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Lynda G. Dodd

Civil Rights Litigation and the Rule of Law

Appeals to the "rule of law" today encompass many different aims – from the establishment of stable markets, to the enforcement of criminal laws and the protection of substantive human rights.[1] Over the past decade, the United States has supported a number of new programs designed to promote these rule of law objectives, in order to assist countries along a path of advancement that is assumed to end with the achievement of policies matching the American polity's mature expression of the rule of law.[2] Because the rule of law is thought ultimately to require the protection of basic civil and political rights, one cannot help but observe an irony in the fact that the United States has – during this same period – increasingly failed to practice what it preaches.

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One can, to be sure, find recent court opinions endorsing expansive definitions of some constitutional rights,[3] but less attention has been paid to developments hindering the effective protection of those rights. In his recent work, Mark Graber has urged scholars to bridge the divide between the fields of constitutional law and constitutional politics in order to address these enforcement issues:

> The question at the heart of a liberal democratic constitutional order is, How (and how well) does this constitution protect fundamental rights? The question is not simply, What rights does this constitution protect? The first question incorporates the second. We cannot evaluate how well a constitution protects fundamental rights until we know what rights that constitution was designed to protect. Still, the questions of constitutional law do not exhaust the constitutional analysis. *Constitutionalists must identify and assess those constitutional mechanisms responsible for realizing rights. Placing a right in the text of the constitution does not necessarily increase the probability the right will be protected.*[4]

Much of constitutional theory offers a narrow view of the required mechanisms. This essay seeks to shift the focus away from the traditional emphasis on theories of judicial decision-making and the role of judicial review, in order to highlight another mechanism for implementing the rule of law: citizen lawsuits against the state.

Alternative approaches to implementing the rule of law, such as theories focusing on inter-branch checks and balances, seem inadequate to protect citizens from the kinds of abuses of power now more likely to occur after the rise of the Positive State.[5] In contemporary constitutional democracies, additional "auxiliary precautions" are required.[6] To an extent that is unprecedented in our history, citizens interact more often with, and depend more upon, government officials. Constitutional harms are inflicted every day by government officials misusing the authority granted to them under legislation that is itself constitutional. Judicial review as a mechanism for securing constitutional rights is irrelevant in such cases.

These additional auxiliary precautions only became available in 1961, with the Supreme Court's ruling in *Monroe v. Pape*.[7] The *Monroe* Court introduced "one of the great innovations of modern American law"[8] when it permitted citizens to file lawsuits against government officials whose unauthorized actions violated the Constitution. Constitutional tort litigation has since become an important method of implementing the rule of law.[9] But it is also a method that has generated much criticism. In what follows, I describe the growth of opposition to citizen suits against the state, and explain why these developments are so troubling.

The Role of Citizen Plaintiffs

Do Citizen Plaintiffs Deserve Our Respect?

Citizen plaintiffs and their lawyers are today confronting alarming levels of hostility.[10] In the past, celebratory praise was offered to citizens who had "the courage of their convictions"[11] to seek justice in the court system and vindicate the rights of all their fellow citizens. Today, far more skeptical views about their role abound.

The problem is that these impressions appear to be influenced largely by popular anecdotes about frivolous cases that are cited over and over again by opponents of litigation. This type of

rhetorical attack was used to great effect during the years leading up to the Prison Litigation Reform Act of 1995.[12] Opponents of civil rights litigation clearly won the "battle of the sound bites," and the news media hyped those stories relentlessly.[13] For example, in 1995 the National Association of Attorneys General asked its members to develop lists of the ten most frivolous prisoner complaints, which they then pared down to a shorter list and widely disseminated it to the media.[14] In a letter to the New York Times, a group of state Attorneys General described a number of frivolous prison suits, including one filed by a prisoner allegedly complaining about something as trivial as receiving creamy peanut butter rather than the preferred chunky variety.[15] The incidents described in that letter were widely reported in the media and cited by many politicians supporting the PLRA.[16]

When legislation affects such an important element in our constitutional democracy as one of the key mechanisms for implementing the rule of law – citizen lawsuits against the state – more than mere anecdotes should be required before restricting access to justice. Legislators should take their duties seriously enough to move beyond anecdote and instead commission or seek out more comprehensive studies examining the impact of the growth of prisoner complaints, in order to determine the extent to which frivolous complaints are filed. At the very least, those widely deplored anecdotes of frivolous claims should be placed in the broader context of the full spectrum of prisoner abuse complaints, in order to acknowledge the prevalence of more serious cases of abuse and to assess the impact of proposed reforms on such cases.[17]

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Politicians, of course, always score bonus points for being tough on criminals, so perhaps calls for comprehensive empirical research are beside the point.[18] If members of Congress really wanted to demonstrate that they could be tough on criminals, then they have succeeded. Recent interpretations of the PLRA exhaustion requirement have made it far more difficult for prisoners to serve as successful whistleblowers, even when very serious constitutional violations occur.[19] The discourse highlighting lost hobby kits and boxes of broken cookies fails to mention this consequence, however. Because of the PLRA, it is now far less likely that more serious violations will ever be publicized and remedied. In recent months, citizens across the country, as well as members of Congress, have been vocal in expressing outrage over the prison abuse in Iraq, yet few participants in the current debate acknowledge that very little has been done in this country to support – and indeed a great deal has been done in the past decade to harm – longstanding methods of implementing the rule of law in our own prison systems.[20]

The public is not just hostile to prisoner lawsuits. Proponents of tort reform have largely succeeded in mobilizing public opinion to view all plaintiffs in a more negative light. Anecdotes are the tool of choice here as well. Websites like Walter Olsen's www.overlawyered.com offer numerous examples of silly and occasionally outrageous tort claims. The American Tort Reform Association (ATRA) offers another source of anecdotes; on their front page there is a link to a page listing "loony lawsuits."[21] Although we might expect professional journalists to attempt more than report the anecdotes mentioned in these groups' press releases and websites, they all too often do not perform the work required to verify or place these anecdotes in their proper context.[22]

Civil rights groups who are concerned about access to justice issues need to pay more attention to this aspect of their public education campaigns. Public outreach and media campaigns can offer a counterweight to the anti-litigation anecdotes offered by powerful government and business groups. Scholars, public intellectuals, and journalists who are concerned about civil rights and access to justice need to contribute to this debate as well. More must be done to explain and defend the role of citizen plaintiffs in upholding the rule of law.[23]

The Brennan Center for Justice[24] is one pro-litigation group that has done a superb job in promoting awareness of access to justice issues. The Brennan Center's website and e-alerts service includes coverage of cases, including some brought by citizen plaintiffs to sue the government for its abuses of power.[25] Much of their attention has been focused on a recent effort in Congress to impose restrictions on the work funded by the Legal Services Corporation. This legislation, signed into law by President Clinton in 1996, offers one more example of the growing hostility towards citizen plaintiffs.

In 1974, Congress passed legislation creating and funding the Legal Services Corporation ("LSC").[26] The purpose of the LSC was to promote "equal access to the system of justice in our Nation" by administering congressional appropriations through grants to local legal aid programs.[27]

After surviving attempts by the Reagan Administration to eliminate it, LSC confronted renewed threats to its existence when the Republicans took control of Congress after the 1994 midterm elections.[28] In 1995, Representative Dan Burton, along with twenty-seven other conservative members of Congress, wrote to then House Speaker Newt Gingrich, urging legislation to abolish the LSC. In a 1996 press release, Burton claimed that the LSC spends "millions of taxpayers' dollars on outlandish test cases to promote a left-wing political agenda that hurts the poor

more than it helps."[29] Senator Bob Dole used even harsher language:

> [The LSC has] become . . . the instrument for bullying ordinary Americans to satisfy a liberal agenda that has been repeatedly rejected by the voters . . . . The impoverished individual who has run-of-the-mill, but important, legal needs is shunted aside by Legal Services lawyers in search of sexy issues and deep pockets.[30]

Other opponents of the LSC offered similarly broadly worded, extremely negative attacks, and offered a select few anecdotes to support them.[31] Although a great deal of evidence demonstrated that these portrayals of the LSC caseload were inaccurate, much of the criticism portrayed the clients of LSC-funded lawyers as dupes of political activists who were manipulating them to serve a political agenda that was not in their interests.[32]

The 1996 LSC appropriations bill cut the agency's budget by $122 million, and imposed a series of restrictions on grant recipients.[33] The welfare-specific regulations were struck down in 2001 by the Supreme Court as impermissible "viewpoint discrimination" under the Free Speech Clause in *Legal Services Corp. v. Velasquez*.[34] All the other restrictions, including the ban on class actions, were left untouched by the Court one week later.[35] Currently, legal aid lawyers receiving funding from the LSC cannot offer advice to potential clients (i.e., the lawyers cannot advise them that they have an actionable legal claim); they cannot bring class actions; and they cannot represent many categories of immigrants. Lawyers receiving LSC funds cannot engage in any of these prohibited activities even if they are fully supported with non-LSC funds (unless the non-LSC funds are used to maintain a physically separate legal office). Although much of the public discourse concerning the 1996 restrictions and the Court's opinion in *Velasquez* has focused on the role and rights of legal services attorneys, the Brennan Center has instead chosen to highlight the true victims: indigent plaintiffs who as a result of the restrictions have fewer or no opportunities to defend their rights in court.[36]

One issue that the Brennan Center's Access to Justice Project has not yet adequately publicized is the obstacles imposed by new doctrines curtailing attorneys' fee awards for citizen plaintiffs bringing civil rights actions under § 1983 and other statutes with fee-shifting provisions.[37] These attorneys' fees cases will have an enormous impact on the future role of citizen plaintiffs and § 1983 in implementing the rule of law, and so deserve much more scrutiny than they have thus far received by the public and media.[38]

In the mid-1970s, the Supreme Court began to prohibit plaintiffs bringing suit under § 1983 from receiving attorneys' fees. In *Alyeska Pipeline Service Co. v. Wilderness Society*,[39] the Court overturned the D.C. Circuit Court's award of attorneys' fees to the plaintiffs, arguing that courts should not depart from the presumption favoring the "American Rule" requiring parties to pay for their own lawyers, unless a legislature specifically provides for fee-shifting. After *Alyeska*, § 1983 plaintiffs were ineligible for recovery of these costs, but plaintiffs bringing claims under Title VII, Title IX, and a host of other statutes remained eligible, because those statutes contained attorneys' fees provisions. Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976[40] soon thereafter, modeling the new law on the fee-shifting provisions in the 1960s civil rights statutes.[41]

State officials obviously disliked the catalyst theory because it meant that they would have to pay out significant amounts for attorneys' fees, even when there was no judicial determination of fault and the amount of damages was much lower than the fees.

In 1994, the Fourth Circuit broke away from the consensus developed in all of the other circuits and offered a unique interpretation of the meaning of "prevailing party" in § 1988 and all other fee-shifting statutes using similar language. The settled interpretation of § 1988, known as "the catalyst theory," understood the statutory term "prevailing party" to include all plaintiffs whose legal challenge produced some beneficial change in the defendant's behavior. No final judgment was required. Nor was a settlement required, as long as the defendant took voluntary steps to alter its behavior.

State officials obviously disliked the catalyst theory because it meant that they would have to pay out significant amounts for attorneys' fees, even when there was no judicial determination of fault and the amount of damages was much lower than the fees. With the catalyst theory structuring incentives, states had an incentive to attempt to settle quickly by proposing generous terms; otherwise citizen plaintiffs would have no reason to settle so soon.

In developing a challenge to the catalyst theory, state officials pointed to the Supreme Court's 1992 opinion in *Farrar v. Hobby*,[42] which held that a plaintiff who was awarded nominal damages was a prevailing plaintiff entitled to the award of attorneys' fees and costs. When explaining its reasoning, the Court stated that "the touchstone of the prevailing party inquiry must be the material alteration of the *legal* relationship of the parties."[43] Focusing on the Court's language referring to the "legal relationship of the parties," state lawyers began arguing that the Supreme Court had signaled its willingness to reconsider the catalyst theory. This argument was quickly adopted by the Fourth Circuit, which announced in a 1994 case[44] that it would no longer apply the catalyst theory to any fee-shifting provisions using the prevailing party language.

In *Buckhannon Board & Care Home v. W. Va. Department of Health and Services*,[45] the plaintiff challenged the enforcement of a state regulation requiring residents of all residential board and care homes to be capable of "self-preservation" in the event of a fire. Because three of its residents were too elderly or infirm to comply with the regulation, they would have to be transferred to a nursing home or the facility would lose its license. The owner of the Buckhannon facility could not afford to hire attorneys, but a lawyer agreed to take the case because he thought the prospects for winning on the merits at trial were strong, and he assumed that he could recoup his costs then. Although the state initially refused to settle the case, state attorneys continued lobbying[46] the West Virginia state legislature to repeal the self-preservation rule, which it eventually did. Because the state's decision to repeal the law in no way affected the legal relationship of the parties, the Fourth Circuit rejected the plaintiff's motion for attorneys' fees, which had by then totaled nearly $200,000.[47]

In his majority opinion,[48] Rehnquist announced that that the "clear" meaning of "prevailing party" was something other than what eleven other circuits and four of his colleagues on the Supreme Court believed. The clear meaning, according to Rehnquist, can be found in a Black's Law Dictionary.[49] Quoting from an edition that was not yet in existence when the phrase in question was incorporated in many fee-shifting statutory provisions, Rehnquist defined a "prevailing party" as "one in whose favor a judgment is rendered."[50]

In a concurring opinion, Scalia argued that the catalyst theory rewarded citizen plaintiffs who could force defendants to change their behavior by "threatening" a lawsuit. Defendants might feel pressured to alter their position just to avoid the hassle of litigation and not because they had done anything wrong. Because no legal determination of the merits of the plaintiff's case had yet been made, Scalia argued that it was unfair to allow a catalyst theory to force the defendant to pay for attorneys' fees. Scalia concluded by arguing that citizen plaintiffs should not be rewarded for their "extortion."[51]

Scalia's characterization suggests that the reputation of citizen plaintiffs has reached its nadir in some quarters. There is no empirical evidence to support his assumption that, during the entire time the catalyst theory was endorsed by federal courts, civil rights attorneys were agreeing to pursue citizen plaintiffs' meritless claims in order to be awarded attorneys' fees.[52] There is in fact some evidence to suggest that fee shifting should be encouraged because it provides a much-needed incentive for otherwise reluctant citizen plaintiffs. Based on the existing empirical evidence regarding the underreporting of common law torts,[53] one can reasonably conclude that most victims of many constitutional torts never file a claim against the government. In cases involving constitutional torts, there is an especially weighty *public* interest in encouraging citizen plaintiffs to act as "private attorneys general"[54] to hold governments accountable for their unconstitutional actions.[55] For Scalia, however, the hypothetical possibility that a plaintiff with a "phony claim" can be awarded fees "far outweighs" the harm to the public interest that is caused by abandoning the catalyst theory.[56]

Following *Buckhannon*, citizen plaintiffs must find attorneys willing to pursue a case vigorously after an early settlement offer is on the table. Civil rights attorneys may feel pressured to take early settlement offers because of the fear that, after investing in the case, defendants will opt to remedy the problem at the eleventh hour and moot the case. One way to prevent that type of scenario is to request damages remedies along with declaratory and injunctive relief, in order to prevent last-minute reforms mooting the case, but that will not be an option in civil rights cases brought against state agencies, like in *Buckhannon*, because of the Court's sovereign immunity doctrine. In any case, without the bargaining advantages the prospect of attorneys' fees provided to citizen plaintiffs, defendants are in a much stronger position to behave strategically about their litigation strategies.[57] For example, in § 1983 cases, defense attorneys can discourage lawsuits, by forcing plaintiffs to spend far more in pre-trial litigation costs – i.e., by filing a series of motions for qualified immunity[58] – than what is likely to be awarded as compensatory damages. Without the catalyst theory as leverage, when they are willing to pursue the case at all, plaintiffs are far more likely to settle early and on less favorable terms.

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Do Citizen Plaintiffs Deserve Our Encouragement?

Buckhannon has been aptly described as a "neutron bomb" for civil rights litigation,[59] but calls for Congress to overturn *Buckhannon* by expressly incorporating the catalyst theory into § 1988 will likely go unheeded while anti-plaintiff Republicans control both the House and Senate.[60] Even among those generally respectful of the role citizen plaintiffs can have in enforcing the rule of law, some have expressed doubts concerning the potential effectiveness of constitutional torts litigation. There is a rich tradition of empirically grounded work by political science and law and society scholars suggesting that the emphasis on litigation for social change may be misplaced. Some of the more influential studies, like Gerald Rosenberg's *The Hollow Hope*, focus primarily on institutional reform litigation, rather than damages claims for unauthorized executive

action, and so may not be as relevant to the method of upholding the rule of law I am focusing on here. However, there is another literature examining success rates in litigation, derived from Marc Galanter's famous study, "Why the 'Haves' Come Out Ahead," which should raise separate concerns regarding citizen plaintiffs' prospects for success.[61]

Because most citizen plaintiffs are "one-shotters" suing the greatest "repeat player" of all, the government, Galanter's work suggests that they will have a more difficult time in the litigation process. For example, Galanter predicted that repeat players will consider their long-term interests and "play for the rules," by seeking settlements in closer cases and proceeding to trial in cases for which there is a reasonable chance of producing favorable precedents that will advantage them in the future. Repeat players, especially the government, have a built-in, extremely experienced support structure; there are thus far fewer start-up costs when defending itself in court. After Galanter wrote his study, some positive developments occurred. The Civil Rights Attorneys' Fees statute made it much more likely – at least until *Buckhannon* – that citizen plaintiffs would find capable attorneys to assist them. The development of informal networks among civil rights plaintiffs' attorneys meant that they could begin thinking in terms of a repeat players' strategy, if they could persuade their clients to agree to focus on these considerations. Despite these developments, Galanter's general predictions have been confirmed by empirical studies on the success rates of citizen plaintiffs in § 1983 claims filed in federal district courts.[62] Other studies show that government defendants maintain their advantage in appeals.[63]

Should we take from these studies the more general conclusion that citizen enforcement of the rule of law is therefore a futile ambition? I would like to develop these thoughts more systematically, but my initial impression is that the greatest difficulty confronting citizen plaintiffs today is due to the *doctrinal structure* of § 1983, which is an enormously complicated set of rules offering the government every possible opportunity to defend itself against charges of unconstitutional conduct – through the qualified immunity defense, the formalistic standard for municipal liability, state sovereign immunity doctrines, etc.[64] Many of these advantages could be moderated or even erased, if Congress sought to revise the § 1983 statutory provisions.[65]

Even today, without the benefit of these changes, citizen plaintiffs' efforts are not entirely futile. The process of starting the process of litigation, of formally charging the government with misconduct, can have benefits of its own, especially by publicizing the abuses.[66] The process of discovery can be an enormously powerful "weapon of the weak": citizen plaintiffs can use it to determine exactly what the officers did and why, to uncover information about the governments' hiring, training, and supervision policies, and much else. If the rule of law requires that government must be held accountable in some way for its unauthorized conduct, then this kind of publicity can promote it by allowing political forms of accountability in cases where other citizens are persuaded to take action during the next election. The prospect of such an outcome can serve as its own kind of deterrent, regardless of the outcome of the litigation itself.[67]

Much more empirical work needs to be done to examine the role of citizen plaintiffs in enforcing the rule of law. Perhaps the most basic and crucial task for future scholarship is to highlight the public purposes served by these suits, lest they become entirely undermined by current anti-litigation forces. After the setbacks of the past decade, efforts to expand access to justice for all citizen plaintiffs must be defended, through rigorous scholarship and effective advocacy, if we are to improve a system of litigated checks and balances that has become such a crucial component of implementing the rule of law.

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Endnotes

1. Richard Fallon argues that most conceptions of the rule of law typically appeal to three "values and purposes that the Rule of Law is thought to serve":

> First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.

Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," 97 *Columbia Law Review* 1, 8–9 (1997).

2. See Rosa Ehrenreich Brooks, "The New Imperialism: Violence, Norms, and the 'Rule of Law'", 101 *Michigan Law Review* 2275, 2276, n.5 (2003) (suggesting that the concept of the rule of law underlying these promotion efforts is "amorphous and undertheorized"). *See also* Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace,1999); Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* Mar./Apr. 1998.

3. See e.g., *Bond v. United States*, 529 U.S. 334 (2000) (warrantless squeeze of luggage placed in overhead compartment of a bus violates reasonable expectations of privacy); *Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless use of thermal imaging device to monitor a private home violates reasonable expectations of privacy).

4. Mark Graber, "The Constitution as a Whole: A Partial Political Science Perspective," 33 *University of Richmond Law Review*. 343, 361 (1999) (emphasis added).

5. For studies highlighting the role of separation of powers in theories of constitutionalism, *see* M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998); Scott Gordon, *Controlling the State: Constitutionalism from Ancient*

Athens to Today (Cambridge: Harvard University Press, 1999); Cass Sunstein, "Constitutionalism After the New Deal," 101 *Harvard Law Review* 421 (1987).

6. *The Federalist Papers* No. 51 (Madison).

7. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law.") The statute at issue in *Monroe*, 42 U.S.C. § 1983, is now the primary vehicle citizens may use to vindicate their constitutional rights against state and local government officials and municipalities. The Court has held that plaintiffs cannot rely on § 1983 to sue state governments for damages. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). For harms committed by *federal* officials, courts have developed a separate doctrine, originating in its *Bivens* decision. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying from the Fourth Amendment the ability of an individual to bring a damage action against federal officials for an illegal search).

8. John C. Jeffries, "In Praise of the Eleventh Amendment and Section 1983," 84 *Virginia Law Review* 47, 80 (1998); see also Marshall S. Shapo, "Symposium, Re-Examining First Principles: Deterrence and Corrective Justice in Constitutional Torts: Afterword," 35 *Georgia Law Review* 931, 934 (2001) ("[J]udicial elaboration of the *Monroe* interpretation of § 1983 has made it the case of the century for our rights as citizens.").

9. Marshall S. Shapo, "Constitutional Tort: Monroe v. Pape and the Frontiers Beyond," 60 *Northwestern University Law Review* 277 (1965) (coining the phrase "constitutional tort" and describing it as an action that "is not quite a private tort, yet contains tort elements; it is not quite 'constitutional law,' but employs a constitutional test"). For an overview of the history and evolution of constitutional torts doctrines, see Lynda G. Dodd, Securing the Blessings of Liberty: The History and Politics of Constitutional Torts Litigation (unpublished Ph.D. dissertation: Princeton University, 2004).

10. For recent discussions of this trend, *see* David Luban, "Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers," 91 *California Law Review* 209 (2003); Pamela Karlan, "Disarming the Private Attorney General," 2003 *University of Illinois Law Review* 183.

11. Peter H. Irons, *The Courage of Their Convictions* (New York: Free Press, 1988).

12. Prison Litigation Reform Act of 1995, Title VIII of the Omnibus Public Services Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.) (hereinafter "PLRA") (requiring, *inter alia*, the exhaustion of state administrative remedies before granting federal jurisdiction in § 1983 cases, and barring inmates claiming mental or emotional injuries without a prior showing of physical injuries from suing in *either* state or federal courts).

13. Mark Tushnet & Larry Yackle, "Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act," 47 *Duke Law Journal* 1, 64 (1997).

14. Jon O. Newman, "Pro Se Prisoner Litigation: Looking for Needles in Haystacks," 62 *Brooklyn Law Review* 519, 520, fn 3 (1996) (*citing* Attorneys General Seek to Curtail Frivolous Inmate Lawsuits; Call Upon U.S. Congress, States Legislatures to Respond, News Release (National Association of Attorneys General, Washington, D.C.), Aug. 1, 1995). Another example of the influence of this list also illustrates how these anecdotes are used without adequate empirical support: The conservative grassroots lobbying group, Citizens for a Sound Economy, was still citing the National Attorneys General Association's top-ten list in 2000, *long after* the passage of federal legislation, the PLRA, that not only eliminated such frivolous claims (actually truly frivolous claims could be dismissed even prior to the PLRA), but also impeded many far more serious allegations of constitutional violations. Citizens for a Sound Economy, News Release, Federal Criminal Lawsuits Reflect Need for Tort Reform, September 18, 2000, available at http://www.cse.org/newsroom/press_template.php?press id=287.

15. Dennis C. Vacco et al., Letter to the Editor, Free the Courts from Frivolous Prisoner Suits, N.Y. Times, Mar. 3, 1995, at A3. Judge Newman points out that this particular claim was incorrectly described. Jon O. Newman, "Pro Se Prisoner Litigation: Looking for Needles in Haystacks," 62 *Brooklyn Law Review* 521–2 (1996) The complaint alleged a violation of procedural due process and concerned improper charges on the prisoner's account. Although the amount at issue was only $2.50, and so the claim still could be criticized for forcing the court to deal with a trivial matter, it is not as ridiculous as the publicized version. The prisoner was *not* suing in order to have "a right to the peanut butter of his choice" enforced.

16. The claim was quickly dismissed. But this particular complaint, and others describing bad haircuts and broken cookies, would later be cited by Senate Majority Leader Robert Dole on the floor of the Senate during the debates preceding passage of the Prison Litigation Reform Act. See 141 Cong. Rec. S144, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). According to Kermit Roosevelt, the peanut butter story was cited repeatedly throughout the debate. Kermit Roosevelt, "Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error," 52 *Emory Law Journal* 1771, fn. 34 (2003) (*citing* 142 Cong. Rec. S11, 492 (daily ed. Sept. 27, 1996) (statement of Sen. Reid); 142 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham); 142 Cong. Rec. S2219–03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid)).

17. See Alan Elsner, "Abuse Common in U.S. Prisons, Activists Say," *Reuters*, May 6, 2004.

18. A pre-PLRA study by the Department of Justice estimated that frivolous claims constituted 19% of the total prisoner complaints filed in federal court. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, "Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation" 6, 8, 20 (1994) (estimating, from a sample of 2, 738 § 1983 suits processed in 1992, that 19% of them were dismissed as frivolous), at http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf. Although the 19% percent figure does not seem unduly burdensome, federal judges evidently formed the impression that they were being inundated with frivolous suits. One judge has described the task of searching for serious, meritorious claims in the pre-PLRA era as "searching for a needle in a haystack." Judge Newman states at the outset of his essay that "the vast majority" of these cases are dismissed as frivolous. Following that assertion there is no footnote; the judge offers no citation to evidence to support his claim. Jon O. Newman, "Pro Se Prisoner Litigation: Looking for Needles in Haystacks," 62 *Brooklyn Law Review* 519 (1996). The DOJ study cited above not only does not support such his characterization; in fact it suggests the opposite. In more than 80 % of the cases examined in the study, the complaints were deemed not to be frivolous.

19. Kermit Roosevelt, "Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error," 52 *Emory Law Journal* 1771 (2003) (discussing *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002)).

20. Margo Schlanger, "Inmate Litigation," 116 *Harvard Law Review* 1555, 1560–1 (2003) (observing that, in 2001, "filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.")

21. American Tort Reform Association, http://www.atra.org/display/13.

22. For a recent example of "journalism by anecdote," see the cover story, "Lawsuit Hell," *Newsweek* (December 15 , 2003). By the time the *Newsweek* issue was printed, the Center for Justice & Democracy had prepared and posted a rebuttal memo on its website, http://www.centerjd.org/Newsweekrel.pdf (press release, December 7, 2003).

23. For example, one pro-access to justice group, the Center for Justice & Democracy, offers particularly effective summaries of research findings by nonpartisan organizations like RAND and the National Center for State Courts, but it makes them available to journalists only upon request; all others, including members of the public, who wish to view the content on their website must pay a registration fee. See The Center for Justice & Democracy, http://www.centerjd.org/index.html.

24. The Brennan Center for Justice was founded in 1995 by Justice Brennan's former law clerks, and, under the direction of E. Joshua Rosenkranz and legal director Burt Neuborne, became an enormously influential legal center, by serving as lead counsel in litigation in state and federal courts, including the Supreme Court; participating as *amici* in numerous Supreme Court cases; organizing academic conferences in law schools; conducting social science research with affiliated and in-house political science experts; testifying before Congress and state legislatures; and engaging in media outreach and public education campaigns. The Brennan Center is by no means spearheading a grassroots movement, and so some progressives would likely find its approach less appealing for that reason. But its impressive achievements over the past decade do offer one important model of collaborative lawyering, and in my opinion deserves the attention of other "Progressive Constitutionalists" who are trying to move away from strictly court-centered litigation campaigns.

The Center was especially bold in its fight for campaign finance reform. Its efforts to forge relationships with social scientists and develop the data to support their arguments in the campaign finance litigation exposed them to some harsh criticism, but it is certainly better to fight it out over the empirical data than not to attempt developing it at all. See E. Joshua Rosenkranz, Press Release http://www.brennancenter.org/programs/bcra/mccain_jr_statement.html (discussing the Brennan Center's mission and the *McConnell v. FEC* litigation); David Tell, *An Appearance of Corruption: The Bogus Research Undergirding Campaign Finance Reform*, Weekly Standard (May 26, 2003) (describing James Gibson's critique of Kenneth Goldstein's coding and Jonathan Krasno's data analysis); Thomas Mann, *No Merit in Brennan Center Smear Campaign*, Roll Call (May 22, 2003) (defending Goldstein and Krasno).

25. See, e.g., Brennan Center for Justice, Access to Justice Series on the 1996 restrictions the Legal Services Corporation (LSC), http://www.brennancenter.org/resources/atj/index.html; Brennan Center, Access to Justice E-alerts, http://www.brennancenter.org/programs/lse/pages/index.php.

26. See Legal Services Corporation Act of 1974, 42 U.S.C. § 2996.

27. Legal Services Corporation, "What is the LSC?" http://www.lsc.gov/welcome/wel_who.htm.

28. John Newberry, "Staying Alive," 81 *A.B.A. Journal* 89 (April 1995).

29. Brennan Center for Justice, *Unsolved Mystery: Why are Rogue Politicians Trying to Kill a Program That Helps Their Neediest Constituents?* Access to Justice Series, No. 3 (March 2000), available at http://www.brennancenter.org/resources/atj/index.html.

30. 141 Cong. Rec. S14605 (Sept. 28, 1995) (statement of Sen. Dole).

31. Representative Steve Largent, one of the conservative Republicans who had signed onto the Gingrich letter, wrote an op-ed for *USA Today*, arguing that LSC attorneys "see themselves as social reformers rather than advocates for the most needy in our society – abused women and children." Once Largent received more information about how the LSC-funded agencies in his own district operated, he changed his position in 1998 and voted to support LSC funding. Brennan Center for Justice, *Unsolved Mystery: Why are Rogue Politicians Trying to Kill a Program That Helps Their Neediest Constituents?* Access to Justice Series, No. 3 (March 2000), available at http://www.brennancenter.org/resources/atj/index.html.

32. See, e.g., Rael Jean Isaac, "War on the Poor: Criticism of the Legal Services Corporation," 47 *National Review* 32 (1995) (suggesting that LSC-funded programs "are designed to implement the philosophy of an elite corps of Sixties-style radicals (Green Berets of the Left, as one critic has termed them) who use the poor as tools, and then leave them behind as victims"). The LSC had accumulated detailed records of grantees' activities, but its opponents apparently made little use of this data.

33. Some of the most significant restrictions included bans on class actions, welfare reform challenges, and cases involving redistricting or abortion. LSC-funded attorneys were also prohibited from representing prisoners, drug offenders challenging public housing evictions, and certain kinds of aliens. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 504, 110 Stat. 1321, 1321–53–57 (1996).

34. 531 U.S. 533 (2001).

35. The Court declined to grant certiorari to plaintiffs challenging the parts of the Second Circuit ruling in *Velasquez v. Legal Services Corporation*, 164 F.3d 757 (2nd Cir. 1999), that upheld the district court's denial of a preliminary injunction for the remaining restrictions on the LSC, including the ban on class actions.

36. Brennan Center for Justice, Access to Justice Series on the 1996 restrictions on the Legal Services Corporation (LSC), http://www.brennancenter.org/resources/atj/index.html;

37. Because LSC lawyers have since 1996 been prohibited from accepting attorneys' fees under § 1988 or any other statute, the impact of recent court developments will be minimal for LSC attorneys. Even so, the Brennan Center's Access to Justice Project has participated as *amici* in litigation involving attorneys' fees provisions in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(enacted in 1980 to help citizens sue the federal government).

38. Speaking at a Fourth Circuit Conference in 2001, Justice Rehnquist chose to discuss a handful of opinions from the 2000 Term that he believed would have an enormous impact, even though

they may not have received many headlines. Given the consequences I describe below, it is interesting that Rehnquist, quoting from a poem by Thomas Gray, suggested that *Buckhannon* is one of those cases that are "like flowers which are born to blush unseen and waste their sweetness on the desert air." *See* Jennifer Myers, "No Talk of Retirement at Circuit Meeting," *Legal Times* (July 9, 2001).

39. 421 U.S. 240 (1975).

40. Now codified at 42 U.S.C. § 1988(b).

41. Because the text of the provision refers to the "prevailing party," some have argued that it should be read as allowing a general "loser pays" rule, but the Court rejected that literalist reading in favor of one that permits only prevailing *plaintiffs* to claim costs. *See Hughes v. Rowe*, 449 U.S. 5 (1980) (rejecting literalist reading).

42. 506 U.S. 103 (1992).

43. *Id*. at 111 (emphasis added) (quoting *Texas State Teachers Assn. v. Garland Independent School Dist*., 489 U.S. 782 (1989)).

44. *S-1 & S-2 ex rel. P-1 & P-2 v. State Board of Education of North Carolina*, 21 F. 3d. 49 (4th Cir. 1994) (en banc), cert. denied 513 U.S. 876 (1994).

45. 532 U.S. 598 (2001).

46. In Ginsberg's dissenting opinion, she notes that the state lawyers had failed to provide notice to the plaintiff's lawyers regarding the proposed repeal of the state self-preservation regulation, and were sanctioned under Rule 11. *Id*. at 625, n.4.

47. Marcia Lowry, "Fee Change is a Sea-Change," *National Law Journal* (June 11, 2001).

48. 532 U.S. at 600–610.

49. 532 U.S. at 603.

50. *Id.*

51. *Id.* at 618.

52. If they chose to pursue a client's clearly meritless claim, not only would the attorneys be denied fees for doing so, they would very likely be confronted with sanctions under Rule 11 of the Federal Code of Civil Procedure. *See* Arthur R. Miller, "The Pre-Trial Rush to Judgment: Are the 'Litigation Explosion', 'Liability Crisis', and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?" 78 *NewYork University Law Review* 982, 1007–1009 (2003) (discussing the role of Rule 11 in curbing frivolous cases).

53. Richard E. Miller & Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," 15 *Law and Society Review* 544 (1980–1); Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," 31 *UCLA Law Review* 4 (1983).

54. The phrase "private attorneys general" is the traditional term used to describe citizen plaintiffs. For *constitutional torts* cases, Robert Tsai suggests that the better analogy is that of political dissidents. *See* Robert Tsai, "Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access," 51 *American University Law Review* 835, 870 (2002). For cases involving government officials' unauthorized actions, it seems to me that either term is appropriate. My emphasis here is on the role of citizen plaintiffs' participation in the processes of checks and balances that can help implement the rule of law. That participation can be described in terms of "enforcing" the rule of law or "protesting" the government's departure from it.

55. Because some constitutional harms do not cause serious physical injury or property loss, plaintiffs will in those cases receive only nominal damages. In *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986), the Court held that any injuries that would also be compensated under the applicable common law doctrines may be considered in the estimation of damages under § 1983. In addition to physical injury and property loss, compensable injuries can thus sometimes include emotional distress and other forms of monetary loss. In cases where no such injuries can be established, the Court had held that the "abstract value" of a constitutional right to a plaintiff cannot form the basis of a damage remedy. In these cases, the plaintiff typically will receive a nominal damage award of one dollar. *See Carey v. Piphus*, 435 U.S. 247, 266–7 (1978). If constitutional torts litigation depended upon contingency fees arrangements alone, many lawyers likely would have focused on cases for which there could be shown serious physical injury or some other injury supporting a large damages award. Many other important constitutional torts cases would have gone unheard. Herbert M. Kritzer, "Contingency Fee Lawyers as Gatekeepers in the Civil Justice System," 81 *Judicature* 22 (1997). The Civil Rights Attorneys' Fees Act of 1976 was, for this reason as well, a crucial breakthrough for § 1983 citizen plaintiffs.

56. 532 U.S at 618.

57. Frances Kahn Zemans "Fee Shifting and the Implementation of Public Policy," 47 *Law and Contemporary Problems* 187 (1984).

58. In § 1983 cases, many circuits allow the defense to file motions for qualified immunity repeatedly as discovery progresses.

59. Margaret Graham Tebo, "Fee-Shifting Fallout: In the Two Years Since the Supreme Court Limited Catalyst Theory, Civil Rights Lawyers Find Themselves Torn Between Losing Fees and Settling for Their Clients," 89 *A.B.A. Journal* 54 (July 2003).

60. Senator Edward Kennedy and Representative John Lewis have sponsored legislation entitled "FAIRNESS: The Civil Rights Act of 2004," which includes a provision overturning *Buckhannon*.

61. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change," 9 *Law & Society Review* 95 (1974).s

62. *See, e.g.,* Stewart J. Schwab and Theodore Eisenberg, "Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant," 73 Cornell Law Review 719 (1988).

63. Herbert M. Kritzer, "The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?" in *In Litigation: Do the 'Haves' Still Come Out Ahead?* edited by Herbert Kritzer and Susan Silbey (Palo Alto: Stanford University Press, 2003).

64. *See* Lynda G. Dodd, Securing the Blessings of Liberty: The History and Politics of Constitutional Torts Litigation (unpublished Ph.D. dissertation, Princeton University, 2004). In my dissertation, after discussing the origins of the Ku Klux Klan Act of 1871 (the predecessor statute to § 1983), and the "forgotten years" of constitutional torts litigation (from 1871 to 1961), I examine four types of strategies influencing the evolution of the Court's contemporary constitutional torts doctrine: (1) narrowing the scope of rights, especially due process rights, to curtail remedies; (2) favoring individual officer liability over governmental entity liability, (3) protecting governments and officials with a variety of immunity doctrines, and (4) establishing bright-line distinctions between public and private actors.

65. The Supreme Court, if new appointees are so motivated, could also modify those elements of the current doctrinal framework for constitutional torts preventing citizen plaintiffs from using

§ 1983 to enforce the rule of law. In *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 430–1, 435–7 (1997), Justice Breyer – in a dissenting opinion joined by Ginsberg and Stevens, and warmly praised by Souter in his own dissenting opinion – argued strongly in favor of a complete overhaul of § 1983 doctrine, including the abandonment of the existing doctrine rejecting vicarious liability. With four Justices favoring a complete reassessment, the prospects for doctrinal reform are not entirely out of reach.

66. For a similar argument, *see* Lynn Mather, "Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation," *Law & Social Inquiry* 897 (1998). Using litigation as a political resource need not entail the promotion of meritless or frivolous lawsuits. Indeed, such claims would be quickly dismissed, and in the more extreme cases may result in judicial sanctions under Rule 11.

67. Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* 213–9 (Ann Arbor: University of Michigan Press 2d ed. 2004).