The Paths to Comprehensive Entity Liability in Constitutional Litigation

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- Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 **Fla. L. Rev.** ___ (forthcoming, 2021), available at SSRN;
- Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 **Duke L.J.** ___ (forthcoming, 2022), available at SSRN.

Proferred solutions to the problem of police misconduct have coalesced around qualified immunity—government officials (not only police officers, although that has been the focus of the current political moment) cannot be liable for damages unless it was clearly established by judicial precedent that the officer's conduct violated the Constitution, such that all reasonable officers would have known their conduct was unlawful. Scholars, justices, judges, and members of Congress have argued for eliminating the defense. And qualified immunity makes an easy target for reform by reference to cases involving prisoners locked in cells containing raw sewage or officers who stole cash and coins while executing a search warrant.

Katherine Mims Crocker offers a different approach. In two related articles that connect to a broader "panoramic view" of the system of constitutional-tort litigation—*Reconsidering Section 1983's Nonabrogation of Sovereign Immunity* and *Qualified Immunity, Sovereign Immunity, and Systemic Reform*—Crocker argues that the key to government accountability for constitutional wrongs lies in eliminating sovereign immunity and expanding the liability of government entities, rather than a pinpoint focus on eliminating qualified immunity (although she agrees the latter should happen).

Reconsidering looks backward to critique an arguable original sin—the Court's conclusion that Congress did not abrogate sovereign immunity and subject states to suit under § 1983. The Court held that Congress did not provide a clear statement that states could be sued, using a statutory word—"person"—that does not, without more, obviously include states. This conclusion, Crocker argues, is doubtful on its terms, as a negative matter and an affirmative matter.

The negative critique targets the ahistoricity and anachronism of the Court's analysis. It makes no sense as a matter of legislative-process theory for the modern Court to apply a clear-statement rule, judicially established in 1973, to a statute enacted in 1871. This carries greater force in light of the unique conditions and objectives of the Reconstruction Congress and its legislative efforts. The Court also assumed that the Reconstruction Congress understood that the Eleventh Amendment limited state suability and that it had to address that in the statute, although the Court did not hold that the Eleventh Amendment immunized states from federal claims until almost twenty years after the 1871 Act. The affirmative critique argues that the Court may have been wrong as a matter of text. The evidence "on balance" appears to show that states were "bodies politic and corporate," persons under federal law, and within the meaning of the term in § 1983.

Qualified Immunity shows why this historical argument matters. Crocker argues that the constitutional-tort system focuses on individual rather than entity liability because of the Court's "dedication" to sovereign immunity and other limitations on entity liability—a dedication reflected in decisions holding that states are not § 1983 persons. This background of sovereign immunity made individual officers the primary targets in damages claims. The Court then created qualified immunity to narrow individual-officer liability, ease the costs and burdens on individual officers, and avoid expanding federal dockets. This connection is not linear—the line of cases expanding qualified immunity (and thus narrowing individual liability) developed prior to and independent of the decisions narrowing entity liability. But that

means the "real-life problems plaguing the constitutional-tort system" are not about qualified immunity alone, but about sovereign immunity and other limits on entity liability.

Crocker discusses literature showing near-universal government indemnification, with individual officers paying any amount in less than .5 % of cases and contributing .02 % of overall awards. Because qualified immunity exists to protect officers against crippling personal financial liability, the fact that officers pay virtually nothing undermines the doctrine's purpose and existence. But indemnification also undercuts the reasons for sovereign immunity. Sovereign immunity seeks to protect the public fisc, to shield the treasury from damages actions. If governments agree to pay virtually all judgments through indemnification, it shows that the public fisc does not need protection from damages suits. If the logic of sovereign immunity falls, so does the logic of individual liability and thus the need for qualified immunity.

Instituting entity liability for all levels of government requires three changes, all of which can come from Congress. First, Congress should codify *Bivens* and waive federal sovereign immunity from constitutional-tort cases, creating a statutory analogue to § 1983 for constitutional violations by federal officers. Second, Congress should amend or replace § 1983 to make clear that states and arms of the state can be sued—legislatively correcting the judicial misstep discussed in *Reconsidering*. Third, Congress should eliminate *Monell*'s custom-or-policy requirement for claims against municipalities. All government entities would be liable for their officers' constitutional violations under the common-law standard of respondeat superior. And these changes complement the fourth move of eliminating qualified immunity for individual officers.

The resulting comprehensive system allows plaintiffs to pursue claims against individual officers and government entities in a single action. Liability could attach to the entity on respondeat superior or on a custom-or-policy claim against unique systemic wrongdoing. Proceeding against individual officers remains important for claims based on conduct beyond the scope of employment (to which respondeat superior does not attach) but still under color of law (to which § 1983 does apply); Crocker offers the example of an off-duty police officer working as a private security guard who identified himself as a police officer prior to shooting the victim. This shift to entity liability offers three benefits—it improves litigation by bringing the public cost of the judgment (and thus of the constitutional violation) to the forefront, enhances political accountability, and better allocates the costs, burdens, and perverse of incentives of constitutional misconduct.

Crocker limits the proposal to Fourth Amendment excessive-force claims. These represent the most-pressing civil-rights problem and they lie at the center of the congressional focus on constitutional litigation; Congress is concerned with, and likely to act in response to, the narrow and politically salient issue of "policing" as opposed to the broader and more abstract issue of "constitutional enforcement." Crocker hopes that this case study will allow and encourage governments to respond to the current policing crisis while seeing that entity liability is not destructive, while giving Congress the opportunity to use excessive-force as a test case for future expansion or fine-tuning. She recognizes the benefit of a one-time change to establish a broader scheme covering all constitutional claims, but argues that Congress need not jump there immediately and can reach the correct result even when it prefers to move incrementally.

The legal and political discussion of reforming constitutional litigation is welcome and necessary. But limiting the discussion to qualified immunity—with the opportunity to focus on and mock egregious decisions on Twitter—misses the broader issue. The process of constitutional litigation consists of many moving pieces that contribute to the problem and that any solution must address. Crocker offers and defends a comprehensive scheme that, if followed to the end, would produce a superior system of constitutional-rights enforcement.

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