that common-law immunities could be incorporated under § 1983 only if they were "well established" in 1871); *City of Newport*, 453 U.S. at 263 (suggesting that the immunity in question was "well established"). Justice Stevens also flirted with this approach. *Compare Briscoe*, 460 U.S. at 336 (Stevens, J.) (apparently adopting Static Incorporation Approach) *with id.* at 330-31 (describing the immunity at issue as "well established in English common law") *and id.* at 334 (describing it as so well established that the Court cannot believe Congress intended silently to abrogate it) *and id.* at 346 (describing it as "well settled") *and* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (suggesting that § 1983 should be interpreted as authorizing the Court to adopt legal rules on a case-by-case basis).

175 *Newport*, 453 U.S. at 258-59.

176 453 U.S. 247 (1981).

177 *Id.* at 258.

178 For a similar treatment of the 1966 amendments to 28 U.S.C. § 2244, see McCleskey v. Zant, 111 S. Ct. 1454, 1480 (1991) (Marshall, J., dissenting).

179 Both also reject incorporation of immunities that would subvert the statutory purpose.

180 Gomez v. Toledo, 446 U.S. 635, 639 (1980).

181 *See supra* text accompanying notes 105-21.

182 Briscoe v. LaHue, 460 U.S. 325, 336 (1983); City of Newport v. Fact Concerts, 453 U.S. 247, 266 (1981).

to be inconsistent with Congress's intent.[183] Thus, under the Golden Rule Approach, incorporation of common-law immunities is the exception, while under the Static Incorporation Approach, it is the norm. Under the Golden Rule Approach, "the starting point in our analysis must be the language of the statute itself."[184] But for the Static Incorporation Approach, "[t]he starting point . . . is the common law."[185]

2. There are three reasons why it seems unlikely that the 42nd Congress intended § 1983 to be read as presumptively incorporating common-law immunities. First, no unitary body of common-law tort immunities existed that Congress could have intended to incorporate. Second, the cause of action created by § 1983 had no clear common law analog. Third, it is unlikely that Congress would have intended to limit a statute particularly directed at public officials by incorporating into it a body of law that provided special protections for those officials.

In the nineteenth century, no unitary, unchanging[186] body of tort law existed that Congress could have intended to incorporate. The common law of tort was fragmented both geographically and substantively. The thirty-seven states then in existence were less unified and more protective of the independence of their legal systems than the fifty states are now. The early twentieth-century efforts of the American Law Institute Restatements to bring order out of chaos implicitly recognized that chaos did exist. Any review of "[t]he battle of the string citations"[187] in the Supreme Court's § 1983 decisions will lay to rest the idea that the states shared a single common law.[188] In addition, under *Swift v. Tyson*,[189] the federal courts enforced yet another version of the common law.[190] Moreover, even within a particular jurisdiction, no single body of "tort" law existed. Instead, there were various causes of action for non-contractual wrongs having different elements, different defenses, and different

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183 This reversal of the presumption is generally dispositive since there is little explicit evidence of the 42nd Congress's intent either to incorporate or to abrogate specific common-law immunities. Moreover, the evidence that does exist has been rejected by the Court as insufficient. *See supra* Part I A.

184 Owen v. City of Independence, 445 U.S. 622, 635 (1980).

185 Pulliam v. Allen, 466 U.S. 522, 529 (1984).

186 In the nineteenth century, the fact that the common law was dynamic rather than fixed was seen as one of its virtues. *See infra* note 214.

187 Smith v. Wade, 461 U.S. 30, 93 (1983) (O'Connor, J. dissenting).

188 *But see* Kreimer, *supra* note 111, at 618-19 (suggesting that the federal common law under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), was considered an overarching body of law applicable in every state).

189 41 U.S. (16 Pet.) 1 (1842) (holding that the federal courts should create an independent body of federal common law in diversity cases), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

190 The existence of *Swift* itself underlines the lack of uniformity in the common law of tort. There is no need for a field of conflict of laws unless laws conflict. If lawyers were not aware that the federal common law was different than that of the states, *Erie v. Tompkins* could not have arisen.

remedies.[191]

The cause of action created by § 1983 was not easily analogized to any of the various common-law causes of action that we now call torts. The central problem at which § 1983 was aimed—racial discrimination by governmental officials[192]—had many manifestations that had little in common with traditional tort actions. A suit against an official who refused to permit an African-American to sit on a jury or serve as a witness shared little with one against an official who failed to repair a bridge. The Court's difficult struggle to determine § 1983's statute of limitations by identifying the most analogous state cause of action[193] starkly demonstrates how dubious the analogies are.

The fact that there is no one common law analog to the cause of action created by § 1983 strongly suggests that Congress did not intend for the Court to incorporate common-law rules. Section 1983 created a single cause of action for deprivation of federally protected rights. There is no indication that the 42nd Congress intended that its effect should vary depending, for example, on whether the particular deprivation was more similar to slander than to malicious prosecution.[194]

Finally, general tort law was a particularly unlikely source from which to draw immunities for § 1983. The common law treated torts by officials as exceptional cases to which special principles should be applied. Public officials were entitled to particular protections because the general principles were designed to remedy private wrongs and change private behavior. Any effect that general tort law might have on public officials was incidental and was to be minimized.

But for § 1983, changing the conduct of public officials was a goal rather than a side effect. The 42nd Congress was well aware that it was

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191 GRANT GILMORE, THE AGES OF AMERICAN LAW 46-47 (1977). The common law tort actions included trespass, trespass on the case, trover, ejectment, detinue, and replevin. JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADINGS 151-52 (1969). The action on the case, by itself, included such diverse causes of action as ones for negligence, professional malpractice, seduction, alienation of affections, malicious prosecution, slander, neglect of official duty, statutory liability, and liability for injury by servants or animals. *Id.* at 187-201.

Moreover, if Congress had intended to incorporate a body of common law, it would not necessarily have looked only to tort law. Contractual causes of action, such as debt, were also sometimes used to enforce obligations imposed by statutes. *Id.* at 274. When Congress explicitly specified a common law form of action to be used to enforce civil rights, it did not limit itself to tort law. *Compare, e.g.*, Civil Rights Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (action on the case) *and* Enforcement Act of 1870, ch. 114, §§ 2-4, 16 Stat. 140, 140-41 (same) *with* Civil Rights Act of 1875, ch. 114, § 2, 18 Stat. 336, 336 (action of debt). Of course, in § 1 of the 1871 Act, from which § 1983 was derived, Congress provided no such specification.

192 GLOBE APP., *supra* note 29, at 68 (Remarks of Rep. Shellabarger); *cf.*, Monroe v. Pape, 365 U.S. 167, 173-78 (1961).

193 *See* Owens v. Okure, 488 U.S. 235 (1989); Wilson v. Garcia, 471 U.S. 261 (1985).

194 *Compare* Briscoe v. LaHue, 460 U.S. 325 (1983) *with id.* at 346-69 (Marshall, J., dissenting). For a more recent attempt at the same Sisyphean task, see Burns v. Reed, 111 S. Ct. 1934, 1946-47 (1991) (Scalia, J., concurring in part and dissenting in part).

creating a new cause of action that protected constitutional rights by restricting the previously existing powers and privileges of state and local officials. Congress recognized that the Civil War and the Reconstruction-era constitutional amendments had revolutionized the relationship between the federal government and the states,[195] and that many state and local officials vigorously opposed the change. Unlike common law tort doctrine, § 1983 was specifically aimed at public officials. Immunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute which was primarily intended to prevent the abuse of those prerogatives.

In the words of the second Justice Harlan, "[i]t would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."[196] There is no reason to believe that the 42nd Congress relied on such a coincidence.

D. The Dynamic Incorporation Approach

1. Under the fourth approach to § 1983 immunities, the statute is seen as incorporating the common law as a developing body of law rather than as a historically fixed one. Under this Dynamic Incorporation Approach, the Court may consider all common-law doctrines including doctrines developed after § 1983's enactment. The Court may recognize an immunity under § 1983 if that immunity is recognized in contemporary tort actions, even if it was not recognized in 1871. The Court can look "to the common law of torts (both modern and as of 1871)"[197] to resolve issues of immunity.[198]

The Dynamic Incorporation Approach is most clearly exemplified by Justice Powell's opinion in *Imbler v. Pachtman.*[199] In *Imbler,* the Court held that prosecutors are absolutely immune from damage liability for actions taken in initiating or presenting criminal cases. The opinion stressed that immunities under § 1983 were not the result of judicial fiat[200] and could be justified only where the official had "historically"[201]

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195 The change was so significant that members distinguished between the "new" constitution and the "old" constitution. *See, e.g.,* GLOBE APP., *supra* note 29, at 70 (statement of Rep. Shellabarger); GLOBE, *supra* note 32, at 577 (statement of Sen. Carpenter).

196 Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring). *Cf.* Sunstein, *supra* note 56, at 481 ("When the legislature intends to transform the relationships created by the common law, principles rooted in the common law do not provide an appropriate background understanding.").

197 Smith v. Wade, 461 U.S. 30, 34 (1983).

198 Justice Scalia has recently explicitly rejected this use of post-enactment common law developments. Burns v. Reed, 111 S. Ct. at 1945-47 (Scalia, J., concurring in part and dissenting in part).

199 424 U.S. 409 (1976).

200 *Id.* at 421.

been accorded an essentially similar immunity.[202] However, the decision explicitly treated post-enactment common law developments as part of the relevant history. The opinion acknowledged that prosecutorial immunity was first discussed in an 1896 decision[203] and that it "became" the majority rule in the second and third decades of the twentieth century.[204] Thus, the "historically accorded" immunity to be considered is not limited to that available in 1871, with which the 42nd Congress could be assumed to be familiar.[205] Rather, it includes those immunities subsequently recognized in the common law of torts.[206]

In the portion of *Pierson v. Ray*[207] holding that police officers were entitled to qualified immunity,[208] the Court apparently utilized the same approach.[209] Rather than attempt to determine the state of the common law in 1871, the Court relied on "the prevailing view in this country that a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is subsequently proved."[210] The decision cited three twentieth-century authorities as support for the "prevailing view,"[211] and none from the nineteenth century.

2. Justices Rehnquist and Marshall have each attacked dynamic incorporation as inconsistent with any effort to determine congressional intent.[212] Since Congress could not have known about future develop-

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201 *Id.*

202 *Id.* at 419.

203 *Id.* at 421.

204 *Id.* at 422 & n.19.

205 City of Newport v. Fact Concerts, 453 U.S. 247, 258 (1981).

206 *See* Smith v. Wade, 461 U.S. 30, 35 n.2 (1983) (rejecting the position that Congress intended to freeze obsolete doctrine into § 1983).

207 386 U.S. 547 (1967).

208 In an earlier part of the opinion, the Court held that judges are entitled to absolute immunity. *Id.* at 553-56. In that portion of the opinion, the Court appears to have utilized the Golden Rule approach.

209 On the other hand, it based its rejection of absolute immunity for police officers on the fact that such immunity "has never" been granted to police officers. *Id.* at 555.

210 *Id.*

211 *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 121 (1965)); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.18, at 277-78 (1956); Missouri *ex rel.* Ward v. Fidelity & Deposit Co., 179 F.2d 327 (8th Cir. 1950)). Although these were twentieth-century authorities, each was explicitly based on nineteenth-century precedent. Harper and James referred to Beckwith v. Philly, 6 B. & C. 635, 108 Eng. Rep. 585, 586 (K.B. 1827), as a leading case supporting its position on the issue and relied on several nineteenth-century American cases. HARPER & JAMES, *supra* at 278 n.13. *Ward* relied on an earlier Missouri case and noted that it was based on Blackstone's Commentaries and a nineteenth-century treatise. 179 F.2d at 331. The Reporter's Notes to the Restatement section also cite *Beckwith*. RESTATEMENT (SECOND) OF TORTS § 121 appendix, at 126 (1966). However, the *Pierson* Court does not indicate that it was aware of the nineteenth-century antecedents of its twentieth-century authorities.

212 Smith v. Wade, 461 U.S. 30, 65-68 (1983) (Rehnquist, J., dissenting); Briscoe v. LaHue, 460 U.S. 325, 355 n.15 (1983) (Marshall, J., dissenting). Interestingly, each Justice has also supported

ments in the common law,[213] it could not have intended that such developments be part of § 1983.[214] Therefore, to be faithful to the 42nd Congress's intent, one must look only at the common law in existence when the 42nd Congress acted.[215]

The apparent logic of this argument is deceptive. Incorporation of a changing standard is a common way of dealing with a situation in which the fact of change is anticipated but the nature and direction of the change is unknown. There are at least two types of changing standards that are commonly incorporated. In the commercial context, the two can be illustrated by a "benchmark price" clause and a "prime" interest rate clause. Under a benchmark price contract, the parties agree that the price at which a product will be sold will vary according to a price set by the market or by a third party.[216] The parties are willing to enter into such an agreement because they believe that the benchmark price will fairly take into account changing circumstances and because neither party has any appreciable control over that price. Under "prime" interest rate clauses, the interest rate is tied to the lender's prime rate, i.e., the lowest rate at which it lends to its best customers.[217] Such a note gives the lender a substantial degree of control over the borrower's interest rate. However, the lender cannot exercise that control in a way that affects only the borrower. It can change the borrower's rate only by

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the approach. Justice Marshall joined the *Smith* majority opinion from which Justice Rehnquist dissented. Justice Rehnquist joined the *Briscoe* majority opinion from which Justice Marshall dissented.

213 *Wade*, 461 U.S. at 66 (Rehnquist, J. dissenting) (42nd Congress would have needed "extraordinary foresight" to consider post-1871 judicial decisions); *Briscoe*, 460 U.S. at 355 n.15 (Marshall, J., dissenting) (42nd Congress would have needed to be "clairvoyant" to consider post-1871 decisions and treatises).

214 I assume that Justices Rehnquist and Marshall are not arguing that the 42nd Congress could not have anticipated the fact that the common law would change but rather that it could not have anticipated what the changes would be. The fact that the common law evolved and changed over time was well recognized in the nineteenth century and was frequently cited as one of its virtues. *See, e.g.*, John N. Pomeroy, *The True Method of Interpreting the Civil Code*, 4 WEST COAST REP. 1, 110 (October 14, 1884) ("The distinguishing element of the common law, and one of its highest excellencies, is its elasticity, its power of natural growth and orderly expansion."); Norway Plains Co. v. Boston & Me. R.R., 67 Mass. (1 Gray) 263, 267 (1854); *see also* Kreimer, *supra* note 111, at 619 n.90.

215 *Wade*, 461 U.S. at 67-68 (Rehnquist, J., dissenting); *Briscoe*, 460 U.S. at 355 n.15 (Marshall, J., dissenting). This argument does not necessarily imply that one could consider no cases decided after the date of § 1983's enactment. There are several ways in which a somewhat later case could indicate the state of the law in 1871. For example, it could explicitly state that the principles it applied were long established ones or could treat opposing arguments as being self-evidently frivolous.

216 *See, e.g.*, Eastern Air Lines v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975). Other examples include cost of living escalator clauses and "prime" interest rate clauses where the specified prime rate is that of a bank which is not a party to the agreement.

217 This type of clause should be distinguished from somewhat similar clauses that tie the borrower's interest rate to the prime rate at a bank *other than* the lender or to a composite index of interest rates. Such clauses are forms of benchmark pricing.

changing the rate it charges all "prime" and "prime plus" borrowers.[218] Borrowers are willing to execute such notes because they believe that the lender will not unreasonably raise an interest rate when doing so might alienate its best existing customers and put it at a disadvantage in seeking new ones.[219] The note gives the borrower the authority to set the interest rates, but it places strong practical constraints on that authority.

Legislatures frequently incorporate changing standards in the same two ways. The 42nd Congress itself provided an explicit example of the first type of dynamic incorporation by enacting the Conformity Act of 1872.[220] Under section 5 of that act, procedures in certain federal civil cases were to conform to those existing in the state courts "at the time [of trial]."[221] The Davis Bacon[222] and Service Contract[223] Acts are additional examples. By providing that certain employees must be paid the prevailing wage in the relevant area, the acts incorporate a changing standard, the future content of which could not be known by the enacting Congress. Like the parties to a benchmark price contract, Congress incorporated a standard that it believed would fairly reflect changes in relevant conditions and over which the affected parties had no substantial control.

The Full Faith and Credit Act[224] provides a statutory example of the second type of standard. The Act ties the preclusive effect of state court judgments in federal proceedings to that given them in the courts of the rendering state. A state can increase the preclusive effect of its judgments in federal courts, but only by increasing the preclusive effect in its own courts as well.[225]

Although it is logically possible, it seems exceptionally unlikely that the 42nd Congress intended to incorporate the developing common law of immunities into § 1983. A dominant theme throughout Reconstruction was Congress's effort to shift control over civil rights away from the state courts.[226] Congress simply did not trust state courts to protect indi-

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218 Requirements contracts provide another example. The buyer can change the quantity it must purchase, but it can do so only by changing its operations.

219 Of course, this expectation would be frustrated if the lender could have a nominal "prime" rate that differed from its real prime interest rate. *See, e.g.*, Kleiner v. First Nat'l Bank, 581 F. Supp. 955 (N.D. Ga. 1984).

220 Act of June 1, 1872, ch. 255, 17 Stat. 196.

221 *Id.* § 5, at 197; JAMES & HAZARD, *supra* note 173, at 19.

222 40 U.S.C. § 276a (1988).

223 41 U.S.C. § 351 (1988).

224 28 U.S.C. § 1738 (1988).

225 For additional examples, see, e.g., 29 U.S.C. § 206(d)(3) (1988) (tying enforcement procedures under the Equal Pay Act to those under the Fair Labor Standards Act); 29 U.S.C. § 626 (b) (1988) (tying enforcement procedures under the Age Discrimination in Employment Act to those under the Fair Labor Standards Act); HART & SACKS, *supra* note 57, at 1203-17 (discussing the effect of the Nineteenth Amendment on state statutes tying eligibility to serve as a juror to eligibility to vote).

226 *See infra* text accompanying notes 267-81.

vidual rights.[227] Yet dynamic incorporation of common-law immunity doctrine would inevitably give those courts a substantial role in determining the effective scope of § 1983. Moreover, the objections to the Static Incorporation approach—the geographical and substantive fragmentation of the common law,[228] the lack of a clear common law analog to actions under § 1983,[229] and the anomaly that would result from incorporating defenses designed to provide particular protection to public officials into a statute targeted at those officials[230]—apply equally to the Dynamic Incorporation Approach.

E. The Delegation Approach

1. The currently dominant Delegation Approach[231] is one acknowledged more often by commentators than by the Court.[232] Under this approach, the Court interprets § 1983 as having authorized the Court to use its own view of sound public policy and current societal conditions to decide which immunities should or should not be granted. Under this approach, the 42nd Congress did not itself resolve the issues. Instead, it delegated that responsibility to the Court.[233]

It is important to distinguish the Delegation Approach from the Dy-

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227 For a discussion of Congress's expansion of federal court jurisdiction at the expense of the state courts, see *infra* text accompanying notes 267-81. For examples of statements expressing the 42nd Congress's distrust of the state court systems, see Briscoe v. LaHue, 460 U.S. 325, 364 n.31 (1983) (Marshall, J., dissenting); Note, *supra* note 55, at 328 & n.38.

228 *See supra* text accompanying notes 186-91.

229 *See supra* text accompanying notes 192-94.

230 *See supra* text accompanying notes 195-96.

231 Statutes interpreted in this way are frequently labeled "common law statutes." This Article avoids that terminology for two reasons. First, in light of the extensive use of the common law in the other approaches, the phrase seemed unnecessarily confusing. This is particularly true since, as discussed in the next paragraph of the text, a court using the Delegation Approach may utilize common-law methodology but is not bound to give weight to decisions in the traditional common-law fields. Second, the phrase "common law statute" is also used to refer to statutes declaring that, with certain exceptions, the common law of England would provide the rules of decision within the state. *See, e.g.*, James M. Landis, *Statutes and the Sources of Law, reprinted in* HARVARD LEGAL ESSAYS 213, 214 & n.2 (Roscoe Pound ed., 1934). For examples of such statutes, see, e.g., MO. REV. STAT. § 1.010 (1990); CAL. CIV. CODE § 22.2 (West 1991); ILL. REV. STAT. ch. 1, para. 801 (1989).

232 *See, e.g.*, Kreimer, *supra* note 111, at 610-11; Eskridge, *supra* note 159, at 1052; Sunstein, *supra* note 56, at 421-22.

233 Much of this section assumes that the only permissible justification for the Court's exercise of this level of lawmaking power is a belief that Congress implicitly authorized the Court to do so. *Cf.* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting); Textile Workers v. Lincoln Mills, 353 U.S. 448, 450-51, 456-57 (1957); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POLICY 87, 93-94 (1984); Easterbrook, *supra* note 160, at 544-46; William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377-78 (1988); Miller, *supra* note 158, at 23-24 n.2; Richard Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983). Some scholars have argued that current "public values" should override reconstructed legislative intent whenever "circumstances have materially changed since the statute's enactment," Eskridge, *supra* note 159, at 1009-10, and that judges should feel free to alter statutes whenever they become "out of line with

namic Incorporation Approach. Under the Delegation Approach, the Court is free to develop § 1983 as an independent body of law. While it may elect to draw upon contemporary common-law tort principles, it may also completely disregard them.[234] The Court has not been directed to interpret § 1983 as governed by the immunity principles that the Court (or the state courts) develop in traditional common-law fields. Instead, under the Delegation Approach, the Court has been directed to use a method similar to common-law decisionmaking to develop independent principles of immunity that are unique to § 1983.

The Court's increasing use of the Delegation Approach can most easily be traced in its decisions defining the content of qualified immunity.[235] Its earliest decisions defining the content of the defense are arguably based, albeit loosely, on the adoption of the defense available to the specific official at common law.[236] In *Harlow v. Fitzgerald*,[237] however, the Court abandoned any pretense that the content of § 1983 immunities should be tied to the content of their common-law counterparts. Instead, the Court decided the issue solely as a matter of contemporary public policy. It explicitly balanced victims' interest in compensation for constitutional wrongs against public officials' interest in avoiding the burdens of defending their actions.[238] Concluding that the conflicting inter-

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dominant principles." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 90 (1982). *See generally id.* at 87-119.

234 Anderson v. Creighton, 483 U.S. 635, 644-46 (1987) (recognizing that the Court's current formulation of § 1983 qualified immunity was unknown to the common law).

235 Any form of immunity has two dimensions: its availability and its content. Decisions regarding the availability of an immunity determine which defendants can assert it. For example, when the Court decided that state legislators should be permitted to assert the defense of absolute immunity, Tenney v. Brandhove, 341 U.S. 367 (1951), it decided an issue of availability. Decisions regarding the content of an immunity determine the extent of the protection the immunity will provide. When the Court decided that absolute legislative immunity barred injunctions as well as damages, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 732-33 (1980), it decided an issue of content. Similarly, *Harlow v. Fitzgerald's* holding that certain presidential aides would be permitted to assert qualified, but not absolute, immunity, 457 U.S. 800, 807-13 (1982), resolved an issue of availability. Its holding that officials would prevail on the qualified immunity defense whenever their conduct did not violate clearly established rights of which a reasonable person would have been aware, *id.* at 818, resolved one of content.

While it is often possible to restate an issue of content as one of availability (or vice versa), the distinction remains a useful one—particularly in light of the Court's "across the board" treatment of content questions. *Id.* at 821 (Brennan, J., concurring); *cf. id.* at 818 (opinion of the Court).

236 Wood v. Strickland, 420 U.S. 308, 318 & n.9 (1975) (basing content of school board members' qualified immunity defense on that "generally recongized" in state court tort actions); Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (defining content of the qualified immunity of police officers on their common law false arrest defense of good faith and probable cause). While *Wood* emphasized the general public policy arguments for qualified immunity, 420 U.S. at 319-20, it did so as part of its explanation of immunity's common law development. *Id.* at 320 ("These considerations have undoubtedly played a prime role in the development by state courts of a qualifed immunity protecting school officials . . . .").

237 457 U.S. 800 (1982).

238 *Id.* at 815-19.

ests were best reconciled by eliminating the subjective element from the qualified immunity defense,[239] the Court adopted a definition of qualified immunity that had no common-law basis.[240] As the Court subsequently acknowledged, its decision in *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law."[241]

The Delegation Approach presents a sharp contrast to the other approaches. Under the Delegation Approach, the Court can create an immunity unknown to the common law.[242] Under the other approaches, the Court repeatedly states that it can recognize only those immunities that are essentially identical to (if not more limited than) those available at common law.[243] Under the Delegation Approach, the Court resolves immunity issues on the basis of the Justices' own views of sound public policy.[244] Under the others, it just as explicitly denies that it has the power to do so.[245] Under the Delegation Approach, the Court decides immunity issues with hardly a nod to history or to the common law.[246] Under the other approaches, such decisions are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law."[247] Under the Delegation Approach, the Court appears to make the sort of "free wheeling policy choice"[248] that the other approaches forbid.

Of course, opinions using the other approaches have virtually always discussed public policy issues. However, the Court justified doing so as an effort to determine the intent of the 42nd Congress. Since Congress would not have intended to incorporate immunities that would un-

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239 *See, e.g., id.* at 819 (concluding that the "public interest may be better served" under the new standard than under the old).

240 *Id.* at 818 ("[O]fficials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

241 Anderson v. Creighton, 483 U.S. 635, 645 (1987).

242 *See id.*

243 Pulliam v. Allen, 466 U.S. 522, 541 (1984) (Court may not "expand" common-law immunities); Dennis v. Sparks, 449 U.S. 24, 29 (1980) (§ 1983 immunities are "the equivalents of those that were recognized at common law"); Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (police officers entitled to § 1983 immunity equivalent to that available in false arrest actions); *cf.* Burns v. Reed, 111 S. Ct. 1934, 1946 n.1 (1991) (Scalia, J., concurring in part and dissenting in part) (recognizing logical tension between Delegation and Golden Rule Approaches); Malley v. Briggs, 475 U.S. 335, 342 (1986). Presumably, a § 1983 immunity might be narrower than that available at common law since the common-law immunities breadth might be inconsistent with § 1983's remedial purpose.

244 *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

245 Tower v. Glover, 467 U.S. 914, 922-23 (1984); *Burns*, 111 S. Ct. at 1946 (Scalia, J., concurring in part and dissenting in part).

246 *See, e.g.*, Davis v. Scherer, 468 U.S. 183 (1984) (deciding a significant immunity issue without ever mentioning the common law).

247 Imbler v. Pachtman, 424 U.S. 409, 421 (1976); *accord Tower*, 467 U.S. at 920; Gomez v. Toledo, 446 U.S. 635, 639 (1980); Owen v. City of Independence, 445 U.S. 622, 638 (1980); *see also* Procunier v. Navarette, 434 U.S. 555, 568 n.2 (1978) (Stevens, J., dissenting).

248 Malley v. Briggs, 475 U.S. 335, 342 (1986).

dermine the goals of § 1983, the Court must determine whether a particular immunity would have that effect.[249] The Court's refusal to recognize such immunities is based on an inference as to Congress's intent, not on its own views of sound public policy.[250]

2. The Delegation Approach treats § 1983 as having granted the Court discretion to decide remedial issues, such as immunity, on a case-by-case basis. To that extent, the approach is consistent with the analysis of Part I B 2 of this article. However, the Delegation Approach goes farther. It unjustifiably assumes that Congress authorized the Court to exercise that discretion to implement the Justices' own views of sound public policy. The history of the relationship between Congress and the Court during Reconstruction makes it exceptionally unlikely that the 42nd Congress would have given the Court such unchecked power.[251] On issues of importance, one does not ordinarily give unfettered discretion to an institution one does not trust. Simply put, Reconstruction-era Congresses did not trust the Supreme Court to protect individual rights.[252]

Little in the history of the Reconstruction era suggests that Congress trusted the Supreme Court so completely that it would have given it the level of discretion suggested by the Delegation Approach.[253] The memory of *Dred Scott*[254] was fresh, and many members of Congress feared that the Supreme Court would invalidate congressional Reconstruction.[255] A number of the Court's decisions[256] had enraged the radical republicans and given heart to the opponents of congressional Reconstruction.[257] While these opponents saw the Court as an ally, the radicals saw it as an obstacle.[258]

In the late 1860s, the radicals' distrust of the Court led them to

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249 *Id.* at 340; *Tower*, 467 U.S. at 920.

250 At least for the Golden Rule and Static Incorporation Approaches, the question was whether the 42nd Congress would have found the immunity to be inconsistent with § 1983's purposes, rather than whether the current Court does. Thus, to the extent that there have been changes since 1871 in the actual or perceived effects of a particular immunity, those changes should be disregarded.

251 *See infra* text accompanying notes 253-78.

252 *See infra* text accompanying notes 253-66, 282-86.

253 For contrasting general discussions of the attitude of the Reconstruction-era Congresses toward the federal judiciary, compare 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 421-97 (1926) with STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968) and William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969).

254 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

255 KUTLER, *supra* note 253, at 35.

256 Notably, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) and the Test Oath Cases (*Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) and Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866)).

257 HANS L. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE 374-75 (1968); KUTLER, *supra* note 253, at 55-56.

258 KUTLER, *supra* note 253, at 34-35; TREFOUSSE, *supra* note 257, at 374-77. The conservatives were not, however, entirely pleased with the Court's performance. For example, while sitting as

attempt to limit its power.[259] Although it subsequently died in a Senate committee, a bill to require a two-thirds[260] vote of the Court to overturn an act of Congress overwhelmingly passed the House of Representatives.[261] In 1868, Congress overrode a presidential veto to enact a statute[262] stripping the Court of jurisdiction over the habeas corpus appeal of William McCardle[263] even though the Court had already heard oral argument in the case.[264] Similarly, in 1869, responding to a *caveat* in the *McCardle* opinion, the Senate Judiciary Committee favorably reported a bill eliminating Supreme Court jurisdiction over all political questions, including the constitutionality of congressional Reconstruction.[265] Many of those who supported these measures restricting the Supreme Court's power subsequently supported the 1871 Civil Rights Act.[266] It is unlikely that they did so with the understanding that the Supreme Court would have unfettered discretion to immunize officials from liability under that Act.

Reconstruction-era Congresses did significantly expand the original[267] and removal[268] jurisdiction of the federal courts.[269] This expan-

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Circuit Justices, Chief Justice Chase and Justice Swayne had each upheld the constitutionality of the 1866 Civil Rights Act. KUTLER, *supra* note 253, at 37.

259 The fact that most of these efforts failed indicates that many members of Congress were unwilling to go as far as the radicals wished. However, the fact that the defeated bills were introduced and received substantial support shows that a significant portion of Congress was hostile to the Court.

260 An even more radical measure requiring unanimous Court action was also introduced and debated. CONG. GLOBE, 40th Cong., 2d Sess. 478-89 (1868); KUTLER, *supra* note 253, at 74-75. While it was solidly defeated, its supporters included Representatives Bingham and Farnsworth, who were prominent supporters of the 1871 Act.

261 CONG. GLOBE, 40th Cong., 2d Sess. 489 (1868); 2 WARREN, *supra* note 253, at 466-71 (1926); KUTLER, *supra* note 253, at 74-77. For the debates on the bill, see CONG. GLOBE, 40th Cong., 2d Sess. 477-89 (1868). The vote was 116 to 39. Supporters of the two-thirds requirement who were subsequent prominent supporters of the 1871 Act included Representatives Bingham, Coburn, Dawes, Farnsworth, and Maynard.

262 Act of March 27, 1868, ch. 34, 15 Stat. 44.

263 McCardle, a Mississippi newspaper editor, was being held in military custody for having written and published editorials highly critical of Reconstruction. Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 525 (1983).

264 *See, e.g.*, *Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868); 2 WARREN, *supra* note 253, at 473-76.

265 CONG. GLOBE, 41st Cong., 2d Sess. 3, 45 (1869); KUTLER, *supra* note 253, at 85-86. Of the seven members of that Committee, five (Sens. Carpenter, Conkling, Edmunds, Rice, and Stewart) subsequently supported the 1871 Act. The 1869 bill also would have eliminated all Supreme Court jurisdiction over habeas corpus.

In an even more extreme expression of distrust of the Supreme Court, one Senator proposed abolishing judicial review entirely. CONG. GLOBE, 41st Cong., 2d Sess. 2 (1869); KUTLER, *supra* note 253, at 86. For the debate on the latter proposal, see CONG. GLOBE, 41st Cong., 2d Sess. 86-96 (1869). The Judiciary Committee reported the proposal adversely and it was indefinitely postponed. *Id.* at 1250.

266 *See* sources cited in *supra* notes 244-45, 249.

267 Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (reinstating bankruptcy jurisdiction after al-

sion was particularly notable in the field of civil rights. Congress uniformly granted original federal jurisdiction over civil[270] and criminal[271] proceedings to enforce those rights. It also substantially expanded the removal jurisdiction to protect African Americans and their allies.[272]

However, Congress's expansion of the jurisdiction of the lower federal courts is most reasonably interpreted as expressing its lack of faith in state courts and local juries.[273] That expansion did not indicate a willingness to delegate lawmaking power to the courts so much as a desire to allocate judicial power to the federal rather than the state courts—a desire that was hardly surprising given the notorious hostility of many state courts to the Freedmen and their allies.[274]

Congress's preference for the federal trial courts was understandable. After the inauguration of President Grant, Congress had created nine circuit judgeships.[275] Grant filled each of these postitions with a loyal Republican and gave the judges a "mandate to enforce federal

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most a quarter century hiatus); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 105 (1935); Act of March 12, 1863, ch. 120, 12 Stat. 820 (creating Court of Claims); Act of March 17, 1866, ch. 19, 14 Stat. 9 (modifying appeals from Court of Claims to satisfy concerns about its constitutionality); *see generally* Wiecek, *supra* note 253, at 352-57. The expansion of jurisdiction culminated in the grant of general federal question jurisdiction in 1875. Act of March 3, 1875, ch. 137, 18 Stat. 470.

268 *E.g.*, Separable Controversies Act, ch. 288, 14 Stat. 306 (1866); Local Prejudice Act, ch. 196, 14 Stat. 558 (1867); Jurisdiction and Removal Act, ch. 137, 18 Stat. 470 (1875). *See* Wiecek, *supra* note 253, at 336-42; KUTLER, *supra* note 253, at 144-60. A total of twelve removal measures were passed during the civil war and reconstruction era. KUTLER, *supra* note 253, at 147. "By the mid-1870's virtually every case involving blacks, white loyalists, and federal officials in the South could be removed to federal courts." ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 277-78 (1988).

269 *See generally* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 845-47, 1136-38 (2d ed. 1973).

270 *See, e.g.*, Enforcement Act of 1870, ch. 114, §§ 2-4, 14, 23, 16 Stat. 140, 140-41, 143, 146; Force Act of 1871, ch. 99, § 15, 16 Stat 433, 438; Civil Rights Act of 1871, ch. 22, §§ 1, 2, 6, 17 Stat. 13, 13-15; Civil Rights Act of 1875, ch. 114, §§ 3, 5, 18 Stat. 335, 336-37.

271 *See, e.g.*, Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27; Enforcement Act of 1870, ch. 114, §§ 2-6, 16 Stat. 140, 140-41; Force Act of 1871, ch. 99, § 15, 16 Stat. 433, 438; Civil Rights Act of 1871, ch. 22, §§ 2, 6, 17 Stat. 13, 13, 15; Civil Rights Act of 1875, ch. 114, §§ 3, 5, 18 Stat. 335, 336-37.

272 Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27; Force Act of 1871, ch. 99, § 16, 16 Stat. 433, 438-39. The expansion of habeas corpus jurisdiction was intended to have the same effect. KUTLER, *supra* note 253, at 150; Wiecek, *supra* note 253, at 344-45.

273 For representative expressions of the 42nd Congress's distrust of the state court systems, see Briscoe v. LaHue, 460 U.S. 325, 364 n.31 (1983); Note, *supra* note 55, at 328 & n.38.

274 *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 240-42 (1972); Monroe v. Pape, 365 U.S. 167, 173-76 (1961).

275 Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44, 44-45.

At that time, these were the only Circuit Judges. While the Circuit *Court* (consisting of one or more District Judges or Supreme Court Justices) had existed since the Judiciary Act of 1789, Act of September 24, 1789, 1 Stat. 73, the position of Circuit *Judge* had not existed since the 1802 repeal of the Midnight Judges Act. Act of March 8, 1802, 2 Stat. 132, *repealing* Act of February 13, 1801, 2 Stat. 89.

laws."[276] All federal judges were required to take the so-called "Ironclad Oath"[277] that they had never supported the South's rebellion. Congress considered the federal trial courts the most effective tool for enforcing its civil rights policy,[278] but that does not suggest that it intended to give the Supreme Court unfettered discretion to make or change that policy.

Nothing in the debates on the 1871 Act itself indicates a willingness to grant the Supreme Court such unfettered discretion. The debates do contain a number of legislative statements of faith in the federal courts.[279] However, those statements cannot be fairly interpreted as showing a willingness to grant the Supreme Court an unfettered lawmaking role. For example, Representative Coburn stated, "We believe that we can trust our United States Courts, and we propose [in Section 1] to do so."[280] But this statement was part of his larger argument that the courts were to be used before resort to military action and that the federal courts were less biased than the local ones.[281]

By 1871, there had been developments which may have reduced the congressional distrust of the Supreme Court. The Court had bowed to the repeal of its jurisdiction over the *McCardle* case.[282] The Court had upheld exclusive congressional authority to determine the legitimacy of

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276 ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 69 (1985).

The District Judges may have been somewhat less "reliable" than the Circuit Judges, *id.*, although several were willing to enforce vigorously federally protected rights, *id.* at 67. Only eleven of the forty-eight district judges had been appointed by President Johnson. 1 F. Cas. at xvii-xxviii.

277 Act of July 2, 1862, ch. 128, 12 Stat. 502, *repealed by*, Act of May 13, 1884, ch. 46, 23 Stat. 21.

278 FONER, *supra* note 268, at 258 ("Congress placed great reliance on an activist federal judiciary for civil rights enforcement—a mechanism that appeared preferable to maintaining indefinitely a standing army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction."); Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people . . . ."); *accord* McDonald v. City of West Branch, 466 U.S. 284, 290 (1984).

279 *See, e.g.*, GLOBE, *supra* note 32, at 459-60 (statement of Rep. Coburn); *id.* at 476 (statement of Rep. Dawes); *id.* at 691 (statement of Sen. Edmunds); *id.* at 578 (statement of Sen. Trumbull).

280 *Id.* at 460.

281 *Id.* at 459-60. Representative Dawes' paean to the federal courts is similarly focused on the advantages of courts over military action and of the federal courts over those of the states. *Id.* at 476. Senator Trumbull's claim that individual rights could be vindicated in the courts and "in no other way," *id.* at 578, was not an expression of faith in any federal courts. Instead, it was part of a speech against the bill in which he argued, *inter alia*, that individual rights were best protected by state courts. *Id.* at 578-79.

Despite his comments praising the judiciary, Senator Edmunds was unlikely to favor giving discretion to the Supreme Court. Only two years earlier, he had argued forcefully that, on all issues of public policy (so called, "political facts"), "we [members of Congress] are the judges from beginning to end . . . and [the Supreme Court] is as much bound to look to us to ascertain what that political fact may be as the humblest officer in the Government." CONG. GLOBE, 41st Cong., 2d Sess. 94 (1869). Edmunds equally vigorously defended the Court's role in determining constitutional issues. *Id.*

282 *Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868). However, as indicated above, certain *cave-*

competing state governments.[283] With the expiration of Johnson's term, Congress had restored the Court to nine members[284] and the vacancies had been filled by President Grant. By 1871, seven of the nine members of the Supreme Court had been appointed by Lincoln or Grant.[285] Many of the radical republicans of the late 1860s had become more moderate by the early 1870s.[286] These developments may have somewhat decreased congressional hostility toward the Court. However, they are not enough to indicate that members of Congress, who had recently attempted to diminish sharply the Court's authority, were now willing to give it free-wheeling discretion to restrict the effective reach of § 1983.

PART II

Part I revealed an interpretive Scylla and Charybdis. On the one hand, Congress did not intend to resolve immunity issues itself but rather intended to permit the Court to resolve those issues on a case-by-case basis.[287] On the other hand, Congress did not intend to give the Supreme Court unfettered discretion to create immunities based on the Justices' own views of sound public policy.[288]

Part II suggests an escape from this dilemma. While the Court may consider current societal conditions, it must do so to achieve the goals of the 42nd Congress rather than those of the current members of the Court. Like the trustees of a testamentary trust (who may be given considerable discretion but are still obliged to advance the settlor's objectives rather than their own), the Justices must respect the 42nd Congress's value structure and seek to accomplish Congress's goals rather than their own. Part II concludes that, to implement that value structure, the Court must resolve immunity issues in a way that gives hierarchical primacy to the protection of individual rights.

This Article takes as a given that the goal of statutory construction

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ats in that opinion had sparked additional efforts to restrict the Court's jurisdiction. *See supra* text accompanying note 265.

283 Texas v. White, 74 U.S. (7 Wall.) 700 (1869). However, in doing so, it rejected the state suicide theory supported by many of the radicals.

284 Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44, 44-45. Some have concluded that Congress's 1866 reduction of the Court's size was itself an expression of congressional distrust of Johnson and the Court. *See, e.g.*, 2 WARREN, *supra* note 253, at 421-23, and sources cited in KUTLER, *supra* note 253, at 48 n.1. Professor Kutler has argued persuasively that this conclusion is unwarranted. *Id.* at 48-56. However, even if Professor Kutler were mistaken, Congress's willingness to restore the Court to nine members indicates that it believed that Grant appointees would be more sympathetic to congressional goals than the existing members of the Court.

285 It is easy to overemphasize the significance of this fact. For example, while radical republicans were overjoyed when Chief Justice Chase was appointed, TREFOUSSE, *supra* note 257, at 300 & n.8, they were furious with him by 1868. *Id.* at 391-92, 410-11. By that time, Chase was considering seeking the *Democratic* presidential nomination. FONER, *supra* note 268, at 335.

286 TREFOUSSE, *supra* note 257, at 422, 433-35, 441, 455, 457.

287 *See supra* Part I B and text accompanying notes 153-71.

288 *See supra* Part I E and text accompanying notes 253-86.

is to implement the legislative will.[289] Where Congress has not actually considered and resolved an issue, the Court's duty is to resolve that issue as members of Congress would have if they had "acted at the time of the legislation with the present situation in mind."[290] It is to "work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered."[291]

Thus, the goal is for the Court to implement the congressional will rather than its own. To implement the legislative will, the Court should "try to think [its] way as best [it] can into the minds of the enacting legislators."[292] It is far too easy for the Court, under the guise of assuming that Congress "was made up of reasonable persons pursuing reasonable purposes reasonably,"[293] to assume that the enacting Congress must have shared the values of the current Justices.[294] What is required is not

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289 Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Court must give "effect to the will of the Legislature").

290 Vermilya-Brown Co. v. Connell, 335 U.S. 377, 388 (1948). *Cf. id.* at 408 (Jackson, J., dissenting) (question is how Congress would have resolved issue, "had Congress considered the matter"); Teamsters v. United States, 431 U.S. 324, 381-83 (1977) (Marshall, J., concurring in part and dissenting in part) (describing approach and adopting it reluctantly); Granville-Smith v. Granville-Smith, 349 U.S. 1, 16 (1955) (Congress would not have granted the disputed power if it had been explicitly asked to do so); Burnet v. Guggenheim, 288 U.S. 280, 285 (1933) (Court must decide "which choice is it the more likely that Congress would have made" if faced with the issue); FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 21 (1947); Posner, *supra* note 233, at 817. *Compare* JOHN C. GREY, THE NATURE AND SOURCES OF THE LAW 173 (2d ed. 1921) (goal is to guess what legislature substantively intended) *with id.*, at 173 n.1 (recognizing legislatures' intentional use of vagueness to reach compromise and refer remaining disputes to courts). *But see* Miller, *supra* note 158, at 26-35 (describing and criticizing this type of interpretation).

291 OLIVER W. HOLMES, THE COMMON LAW 303 (1881) (referring to the construction of contracts).

This paragraph admittedly oversimplifies the judicial obligation. There are a number of situations in which the Court should not seek to accomplish Congress's objectives. If Congress has itself expressly or implicitly delegated unfettered decision making authority to the Court, fidelity to the congressional will requires the Court to accept that authority. *See supra* Part I E and authorities cited in note 233. At the other end of the spectrum, the Court has no right or duty to implement the *unenacted* congressional will. American Hosp. Ass'n v. NLRB, 111 S. Ct. 1539, 1543-44 (1991); Easterbrook, *supra* note 160, at 548-49; Sunstein, *supra* note 56, at 431 & n.95. However, these limitations do not affect resolution of immunity issues under § 1983.

292 Posner, *supra* note 233, at 817.

293 HART & SACKS, *supra* note 57, at 1415. The emphasis on "reasonableness" tends toward balancing and Aristotelian moderation. However, the people have the right to elect "unreasonable" and immoderate members of Congress. (During Reconstruction, they certainly elected a number of radical ones.) More significantly, within constitutional limits, the enacting Congress's view of what is a "reasonable purpose" is certainly entitled to as much deference as the Court's.

294 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 29 (1948) ("Obviously, there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body.") (quoting United States v. American Trucking Ass'n, 310 U.S. 534, 544 (1940)). *See, e.g.*, Smith v. Wade, 461 U.S. 30, 93-94 (1983) (O'Connor, J., dissenting) (arguing that the Court should effectuate the purposes of § 1983

judicial introspection but rather a conscientious inquiry into the actual value structure of the enacting Congress.

Part II is an effort to explore and explain the value structure of the 42nd Congress. For the 42nd Congress, protection of individual rights was not simply one of several worthy objectives to be balanced against each other. Instead, it was a hierarchically superior obligation—one that must be fulfilled as fully as constitutionally possible before other goals could even be considered. For the 42nd Congress, failure to fulfill that obligation dissolved the moral basis of governmental authority.

Section A will briefly explain the concept of a hierarchically superior purpose. Section B will show that, for the 42nd Congress, protection of individual rights was such a purpose. Members repeatedly described protection of individual rights as an absolute duty of government rather than as merely a desirable goal. These descriptions expressed a deeply held contractarian view of sovereignty in which any government which failed to protect its citizens' rights lost all claim to legitimacy. As a result of this view, Congress attempted to exercise its full power—constrained only by Constitutional limits—to protect those rights.

A. Hierarchical Decisionmaking

A hierarchical decisionmaking structure[295] has two characteristics. First, the decisionmaking criteria are placed in a rank order. Second, lower ranked criteria have no effect unless all higher ranked criteria have failed to provide a decision. Thus, one using a hierarchical decisionmaking structure consults the second ranked criterion only if the first ranked fails to yield an answer. Conversely, if the first ranked criterion provides an answer, all the remaining criteria become irrelevant.

Hierarchical decisionmaking is the antithesis of the balancing process which seems so natural to late twentieth-century lawyers.[296] In a

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but then implicitly assuming that those purposes included avoiding overdeterrence and reducing the amount of litigation).

295 The choice of the word "hierarchical" is far from perfect but seems to be the most descriptive of various alternatives. John Rawls—whose 1967 Ethics course introduced the author to the concept and the term—subsequently used "serial," "lexical," or "lexicographical" to describe this type of comparison. JOHN RAWLS, A THEORY OF JUSTICE 42-44 & n.23 (1971).

296 This preference for balancing may be the result of modern lawyers' greater familiarity with teleological rather than deontological ethical systems. A teleological ethical system defines "the good" independently from the right and defines "the right" as the course of action which maximizes the good. *Id.* at 24. Following Rawls, this Article uses "deontological" to refer to decisionmaking structures that are not "teleological," i.e., that do not judge alternative courses of action solely by the extent to which they achieve desirable results. *Id.* at 24-27, 30. In a rough sense, deontological systems judge actions based on their compliance with rules directly regulating human behavior. Teleological systems judge actions based on the extent to which they achieve more or less desirable states of the world. Thus, the Ten Commandments are deontological while utilitarianism is teleological. For discussion of the distinction, see, e.g., HENRY SIDGWICK, THE METHODS OF ETHICS 3, 96-97 (Dover ed. 1966) (7th ed. 1907) (rejecting deontological systems as "intuitionism"); WILLIAM D. ROSS, THE RIGHT AND THE GOOD 1-48 (1930) (rejecting teleological systems in favor of intuitive

balancing process, a small advance toward a more important goal can be outweighed by a large enough advance toward a less important one. In hierarchical decisionmaking, any advance—no matter how small—toward the higher ranked goal trumps any advance toward a lower ranked one. In a balancing process, all criteria are seen as reducible to a common denominator. In hierarchical decisionmaking, criteria are seen as incommensurable. In a balancing process, every factor must be considered and weighed before a decision can be reached. In hierarchical decisionmaking, lower ranked factors are simply irrelevant unless higher ranked ones fail to provide a decision.

Hierarchical decisionmaking may seem extreme, but it is common both in everyday life and in the law. The old saying that one "must be just before being generous" is simply a statement that the duty to pay debts is hierarchically superior to the duty to give charity.[297] The frequently stated argument that the government should take care of the poor in this country before giving foreign aid rests on the belief that the nation's duty to its "own" poor is hierarchically superior to its duty to those in other countries.[298] Similarly, one who says, "If it is illegal, I will not do it—regardless," is expressing the belief that obedience to the law is hierarchically superior to all other goals.

A "primary purpose" clause in a trust is an explicit expression of a hierarchical value structure. Such clauses frequently provide that the primary purpose of the trust is to provide for the grantor's surviving spouse and that, in administering the trust estate, the trustee should subordinate the interests of all other potential beneficiaries to that purpose.[299] Such a clause directs the trustee to make decisions in a hierarchical fashion: to accomplish the primary purpose as fully as possible before even considering the secondary purposes.

Hierarchical decisionmaking is equally common in the law. For example, the Supremacy Clause[300] is an explicit statement of the hierarchical superiority of the Constitution to state law: actions that violate the Constitution are forbidden even if they are required by state law, and actions required by the Constitution are mandatory even if they are for-

introspective comparison of conflicting prima facie duties); CHARLES FRIED, RIGHT AND WRONG 7-10 (1978) (rejecting "consequentialism" in favor of a deontological system); RAWLS, *supra* note 295, at 24-27, 30 (1971) (discussing distinction generally).

297 *Cf.* Davis & Co. v. Morgan, 43 S.E. 732, 733 (Ga. 1903) (arguing that enforcing promises made without consideration would "make the law an instrument by which a man could be forced to be generous before he was just").

298 For a discussion of the implications of even a minimal duty of benevolence unbounded by geographical limits, see JAMES S. FISHKIN, THE LIMITS OF OBLIGATION (1982). One response to Fishkin is to conclude that most people consider any duty to starving third-world children to be hierarchically inferior to most other duties.

299 For an example of such a clause, see 17A AM. JUR. LEGAL FORMS 2D (REV.) § 251:1001 (1984).

300 U.S. CONST. art. VI, cl. 2.

bidden by state law. A court is permitted to consider the lower ranked decisionmaking criterion (state law) only if the higher ranked criterion (the Constitution) yields an indeterminate answer, *i.e.*, only if the Constitution permits but does not require the action.

B. Protection of Individual Rights: A Hierarchically Superior Purpose

The Supreme Court has not adequately recognized the importance that the 42nd Congress placed on the protection of individual rights. While the Court has frequently acknowledged that protection of individual rights was *an* important purpose of the Civil Rights Act of 1871,[301] it has consistently treated that purpose as simply one laudable objective to be balanced against others.[302]

For the 42nd Congress, however, protection of individual rights was more than one desirable goal among many. It was a hierarchically superior purpose—a goal that government had a duty to achieve as completely as possible before other goals could be considered. Members of Congress repeatedly stated that protection of individual rights was a duty that government had an obligation to perform rather than a goal that was merely desirable for government to seek.[303] Those statements were not mere flights of rhetorical excess. Rather they were expressions of a deeply held and explicitly stated contractarian political philosophy under which any government's failure to provide protection of individual rights dissolved that government's moral claim to legitimacy and allegiance.[304] By both its words and its actions, the 42nd Congress demonstrated that it was willing to implement that philosophy by going to the outermost edge of its constitutional power to provide protection of individual rights.[305]

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301 *E.g.*, City of Newport v. Fact Concerts, 453 U.S. 247, 268 (1981); Owen v. City of Independence, 445 U.S. 622, 650 (1980); Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Monroe v. Pape, 365 U.S. 167, 184 (1961).

302 *See, e.g.*, Smith v. Wade, 461 U.S. 30, 93-94 (1983) (O'Connor, J., dissenting) (assuming that Congress intended the Court to balance the interest in protecting constitutional rights against the interest in avoiding unnecessary distraction of government officials); Harlow v. Fitzgerald, 457 U.S. 800, 814-18 (1982) (asserting the primacy of the interest in avoiding burdening government officials with the defense of meritless actions).

303 *See infra* notes 306-23 and accompanying text.

304 *See infra* notes 324-45 and accompanying text.

305 *See infra* notes 346-60 and accompanying text.

Any attempt to reconstruct the incompletely expressed thinking of a diverse group of legislators who met more than a hundred years ago is necessarily "a choice between uncertainties." Burnet v. Guggenheim, 288 U.S. 280, 288 (1933). One can never "know" their thinking in the same way that one knows the price of gasoline purchased this morning. Rather, one must try to find the most likely truth from hints, suggestions and clues—always recognizing that any conclusion is, at best, the most probable of several. If this Article states conclusions in a more absolute form than could ever be justified, it is for ease of expression rather than from a belief that those conclusions are unquestionably correct.

1. The debates on the Civil Rights Act overflow with concern for protecting individual rights. Both Representative Shellabarger[306]—who reported the bill for the select committee that drafted it[307]—and Senator Edmunds[308]—who managed the bill in the Senate—emphasized the bill's protective nature. In the House, members of the select committee[309] and other representatives[310] repeatedly acknowledged that the bill was intended to provide vigorous protection of the rights of citizens. Similarly, in the Senate, both supporters[311] and opponents[312] of the bill recognized

306 GLOBE APP., *supra* note 29, at 68 (describing § 1 as "meant to protect and defend and give remedies," as "wholly devoted to securing the equality and safety of all the people" and as an effort to provide "protection of the citizens of the United States"). *See also id.* at 69 (enactment of the Fourteenth Amendment authorized the federal government "to directly protect and defend" constitutional rights and the bill is intended to provide that protection).

307 President Grant's message to Congress regarding conditions in the Southern states, GLOBE, *supra* note 32, at 244, was referred to a select committee of the House on Thursday, March 23, 1871. *Id.* at 244-49. That committee consisted of Representatives Shellabarger, Butler, Scofield, Dawes, Blair, Thomas, Morgan, Kerr, and Whithorne. *Id.* at 249. On Tuesday, March 28, Representative Shellabarger, on behalf of the select committee, reported H.R. 320 which became the Civil Rights Act of 1871. *Id.* at 317. Representative Shellabarger has sometimes been described as the draftsman of the Act. *E.g.*, Briscoe v. Lahue, 460 U.S. 325, 358 (1983) (Marshall, J., dissenting).

308 *See infra* text accompanying notes 326-33.

309 *See, e.g.*, GLOBE, *supra* note 32, at 476 (statement of Rep. Dawes) (stating that the bill's purpose "is to protect and secure [American citizens] in these rights, privileges and immunities"); *id.* at 477 (statement of Rep. Dawes) (stating that Section 1 of the bill was the first means for providing that protection); *id.* at 448 (statement of Rep. Butler).

310 *See, e.g.*, GLOBE APP., *supra* note 29, at 141 (statement of Rep. Shanks) (describing bill as intended to provide "protection of the citizen in his life, liberty and property"); *id.* at 196 (statement of Rep. Buckley) (describing bill as intended to "make the protective shield of American citizenship" as effective in the South as in the North); GLOBE, *supra* note 32, at 415 (statement of Rep. Roberts) (describing bill as intended to fulfill "the sacred obligation of personal protection to every inhabitant"); *id.* at 428 (statement of Rep. Beatty) (describing bill as intended to "raise up barriers to protect our constituents in the enjoyment of their constitutional rights and privileges") *id.* at 440 (statement of Rep. Cobb) (describing bill as intended to "insur[e] protection" to citizens in the Southern states); *id.* at 460 (statement of Rep. Coburn) ("That nation is not worth saving that does not protect its friends [i.e., loyal citizens] . . . ."); GLOBE APP., *supra* note 29, at 262 (statement of Rep. Dunnell) (stating that the bill, by assuring that the government will protect constitutional rights, would deter efforts to interfere with those rights).

311 *See, e.g.*, GLOBE, *supra* note 32, at 577 (statement of Sen. Carpenter) (stating that, under the Fourteenth Amendment, Congress had authority affirmatively to protect individual rights); *id.* at 604-09 (statement of Sen. Poole) (stating that the federal government is obliged to protect the rights of its citizens if the states fail to do so). For Senator Edmunds' extensive discussion of the bill as an effort to perform the government's obligation of protection, see *infra* text accompanying notes 326-33.

312 *See, e.g.*, GLOBE, *supra* note 32, at 573 (statement of Sen. Stockton) (stating that the bill's proponents insist that the federal government "is bound to protect United States citizens in all their privileges" including "the right of suffrage"); *id.* at 574 (statement of Sen. Stockton) (stating that the bill's proponents argue that Congress "is bound to protect [citizens] in all their rights"); *id.* at 603 (statement of Sen. Saulsbury) (stating that the bill's supporters claim "this bill is to be passed, because there is great anxiety to protect the rights 'expressly guarantied by the Constitution of the United States to all its citizens' "). The full text of this last speech, in which Senator Saulsbury compares carpetbaggers to vampires and grave-worms, exemplifies the vituperative nature of much of the debate.

that the bill was advanced as a measure to protect those rights.

The language of these debates is revealing.[313] It is deontological rather than teleological.[314] Protection of individual rights is not described simply as one means to a desired end but rather as a "sacred duty,"[315] a "solemn duty,"[316] a "sacred obligation,"[317] or a "high and solemn dut[y]."[318] This is the type of language ordinarily used by those who see an action as obligatory without regard to its consequences—an action such as repaying a debt or keeping a promise. It is the language of a duty that must be performed rather than of an interest that may or may not be served depending on the cost.[319]

The primacy of that duty was emphasized in vehement terms. "No higher duty can exist than to protect [citizens]. Be they white or black, they must have free speech, a free ballot, and a safe home."[320] "[T]hat

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313 As discussed above, members of the 42nd Congress would not have expected the Court to peruse their debates to determine the meaning of a congressional enactment. *See supra* text accompanying notes 54-60. Therefore, silence in response to an opponent's statement of his interpretation should not be read as indicating agreement with that interpretation. *See supra* text accompanying notes 60-79.

Statements by the supporters of an act stand on a different footing. Such statements provide a strong indication of the legislative will. They represent either an accurate statement of the speaker's beliefs or, at least, an accurate statement of what the speaker wanted others to *think* were his beliefs. If the former, the statements show the speaker's own value structure. If the latter, they show what the speaker believed was a value structure that would be supported by his listeners. In either case, the speech indicates a value structure that members of Congress believed they were implementing.

314 For a formal definition of these terms, see *supra* note 296. In a rough sense, "deontological" ethics judges the rightness of actions by their conformity to rules which directly govern those actions while "teleological" ethics judges actions by the extent to which they achieve desirable results.

One result-based justification for the Act was advanced: that, by making it clear that the government would protect individual rights, it would deter wrongdoers from interfering with those rights. *See, e.g.*, GLOBE APP., *supra* note 29, at 262 (statement of Rep. Dunnell); GLOBE, *supra* note 32, at 460 (statement of Rep. Coburn). However, that justification supports rather than undermines this Article's thesis. Direct protection was being justified because it would have the effect of enhancing indirect protection. Even deontological systems must consider consequences. RAWLS, *supra* note 295, at 30.

315 GLOBE APP., *supra* note 29, at 141 (statement of Rep. Shanks).

316 GLOBE, *supra* note 32, at 697 (statement of Sen. Edmunds).

317 *Id.* at 415 (statement of Rep. Roberts).

318 GLOBE APP., *supra* note 29, at 85 (statement of Rep. Bingham, quoting Daniel Webster). For similar statements, see, *e.g.*, GLOBE, *supra* note 32, at 414 (statement of Rep. Roberts) (stating that government has "no higher duty" than protecting its citizens); *id.* at 691 (statement of Sen. Edmunds) (describing protection as a "duty"); GLOBE APP., *supra* note 29, at 141 (statement of Rep. Shanks) (same); *id.* at 72 (statement of Rep. A. Blair) (describing it as an "obligation"); *cf.* GLOBE, *supra* note 32, at 573 (statement of Sen. Stockton in opposition) (proponents claim government is "bound" to provide such protection); *id.* at 574 (same).

319 Of course, deontological ethical systems are not necessarily hierarchical. *See, e.g.*, ROSS, *supra* note 296, at 1-40 (adopting a deontological system in which one's duty is determined by intuitive introspective comparison of conflicting prima facie duties); FRIED, *supra* note 296, at 9-13 (adopting a deontological system in which certain duties are hierarchically superior except in de minimis or catastrophic situations).

320 GLOBE, *supra* note 32, at 414 (statement of Rep. Roberts).

government is valueless and a failure which does not protect all its citizens . . . [in] their equal rights to life, liberty and property."[321] "That nation is not worth saving that does not protect its friends [*i.e.*, loyal citizens]."[322] Thus, for the 42nd Congress, protecting the rights of citizens was a duty to be fulfilled regardless of the cost.[323]

2. These statements cannot be dismissed as mere rhetoric. Rather they are an expression of a deeply held and clearly stated contractarian political philosophy. Under that philosophy, a government's protection of its citizens' rights[324] is the crucial quid pro quo—the consideration—for the citizens' duties of allegiance and obedience.[325] To fail to provide that protection is not just to govern inadequately. It is to dissolve the moral basis for all governmental authority.

This philosophy was clearly expressed in a crucial speech by Senator George Edmunds. As the Senator managing the bill, Edmunds was entitled to make the final speech before the Senate's initial vote.[326] He used that opportunity to present an exhaustive analysis of the bill and its constitutional foundation. The cornerstone of that analysis was a vigorous statement that every government had an obligation to protect its citizens and that failure to perform that obligation relieved the citizens of all obligations to the government.[327]

Senator Edmunds began by quoting an outspoken opponent of Reconstruction, Senator Blair of Missouri:[328]

> '[T]he duty of protection on the part of the Government and the duty of allegiance on the part of the citizen are reciprocal duties—the one is the consideration for the other. If one fails in his duty he has no right to exact the performance of the other. If the Government failed to protect its citi-

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321 GLOBE APP., *supra* note 29, at 141 (statement of Rep. Shanks).

322 GLOBE, *supra* note 32, at 460 (statement of Rep. Coburn).

323 *But cf.* Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs.").

There was one limitation: the duty was subject to the hierarchically superior obligation to obey the Constitution. *See, e.g.*, GLOBE, *infra* note 32, at 691 (statement of Sen. Edmunds); *infra* note 330.

324 For the 42nd Congress, these rights included physical protection of life and property as well as liberty. *See, e.g.*, GLOBE APP., *supra* note 29, at 141 (statement of Rep. Shanks) ("life, liberty and property"); GLOBE, *supra* note 32, at 332 (statement of Rep. Hoar) (same); GLOBE APP., *supra* note 29, at 190-91 (statement of Rep. Buckley) (same).

325 *See infra* notes 328-41 and accompanying text.

326 GLOBE, *supra* note 32, at 691. There was, of course, subsequent debate on the bill after the House of Representatives refused to agree to some of the Senate amendments.

327 *See infra* notes 328-32 and accompanying text.

328 Francis P. Blair, Jr. had been the Democratic candidate for Vice President in 1868 and was a vehement critic of Reconstruction. *See, e.g.*, FONER, *supra* note 268, at 340-43, 421; TREFOUSSE, *supra* note 257, at 412-13. In 1868, Blair had argued that the President should, on his own initiative, "declare these [Reconstruction] Acts null and void, compel the army to undo its usurpations at [sic] the South, dispossess the carpet-bag State governments, [and] allow the white people to re-organize their own governments." 2 JAMES G. BLAINE, TWENTY YEARS IN CONGRESS 403-04 (1884).

zens, it could not require the allegiance of its citizens.'[329]

After thus establishing that even Senator Blair recognized that the legitimacy of government was contingent on performing its promise to protect the rights of citizens, Edmunds went on to state his agreement with that view.[330] He argued that a government which failed to "exhaust all the resources of its power, by diligent and faithful and vigorous effort to preserve the liberties and the rights of its citizens . . . is not entitled to be called a complete or just Government at all; and it ought to be put down by revolution or otherwise."[331] Moreover, that failure, by its own force, dissolved the citizens' duty of allegiance:

> [I]f the people . . . are not protected to the uttermost bound of the power of the nation whose citizens they are—the uttermost bound I mean of course of its constitutional power—then . . . we have absolved them from allegiance to us; they owe us no duty of obedience to law, and they are remitted to themselves to protect themselves as best they may.[332]

Thus, for Senator Edmunds, protection of the rights of citizens was not merely one of several desirable goals. It was a duty that the government was obliged to perform on pain of dissolving the social contract.[333]

This belief resonated throughout the debates. With characteristic brevity,[334] Representative Ellis Roberts of New York capsulized the argument. "Obligations are mutual. Allegiance presupposes protection."[335] Representative Shanks of Indiana expressed the same belief in a

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329 GLOBE, *supra* note 32, at 691 (statement of Sen. Edmunds, quoting Senator Blair).

330 Ever the "precise lawyer," DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 429 (1970), Edmunds distinguished his view from Blair's in one respect. Blair saw the government's obligation as absolute. If it failed to protect its citizens—regardless of the reason for the failure—citizens were absolved of their allegiance. Edmunds argued that the government's obligation was slightly more limited—it was required to "exhaust all the resources of its power" in the effort to provide protection. GLOBE, *supra* note 32, at 691.

331 GLOBE, *supra* note 32, at 691 (statement of Sen. Edmunds).

332 *Id.* (statement of Sen. Edmunds). For further examples of Senator Edmunds' position, see *id.* at 693 ("[T]he United States was bound, is bound, and always must be bound, like every sovereign government to protect every right that it gives to its citizens."); *id.* at 695 (Congress has a "duty" to enforce citizens rights under the Thirteenth Amendment); *id.* at 697 ("The people [through the Constitution] have declared that it is the solemn duty of Congress to see [to it] that [constitutional rights are protected].").

333 For a discussion of the importance of social contract theory, see *infra* notes 342-45 and accompanying text.

334 Roberts was a Yale-educated newspaper editor noted for the conciseness of his presentations. 2 BLAINE, *supra* note 328, at 509.

335 GLOBE, *supra* note 32, at 414.

The reciprocal nature of allegiance and protection was also a consistent theme in ante-bellum abolitionist thought. *See* JACOBUS TEN BROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 64 (1951) (describing the abolitionists' belief that protection was "the governmental quid pro quo for allegiance"); *id.* at 96 (stating that the abolitionists saw the protection of individual rights as "the universal correlative of the allegiance and obligation of obedience which the constitutional system exacts"); *id.* at 22 (" 'It is an axiom of the civilized world, and a maxim even with savages, that allegiance and protection are reciprocal and correlative.' ") (quoting abolitionist THEODORE DWIGHT WELD, THE POWERS OF CONGRESS OVER SLAVERY IN THE DISTRICT OF COLUM-

speech that could have been an introductory lecture on Locke:

> In entering into government with my fellows I give away a portion of my natural rights and privileges in order to secure the remainder, and to that end I incur responsibilities, both pecuniary and personal. And when I do that, it is my duty while I remain its citizen to help sustain the Government by my counsel, my means, and my arms, if necessary; *when I do that, I have bought and paid for my right to its protection, for my life, liberty, and property against all persons and Powers. It is as much the duty of the Government to protect me as it is my duty to aid the Government.*[336]

Representative George Frisbie Hoar of Massachusetts[337] similarly argued that the legitimacy of government depended on its protecting its citizens' individual rights. Representative Hoar's views are particularly significant since he was one of the persons principally responsible for convincing President Grant to issue the message that led to the legislation.[338] In a carefully considered speech,[339] Hoar argued that the Declaration of Independence compelled the conclusion that a government's failure to protect fundamental human rights would justify its overthrow.[340] The duty of obedience is conditioned on government's performing its duty of protection since "the right to life, liberty, and property are rights which the Government owes to the citizen and if the citizen fail [sic] to receive [them] from the Government his obligation to allegiance is gone."[341]

That the members of the 42nd Congress held these views is not sur-

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BIA (1838)); *id.* at 61 (" '[A]llegiance and protection are inseparable.' ") (quoting abolitionist James G. Birney)).

336 GLOBE APP., *supra* note 29, at 141 (statement of Rep. Shanks) (emphasis added).

337 George Frisbie Hoar was a respected member of Congress with a reputation as a scholar and historian. CULLOM, *supra* note 28, at 211; 2 BLAINE, *supra* note 328, at 435-36. His brother, Ebeneezer Rockwood Hoar, had been Grant's Attorney General until his dismissal in the summer of 1870. WILLIAM S. MCFEELY, GRANT 301-02, 362-66 (1981).

338 1 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 204-06 (1902); RICHARD E. WELCH, GEORGE FRISBIE HOAR AND THE HALF-BREED REPUBLICANS 21-22 & n.33. (1971). The chronology in Hoar's own account is slightly confused. For a somewhat different view of the genesis of Grant's message, see 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (1902); MCFEELY, *supra* note 337, at 368-69.

339 WELCH, *supra* note 338, at 22 n.33.

340 GLOBE, *supra* note 32, at 332 (statement of Rep. Hoar). *See also* Representative Hoar's later exchange with Representative Farnsworth. GLOBE APP., *supra* note 29, at 117 (statement of Rep. Hoar).

341 GLOBE, *supra* note 32, at 332-33. For expressions of similar beliefs, see, *e.g.*, GLOBE APP., *supra* note 29, at 72 (statement of Rep. Austin Blair) (describing protection of citizens as "the great object of the Constitution itself" and stating that any government which failed to provide that protection was "a delusion and a snare"); *id.* at 190-91 (statement of Rep. Buckley) (describing protection of each citizen's life, liberty and property as Congress's "sacred duty" and as " 'the first requisite in the social state' ") (quoting "M. Guizot," presumably French political philosopher, Francois Guizot)). Representative Blair had originally considered the bill unnecessary since he believed that the President already had adequate power to deal with the Klan. He was persuaded to support the bill by Grant's message indicating doubt on the point. *Id.* at 71-72.

prising. They were steeped in the American liberal tradition[342]—a tradition in which Locke's Second Treatise on Government[343] and the Declaration of Independence[344] were fundamental texts. Locke had argued that governmental legitimacy rested on a social contract in which the citizen promised obedience in return for the government's promise to protect his fundamental rights and that the contract could be dissolved if government failed to provide that protection.[345] The framers of the Declaration of Independence had restated Locke's principles even more eloquently and fought a revolution based on those principles.

Thus, for the 42nd Congress, a government that failed to use its full authority to protect individual rights was not just unwise or inadequate. Instead, such a government was essentially illegitimate. It was a government that had no right to be obeyed and which could justifiably be overthrown. Government's duty to protect individual rights was not just one of several desirable objectives to be weighed and balanced against others. It was an absolute obligation which government had an equally absolute duty to perform.

3. The 42nd Congress's belief in the paramount importance of the protection of individual rights is also demonstrated by its willingness to go to the outermost verge of its constitutional authority to provide that protection. That willingness is shown by the explicit statements made by the members themselves, by the almost obsessively legalistic nature of the debates, and by the radical provisions of the Ku Klux Act itself.

Members of the 42nd Congress repeatedly stated that they were willing to exhaust their constitutional power to protect the fundamental rights of citizens. Senator Edmunds, the manager of the bill in the Senate, stated he was willing to protect individual rights by legislation going to "the uttermost bound of the power of the nation whose citizens they are—the uttermost bound I mean of course of its constitutional power."[346] He was willing to enact "every measure of constitutional legislation which will have a tendency to preserve life and liberty and uphold order."[347] Even Senator Thurman, a vigorous opponent of the bill, acknowledged that "every member of the Senate was willing to exercise

342 *See generally* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

343 JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT (1690), *reprinted in* THE ENGLISH PHILOSOPHERS: FROM BACON TO MILL 403 (Edwin Burtt ed., 1939). For the importance of Locke in abolitionist thought, see TEN BROEK, *supra* note 335, at 96 (describing Locke as the "starting point of [the abolitionists'] political philosophy").

344 THE DECLARATION OF INDEPENDENCE (U.S. 1776). For the significance of the Declaration of Independence in abolitionist thought, see TEN BROEK, *supra* note 335, at 62 n.20 (describing the Declaration as playing "a large, frequently dominant, role in the constitutional theory of the abolitionists").

345 LOCKE, *supra* note 343, at 492-93.

346 GLOBE, *supra* note 32, at 691.

347 *Id.*

all the constitutional power of this Government, as he believed them to exist, in order to [prevent Southerners from violating individual rights]."[348]

Representative Dawes, a member of the select committee that drafted the bill, challenged the House as follows:

> I presume that no candid legislator on this floor, whatever his political opinions, will fail to give his assent to this proposition, or to say further, 'If you can show me that there is in the arsenal of the Constitution any weapon of defense that the American citizen can take with him to face any unlawful attempt to trench upon the rights secured to him by it, I will use it.'[349]

Even moderate representatives agreed to go to the constitutional limit of congressional power to protect individual rights. For example, Representative Garfield stated, "within the limits of our power, I will aid in doing all things that are necessary to . . . secure to the humblest citizen the fullest enjoyment of all the privileges and immunities granted him by the Constitution, and to demand for him the equal protection of the laws."[350] Similarly, Representative Willard supported the bill despite acknowledging that it "goes to the utmost verge of constitutional power."[351] Representative Burchard was prepared to go even further. If there was doubt as to Congress's authority, he was willing "to go to the extreme verge of fair construction that will justify Federal intervention."[352]

Congress's desire to go the edge of its constitutional power explains the debates' almost obsessive focus on the question of the Act's constitutionality. As has frequently been noted, the debates on the Act were predominantly legal in character.[353] Proponents spent a remarkable proportion of their time defending the Act's legality,[354] while opponents were equally adamant in asserting that it exceeded constitutional bounds.[355] Crucial swing legislators agonized over the Act's constitutionality and successfully demanded amendments to satisfy their constitutional concerns.[356]

The radical nature of the Ku Klux Act also demonstrates the 42nd

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348 *Id.* at 823 (statement of Sen. Thurman).

349 *Id.* at 476 (statement of Rep. Dawes).

350 GLOBE APP., *supra* note 29, at 155 (statement of Rep. Garfield).

351 *Id.* at 189.

352 *Id.* at 312 (statement of Rep. Burchard). In an earlier passage, Representative Burchard stated that he was willing to enact such legislation "unless greater evils may result from the enactment." *Id.* However, in context, he appears to have been saying that the only "greater evil" would be a violation of the Constitution.

353 *See, e.g.*, Monell v. Department of Social Serv., 436 U.S. 658, 669 (1978).

354 *See, e.g.*, GLOBE APP., *supra* note 29, at 68 (statement of Rep. Shellabarger); GLOBE, *supra* note 32, at 481 (statement of Rep. Wilson).

355 *See, e.g.*, GLOBE APP., *supra* note 29, at 47-50 (statement of Rep. Kerr); *id.* at 206-09 (statement of Rep. Blair).

356 *See, e.g.*, GLOBE APP., *supra* note 29, at 149-55 (statement of Rep. Garfield); *id.* at 312-16 (statement of Rep. Burchard).

Congress's belief that it had an indefeasible duty to protect individual rights and its willingness to go to the edge of its Constitutional authority to do so. Section 1—which became § 1983[357]—was among its least extreme provisions. Section 3 gave the President the unprecedented authority to use federal troops to protect individual rights when the states failed or were unable to do so.[358] Section 4 authorized the President to suspend the writ of habeas corpus to insure the prosecution of conspirators who violated individual rights.[359]

Thus, the 42nd Congress's actions were consistent with the members' words and their underlying political philosophy. These words, philosophy, and actions show that, for the 42nd Congress, protection of individual rights was not just one of several interests to be weighed and balanced against others. Instead, providing such protection was a hierarchically superior goal—one that Congress had a duty to accomplish as fully as constitutionally possible before it could even consider other goals.[360]

CONCLUSION

To implement the legislative will, the Court must treat protection of individual rights as a hierarchically superior purpose—one that must be accomplished as fully as possible before other goals are considered. That treatment would lead to an immunity doctrine quite different from the existing one. The details of such a doctrine are beyond the scope of this Article,[361] but its outermost boundaries are clear. The Court may adopt

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357 *See supra* note 2.

358 Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 13, 14.

359 Civil Rights Act of 1871, ch. 22, § 4, 17 Stat. 13, 14-15 (expired by its own terms at the end of "the next regular session" of [the 42nd] Congress").

360 Judge Bork has made a similar argument regarding the Sherman Antitrust Act. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 13, 35-39 (1966) (arguing that Congress intended to permit the courts to consider economic efficiency only); BORK, *supra* note 159, at 63 (same). *Compare* United States v. Associated Press, 52 F. Supp. 362, 368-70 (S.D.N.Y. 1943) (arguing that Congress intended to authorize the courts to balance several competing interests), *aff'd*, 396 U.S. 1 (1945).

The Sherman Act provides another intriguing parallel. George Edmunds, the Senate manager of the Ku Klux Act, was one of the principle draftsmen of the Sherman Act. Apex Hosiery v. Leader, 310 U.S. 469, 489 n.10 (1940) (stating that Senator Edmunds and Senator George Frisbie Hoar probably drafted the Act); CULLOM, *supra* note 28, at 255 (stating that Edmunds had "more to do with framing [the Act] than any other one Senator"); George Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 801-04 (1911) (identifying authorship of specific sections of the Act); Elinor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 17 n.23 (1983) (discussing the controversy over the Act's authorship). *Contra* 2 HOAR, *supra* note 338, at 364 (claiming that Hoar had himself authored the Act).

Late in his life, Edmunds argued that the Sherman Act should be given a form of purposive construction similar to that suggested in this Article. Edmunds stated that the Sherman Act had been drafted in intentionally broad terms, Edmunds, *supra*, at 813, so that the courts could seek to accomplish the congressional goals on a case by case basis. *Id.* at 814.

361 This Article has attempted to identify the methods the Court should use but not the outcomes

an immunity only if doing so would enhance protection of individual rights or, at the least, not diminish that protection.[362] It may not adopt any immunity that diminishes protection of individual rights even if doing so would significantly advance other goals. The Court may adopt an immunity to advance its own goals only if the 42nd Congress's hierarchically superior purpose—the protection of individual rights—is not harmed in the process.

Respecting the legislative will of the 42nd Congress would require significant changes in current immunity doctrine. For example, the current content of qualified immunity, as enunciated in *Harlow v. Fitzgerald*[363] and its progeny, would be indefensible under any scheme that gave hierarchical primacy to individual rights. *Harlow*'s form of qualified immunity was adopted by just the sort of balancing that hierarchical decisionmaking forbids.[364] It was explicitly intended to balance the interest in protecting individual rights against other interests.[365] It also "accomodat[ed those] competing values"[366] by subordinating protection of individual rights—a subordination that is utterly inconsistent with the value structure of the 42nd Congress. That subordination is particularly unjustified in light of the enacting Congress's willingness to enact section 1 despite explicit recognition that section 1's grant of federal jurisdiction would substantially increase litigation expenses.[367]

Respect for the 42nd Congress's value structure would not necessarily lead to elimination of all immunities. The Court could reasonably

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it should reach. The decisionmaking process mandated by this Article requires that immunity issues be resolved in a way that gives hierarchical primacy to individual rights. However, that process requires that those issues be resolved by judges on a case-by-case basis in the concrete context of specific disputes. This Article cannot hope to replicate that process. *Cf.* Sunstein, *supra* note 56, at 439 (arguing that case-by-case judicial resolution of issues in specific factual settings leads to superior statutory interpretation). Therefore, this Article will not attempt to define or defend any comprehensive immunity doctrine.

362 There may also be situations in which the effect on individual rights is so speculative that it could be disregarded as de minimis. For an argument that de minimis and catastrophic situations are independent categories that set the boundaries of categorical obligations without leading to balancing within those boundaries, see FRIED, *supra* note 296, at 9-11.

363 457 U.S. 800 (1982).

364 *See supra* text accompanying notes 295-96.

365 *Harlow*, 457 U.S. at 813-14 (stating that "the resolution of immunity questions inherently requires" that the court balance denial of "the only realistic avenue for vindication of constitutional rights" against the burden which would otherwise be imposed on public officials and society).

366 *Id.* at 814.

367 *See, e.g.*, GLOBE, *supra* note 32, at 429 (statement of Rep. McHenry) ("[E]xpense of litigation will be ruinous to [defendants]."); *id.* at 395 (statement of Rep. Rice) (expenses will be so great that poor defendants will be denied justice); *id.* at 365 (statement of Rep. Arthur) (defendants will be "placed in the pillory of vexatious, expensive and protracted litigation"); *id.* at 337 (statement of Rep. Whitthorne) (federal courts are "distant and expensive tribunals"); GLOBE APP., *supra* note 29, at 216, 220 (statement of Sen. Thurman) (defendants and their witnesses will "be dragged hundreds of miles, at great expense, to attend to the defense of the suit"); *id.* at 86 (statement of Rep. Storm) (litigation in federal court will involve "great additional expense").

find that some forms of immunity enhance protection of individual rights. For example, the Court might conclude that judges should be immune for good faith errors made after a conscientious effort to determine the law.[368] The process of judging is necessarily an attempt to resolve competing claims to governmental protection of "life, liberty and property."[369] If acting in good faith, a judge is already attempting to resolve those competing claims in the way that best protects the parties' rights. The Court could determine that imposing liability on judges who make good faith errors after conscientious efforts to determine the applicable law would be unlikely to enhance protection of individual rights and would detract from that protection by introducing extraneous considerations into the judging process.[370] A Court that granted immunity on that basis would not be balancing individual rights against other interests. It would be granting an immunity to enhance protection of individual rights.

Nonetheless, any body of immunity law crafted within the boundaries discussed in this Article would, in all likelihood, be a narrower one than that chosen by the current Court. Some will undoubtedly believe that such a doctrine would give inadequate protection to public officials. But such an immunity doctrine—unlike the present one—would implement the will of the enacting Congress rather than the will of the current Court. For intentionalist Justices, that should be enough. As Chief Justice Marshall stated long ago, statutes should never be construed "for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[371]

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368 *Cf.* Pierson v. Ray, 386 U.S. 547, 566-67 (1967) (Douglas, J., dissenting) (suggesting that judges should be immune for "honest mistakes"). This form of qualified immunity would be similar to that granted in Wood v. Strickland, 420 U.S. 308 (1975) (officials immune unless they act with malicious intent to injure the plaintiff or with knowledge or reason to know that their actions violate plaintiff's rights).

369 As discussed above, *supra* note 324, for the 42nd Congress, protection of individual rights included physical protection of life and property as well as liberty.

370 Among these extraneous considerations would be the parties' relative propensity and ability to sue.

371 Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824).