

Civil Liberties Litigation: Cases and Materials

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GARY S. GILDIN



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Gary S. Gildin
August 1, 2024

I. INTRODUCTION TO CIVIL LIBERTIES LITIGATION

I. Introduction to Civil Liberties Litigation

***Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978)**

Before Clark, Fay, and Vance, Circuit Judges.

[1] William H. Bogard, a former prisoner at the Mississippi State Penitentiary at Parchman, Mississippi ("Parchman"), filed this action to recover civil damages for personal injuries. While a Parchman inmate, Bogard was subjected to a series of corporal punishments and suffered two incidents of prison violence, one a stabbing that severed his spinal cord and rendered him a permanent paraplegic. Bogard sued various supervisory officials, employees and inmates at Parchman, based on 42 U.S.C. § 1983 and pendent state tort claims.

I. The Facts

A. The Organization of the Parchman Prison

[2] The Mississippi State Penitentiary at Parchman is the only state prison in Mississippi. At the time Bogard was incarcerated at Parchman, the prison was operated essentially as it had been since 1903.

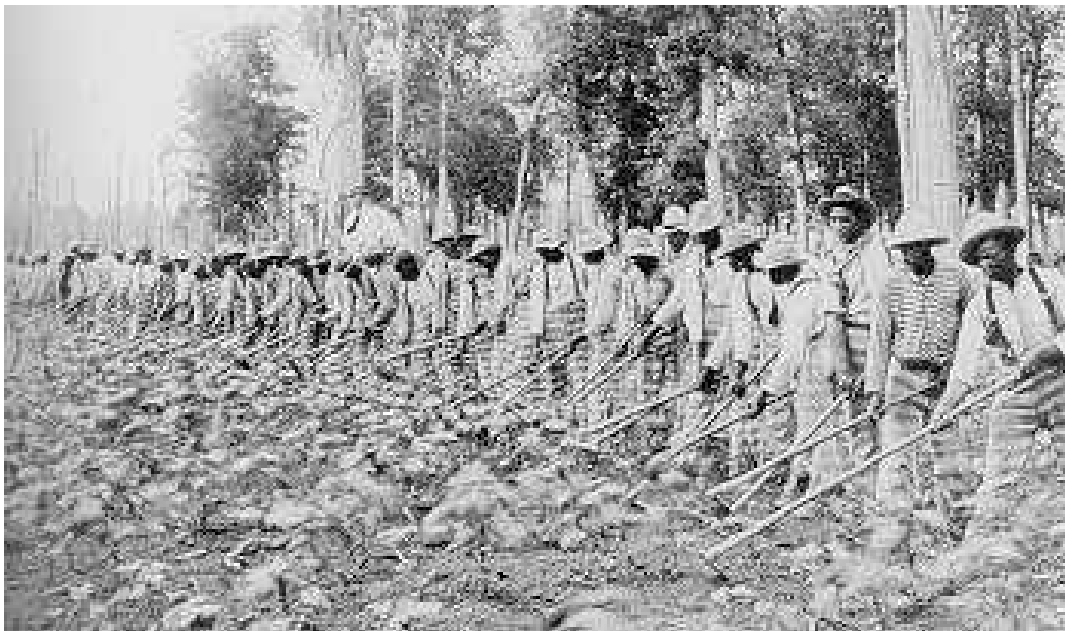


Parchman Prison. [Mississippi Department of Archives and History](#)

[3] Most of its 16,000 acres of farm land was devoted to growing cotton, soybeans and other cash crops, and the production of livestock, swine, poultry and milk. Mississippi law required Parchman to be financially self-

sustaining, MISS. CODE ANN. § 47-5-1. The prison was expected to “operate at a profit at any cost.” *Gates v. Collier*, 349 F. Supp. 881, 892 (N.D. Miss. 1972). Consistent with this profit expectation, state law limited the number of prison employees to 150, “at such salaries as the penitentiary can afford.” MISS. CODE ANN. § 47-5-41. At the time of Bogard’s incarceration at Parchman, the inmate population numbered approximately 1,900. Two-thirds of the inmates were black, and prison facilities were segregated by race.

[4] Discipline and security at Parchman were maintained through the “trusty system,” a form of prison organization mandated by Mississippi law in which certain prisoners were selected to occupy positions ranging from armed guard to errand boy. See MISS. CODE ANN. § 47-5-143 (1972). In the terminology of the prison, the prisoners at the top of the “inside world” hierarchy were the “trusty shooters,” a group of about 150 inmate-guards armed with rifles and charged with the day-to-day guarding of the other inmates. Next came certain unarmed inmates, known simply as “trusties,” who assisted the prison’s civilian employees in various custodial and administrative capacities. “Hallboys” distributed medicine, delivered mail, and maintained files. “Floorwalkers” and “cage bosses” were charged with enforcing discipline and maintaining peace in the prison barracks; on their recommendation inmates could be punished. “Half-trusties,” also unarmed, served primarily as errand boys. The remaining inmates were known as “gunmen.”



Convict workers at Parchman Prison, 1911. [Wikimedia Commons](#) [Public Domain](#) [CCO](#)

[5] Parchman was physically divided into 21 separate units, the most important of which were the 12 major residential camps. Only four civilian employees, known as the “free worlders” were assigned to each residential camp. They consisted of a sergeant, who was in charge of the camp; two “drivers,” who supervised transporting inmates to and from field work; and one night watchman. Each residential camp contained barracks, known as “cages,” with separate wings for gunmen and trusties. Twenty to thirty trusty shooters were assigned to each camp.



Photo © Bill Steber

Parchman penitentiary is located on 20,000 acres in the heart of the Delta and since the turn of the century it has remained one of the most feared institutions in the state. A totally self-contained working farm and miniature city, Parchman is the "county farm" referred to in dozens of blues songs written through the years. William Faulkner called Parchman "destination doom" and author David Oshinsky described it as "the quintessential penal farm, the closest thing to slavery that survived the civil war." It was in prisons like Parchman that the work chant, a series of rhymed song couplets used to synchronize mass work, survived the longest. The work chant used the African-American musical call and response style as its base and the song leader's use of off-color lyrics and spontaneous creativity were archetypes that found wide-spread use in the blues.

Parchman Penitentiary By Bill Steber [Source](#) ©

[6] Parchman had a separate maximum security unit, which contained a special punishment area where inmates could be sent for violating prison rules. Each of the four wings of the maximum security unit contained 13 cells equipped for two men, with double metal bunks having no mattresses, a lavatory and a commode. In addition, each side of the maximum security unit contained a 6' x 6' cell, known as the "dark hole." The dark hole had no windows, lights, commode, sink or other furnishings. A six-inch hole located in the middle of the concrete floor was provided for disposition of body wastes. A solid heavy metal door closed the cell. Mississippi law specifically authorized use of the dark hole punishment for periods of up to twenty-four hours. MISS. CODE ANN. § 47-5-145.

[7] State law vested overall responsibility and control of Parchman in the hands of the prison superintendent. The superintendent, appointed by the state penitentiary board, was exclusively "responsible

for the management of affairs of the prison system and for the proper care, treatment, feeding, clothing and management of the prisoners.” MISS. CODE ANN. § 47-5-23. An assistant superintendent assisted the superintendent in his duties.

B. Bogard’s Injuries and Punishments at Parchman

[8] A twenty-two-year-old William Bogard arrived at Parchman in March of 1969, convicted of armed robbery and sentenced to twenty-five years’ imprisonment. Three years later a permanently paraplegic Bogard left Parchman on the clemency of the Governor. Bogard divides his allegations of injury into three categories: a rifle wound inflicted by a trusty shooter on February 25, 1971, a knife wound inflicted by a fellow inmate on July 7, 1972, and various summary punishments imposed at different times throughout his confinement.

[9] At the time of the shooting incident of February 25, 1971, Bogard was incarcerated at residential Camp Eight at Parchman. It was a cold morning and the prisoners at Camp Eight were demanding that the camp sergeant, defendant Fred Childs, provide them with warmer clothing. When their request was denied, the inmates staged a “buck,” a refusal to work. The striking inmates, including Bogard, were ordered to the Maximum Security Unit, and a truck was summoned to transport them.

[10] Pursuant to prison procedure, the truck was parked outside of the camp’s “gunline,” an imaginary line on the perimeter of the camp identified by markers. An unauthorized crossing of the gunline was considered an escape attempt and could be thwarted by gunfire. To safely cross the gunline and board the truck, a prisoner had to be “hollered out”—authorized to cross the line.

[11] Camp Sergeant Childs and trusty shooters Dougherty and Milton Davis were supervising the loading. Parchman’s Chief Security Officer, Jay Leland Vanlandingham, was standing nearby. Bogard and several other prisoners were ordered by Sergeant Childs to cross the gunline and board the truck. The inmates moved slowly. To hurry them up, trusty shooters Davis and Dougherty fired four to five rifle shots. One bullet struck Bogard in the foot. He was hospitalized for one month.

[12] Following the shooting incident, Bogard was transferred to Parchman’s disability facility, Camp Two, to recuperate from his gun wound. At Camp Two Bogard was appointed to the position of hallboy, a job in which he performed duties for the camp’s sergeant, defendant T.T. Peaks. Bogard’s duties included assisting with the daily roll call, preparing reports, keeping records, dispensing medication and handling mail.

[13] In July of 1972, Bogard, in his capacity as hallboy, informed Camp Sergeant Peaks that one of the camp’s inmates had a sewing machine in his possession in the “cage” the camp barracks. That inmate was defendant James B. “Slicker” Davis, one of the camp’s regular gunman prisoners. Sergeant Peaks ordered Bogard to go into the cage area and remove Slicker Davis’ sewing machine; Bogard obeyed the order. Several hours later Slicker Davis, armed with a boning knife obtained from the slaughterhouse where he worked, stabbed Bogard in the back. Davis struck Bogard with such force that the blade of the knife broke off inside Bogard’s back.

[14] Bogard was carried to the prison infirmary, where the two attending doctors disagreed as to whether he should be immediately sent to a hospital outside the prison. It was decided not to send Bogard out of Parchman; he was given a shot of Demerol and the doctors began their attempts to remove the portion of the blade that was still implanted in his spine. The blade was irregular in shape and deeply embedded; after several attempts to extract it failed, one of the attending doctors asked an assistant to find the strongest prisoner in the area and bring him to the infirmary. “Boss” Stapleton, an inmate of notorious physical strength, was summoned. Stapleton grasped the edge of the blade with a clamp and began to pull, lifting Bogard’s body off of the table with repeated efforts, until finally the blade came free.

[15] Bogard remained in the Parchman infirmary for three days, and was then transferred to the University of Mississippi Medical Center in Jackson, Mississippi. At the University Hospital it was determined that the knife blade had severed Bogard’s spinal cord almost completely, rendering him a permanent paraplegic. On August

4, 1972, the Governor of Mississippi suspended the remainder of Bogard's sentence and he was taken to his parents' home in Harvey, Illinois.

[16] Unlike the circumstances surrounding Bogard's shooting and stabbing injuries, the facts concerning various summary punishments inflicted against Bogard at Parchman are disputed and unclear. The practices Bogard complains of are imprisonment in the "dark hole," "coke crate punishment" (being forced to stand for a long period of time on a small wooden box), the shaving of his head with sheep shears, and confinement for varying periods of time in the Maximum Security Unit's punishment cell. It is undisputed that Bogard was in fact confined in both the punishment cells and dark hole of the Maximum Security Unit on several occasions, and that it was common practice to shave the heads of inmates confined in the dark hole. Testimony as to whether Bogard was given "coke crate punishment" is not completely clear, although the record does reveal that the coke crate punishment was used from time to time to discipline inmates. Because the exact nature of these summary punishments and the extent to which different defendants were aware of or sanctioned their use are issues central to the disposition of this appeal, a more exacting discussion of the evidence concerning summary punishments is reserved for Part IV of this opinion.

C. The Trial

[17] Bogard brought his suit for damages against Slicker Davis, the gunman inmate who stabbed him; Charles Dougherty and Milton Davis, the two inmate trusty shooters who fired the rifle shots that resulted in his gunshot wound of February 25, 1971; Sergeant T. T. Peek, the sergeant in charge of Camp Two when Bogard was stabbed there; Sergeant Fred Childs, the sergeant in charge of Camp Eight who supervised the truck loading there when Bogard was shot; Dr. Hernando Abril, the Medical Director at Parchman who treated Bogard for his shooting and stabbing injuries; Jay Leland Vanlandingham, Chief Security Officer at Parchman; Jack Byars, Assistant Superintendent of Parchman; Thomas Cook, Superintendent at Parchman until February 13, 1972; and John Collier, Superintendent at Parchman from February 14, 1972, through the end of Bogard's custody. Also named as a defendant was the United States Fidelity and Guaranty Company, by virtue of its fidelity undertakings for Superintendents Cook and Collier, and Assistant Superintendent Byars.

* * * * *

[18] Relative to the shooting incident, Bogard alleged that Superintendent Cook and Assistant Superintendent Byars were negligent or reckless in allowing Milton Davis and Charles Dougherty to serve as trusty shooters, because they were appointed without sufficient investigation into their backgrounds and qualifications. Bogard alleged that Cook and Byars were aware of and acquiesced in the use of the type of rifle fire by inmate trusty shooters that took place on the day he was shot but failed to correct such practices, and were negligent in hiring both Childs and Vanlandingham to work at Parchman. Regarding the stabbing, Bogard further alleged that it was the failure of Superintendent Collier (who had recently replaced Cook) and Byars to properly classify inmates according to their propensities for violence, and their use of half-trusty prisoners such as Bogard to assist in the control and supervision of inmates such as Slicker Davis, that led to Davis' vicious attack. Finally, Bogard claimed that the prison officials were aware of and sanctioned his unjustified subjection to the coke crate, dark hole, and Maximum Security Unit punishments.

[19] Bogard asserted that the conduct of the defendants violated his eighth amendment right to be free from cruel and unusual punishment, and his fourteenth amendment right to be free from deprivations of liberty without due process. All of the defendants were also sued for the same conduct in a pendent claim under Mississippi tort law.

D. The Incomplete Verdict

[20] The trial was to a six person jury. Presentation of evidence took three weeks. At the conclusion of the evidence the court prepared a special verdict with thirty-six interrogatories. After a day's deliberation, the court was informed that the jury had answered eighteen of the questions, but was deadlocked on the others. The court accepted the eighteen answers, repeated the charge and explanations on the unanswered interrogatories, and sent the jury back for further deliberation. This process was repeated several times and some additional answers were brought back, but after four days of delicate prodding by the court it became clear that the jury could not reach unanimous agreement on more than twenty-six of the thirty-six issues submitted. None of the parties assign as error the trial court's acceptance of an incomplete verdict.

[21] As to each defendant, the jury was asked in a series of three separate questions whether the defendant (1) had been negligent in his duties, (2) the negligence was the proximate cause of Bogard's injuries, and (3) the negligence was willful, wanton or gross. While there is room for some confusion both in the logic of the special verdict questions and in the jury's answers to them, we construe the verdict as establishing that Bogard in fact suffered both constitutional and common law injuries in the form of summary punishments, the shooting, and the stabbing, but that all of the employee defendants except Cook, Collier and Byars were found by the jury to have acted within the scope of the qualified immunity on all counts. We further construe the jury's failure to resolve the gross negligence questions with regard to Cook, Collier and Byars as a failure to resolve their qualified immunity defense on all counts.

[22] In capsule, the jury found virtually all of the defendants (Sergeant Peek being the sole exception) negligent in their duties. However, only the two inmate defendants, trusty shooters Davis and Dougherty, were specifically found grossly, willfully or wantonly negligent. The jury explicitly decided that the lower and middle level prison employees—Vanlandingham and Childs—were not grossly, willfully, or wantonly negligent. As to the alleged gross, willful or wanton negligence of the management level officials—Cook, Collier and Byars—the jury could not agree. Cook and Byars were found to have subjected Bogard to cruel and unusual punishment, and all defendants save Vanlandingham and Dr. April were found to have deprived him of due process. The total jury awards against all defendants amounted to \$500,000. ^[1]

E. The District Court's Action

[23] In its Memorandum Opinion of November 11, 1975, the district court granted directed verdicts in favor of all defendants except gunman inmate Slicker Davis and trusty shooters Milton Davis and Dougherty. The controlling legal principle in the district court's decision was that the prison employees were entitled to a qualified official immunity defense both under 42 U.S.C. § 1983 and Mississippi tort law. This shield of qualified immunity, the court held, can be pierced only on a showing of misconduct more egregious than ordinary negligence. Guided by this principle, judgment in favor of Sergeants Peek and Childs and Security Officer Vanlandingham followed as a matter of course, since the jury specifically found that their conduct was not willful, wanton or gross. As to the three management level defendants Cook, Collier and Byars the court granted post-trial directed verdicts in this language:

Disposition of the motions sub judice has given the court cause to carefully consider the evidence introduced at trial. Upon mature reflection, the court has concluded that the evidence presented on the issue of whether the defendants Cook, Collier, and Byars acted in a wilful, wanton, or grossly negligent manner in connection with the shooting and stabbing injuries to plaintiff and the claims concerning violations of the plaintiff's constitutional rights was insufficient to create a jury question on those points. In reaching this determination, the court has attempted to strictly adhere to the standard governing the

granting of a directed verdict set forth in *Boeing Co., v. Shipman*, 411 F.2d 365 (5th Cir. 1969). After due deliberation on the matter, the court is of the opinion that a verdict should have been directed on this issue in favor of the aforementioned defendants during the course of the trial.

405 F. Supp. at 1208.

[24] Bogard appeals from the district court's entry of these directed verdicts, claiming that under both state and federal law the defendants are not entitled to a qualified immunity defense, that the trial court evaluated the defendant's liability under an incorrect standard of care, and that no directed verdict was justified.

II. Preliminary Issues

C. The Eleventh Amendment and Monell

[25] The plaintiff brought his suit against the Parchman defendants both in their individual and official capacities. Insofar as the defendants are sued in their individual capacities they enjoy a qualified immunity defense, and as we hold in Part IV, that defense absolves them of individual liability in this case. The plaintiff maintains, however, that when sued in their official capacities, the suit against the defendants becomes in effect a suit against the State of Mississippi. The plaintiff further argues that because the jury's award would be paid by the State itself if the defendants are liable in their official capacities, the defense of qualified immunity would no longer be applicable.

[26] The flaw in the plaintiff's argument is that he may not maintain this action against the State of Mississippi. Retrospective monetary relief against a state is barred by the eleventh amendment. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed.2d 662 (1974). Since Bogard may not maintain this suit against the state, he may only seek recovery from the defendants as individuals. In that capacity, the qualified immunity defense is fully applicable.

III. QUALIFIED IMMUNITY

A. Federal Law

[27] In *Procunier v. Navarette*, 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed.2d 24 (1978), the Supreme Court held that prison officials sued under 42 U.S.C. § 1983 were entitled to the qualified immunity defense that had previously been recognized in [Scheuer v. Rhodes](#), 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed.2d 90 (1974) (state governor, university president and national guard members) and *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed.2d 214 (1975) (school board members). See also [O'Connor v. Donaldson](#), 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed.2d 396 (1975) (superintendent of state hospital).

[28] In *Scheuer* state officials were sued for damages under section 1983 for their involvement in shootings on the Kent State University campus during a Viet Nam anti-war demonstration. The Supreme Court held that a qualified immunity is available to executive officers, increasing in scope with the breadth of the officer's discretion and responsibilities. See *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978). The court stated that the

immunity is predicated on “the existence of reasonable grounds for belief formed at the time” of the official’s action “coupled with good-faith belief” that the action was proper. 416 U.S. at 247-48, 94 S. Ct. at 1692.

[29] *Wood v. Strickland* clarified the *Scheuer* defense by establishing a dual test for measuring the existence of qualified immunity which requires both an objective and a subjective measurement of official conduct. See *Bryan v. Jones*, 530 F.2d 1210, 1214 (5th Cir. 1976) (en banc). Under the objective test of *Wood*, an official, even if he is acting in the sincere subjective belief that he is doing right, loses his cloak of qualified immunity if his actions contravene “settled, indisputable law.” 95 S. Ct. at 1000. *Navarette* brought the objective part of the *Wood* formulation forward without alteration by this language:

Under the first part of the *Wood v. Strickland* rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm. 98 S. Ct. at 860.

[30] Under that second branch of the official immunity doctrine, an official forfeits his immunity, if whatever the objective state of the law at the time of his conduct, his subjective intent was to harm the plaintiff. However, *Wood* did not definitively establish the extent to which conduct less egregious than an affirmative intent to harm—simple negligence, gross negligence or recklessness—would satisfy the subjective “malicious intent” requirement. *Navarette* appears to fill in that deficiency. The holding in *Navarette* squarely establishes that proof of simple negligence is not enough to pierce an official’s immunity under § 1983.

* * * * *

[31] [W]e read the malicious intent prong of the official immunity defense to require proof that an official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result. The spirit of the rule reaches nonfeasance as well as misfeasance. It does not insulate an official who, although not possessed of any actual malice or intent to harm, is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inaction. At the same time, however, the test requires that a plaintiff show that the official’s action, although labeled as “reckless” or “grossly negligent,” falls on the actual intent side of those terms, rather than on the side of simple negligence.

* * * * *

IV. THE DIRECTED VERDICT

[32] The district court directed a verdict in favor of Cook, Collier and Byars on the issue of whether their conduct rose to the level of willful, wanton or gross negligence. That verdict on the qualified immunity issue must be evaluated in light of *Wood* and the subsequent gloss of *Navarette*. Inquiry must be made into the subjective intent of Cook, Collier, and Byars, and the objective reasonableness of their actions when compared to the state of constitutional law concerning prisoners and prison conditions during the period from 1969 to 1970.

* * * * *

[33] Only Cook is implicated by the jury’s verdict in the shooting, and only Collier in the stabbing; Cook and Byars are implicated in the summary punishments. ^[2]

The evidence regarding the defendant’s qualified immunity will be discussed separately with regard to each claim.

A. The Shooting

[34] On February 25, 1971, the day Bogard was shot, Thomas Cook was Superintendent at Parchman. Cook was not present at the location of the shooting or in any sense directly involved in the incident. Bogard attempts to affix liability on Cook for the shooting by alleging that his injury was caused by Cook's failure to properly administer the trusty guard system in the face of knowledge by Cook that the system was corrupt, disorderly and fraught with violence. Specifically, Bogard cites evidence that inmates were selected for the job of trusty shooter through a system of payoffs, favoritism and extortion, that those selected were often either serving time for crimes of violence, were mentally retarded or were suffering from psychological disorders, that after selection those chosen were not trained in the use of firearms or instructed as to proper procedures for the handling of an event such as an inmate "buck," and that the ultimate product of the system was a regime of incessant armed violence on the part of the trusty shooters.

[35] Gates established that the picture Bogard paints of the trusty shooter system is an accurate one:

Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes, and that of the armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders. There is no formal program at Parchman for training trusties and they are instructed to maintain discipline by shooting at inmates who get out of the gun line; in many cases, trusties have received little training in the handling of firearms. Inmates have, on many occasions, suffered injuries and abuses as a result of the failure to select, train, supervise and maintain an adequate custodial staff. Trusties have abused their position to engage in loan-sharking, extortion and other illegal conduct in dealing with inmates subject to their authority and control. The evidence indicates that the use of trusties who exercise authority over fellow inmates has established intolerable patterns of physical mistreatment. For example, during the Cook administration, 30 inmates received gunshot wounds, an additional 29 inmates were shot at, and 52 inmates physically beaten.

349 F. Supp. at 889. It is no less accurate to state that the deplorable state of the trusty system was a proximate cause of Bogard's shooting injury and that Cook was negligent in performing his duty to properly administer the system. The jury specifically found that Cook was negligent in his duties and that Cook's negligence was a proximate cause of the shooting.

[36] To hold Cook personally liable, however, Bogard must overcome Cook's qualified immunity. The district court held that there was insufficient evidence to create a jury question on whether Cook was guilty of anything worse than negligence. Applying the *Navarette* qualified immunity formulation, we agree with the district court that a directed verdict was proper.

[37] The indiscriminate violence of the trusty shooters at Parchman was primarily the result of factors endemic to the trusty system itself. Although the jury could properly have found that Cook's failings as an administrator exacerbated an already corrupt and disorderly system, Cook's complicity in failing to correct abuses does not rise to the level of reckless conduct, and certainly falls short of the malicious intent required by *Wood* and *Navarette*. At the time of Cook's administration, state law restricted the superintendent to 150 civilian employees with whom to operate the prison, and only about 30 of those employees could feasibly be allocated to the actual work of guarding inmates. The nearly 2000 felons housed at Parchman were crammed in rundown and unsanitary quarters, and the superintendent had no funds or authorization to alleviate those explosive physical conditions. State law required Cook to use inmates to guard other inmates, but the legislature appropriated no money for obtaining the necessary staffing or expertise to psychologically test inmates for the position. The physical separation of the 12 residential camps necessitated that actual day-to-day supervision of prisoners be committed to the residential camp sergeants, and that selection for trusty status and demotions

to the gunman level be placed largely in their hands. Corruption and violence within the trusty system at Parchman were entrenched by years of operation under these conditions.

[38] The only meaningful solution to the problems of the trusty system was its total elimination, the result ordered in *Gates*. If Cook had had at his disposal the means to eliminate the violent system but failed to do so, that failure would clearly make a jury issue as to whether it amounted to the malicious intent described in *Navarette*. But Cook was not only unauthorized to institute the only reform that would have been likely to eliminate the type of shooting suffered by Bogard, he was largely unable to take any meaningful intermediate step. Proper selection and adequate training of trusty shooters at Parchman was delegated by necessity to camp sergeants. If Cook failed to do the best he could with what he had, his failure was largely his admitted lack of control over those sergeants. In his brief Cook acknowledged that each sergeant “was almost like a warden of a separate unit,” and that the sergeants were protective of their independence and “resented interference from the administration building.” Although the jury found that Sergeant Childs at Camp Eight was not grossly negligent in his duties a factor that tends to blunt Bogard’s assertion that Cook was grossly negligent in delegating responsibility to him the record and the findings in *Gates* support the inference that it was the unbridled tyranny of camp sergeants at Parchman that fueled much of the violence there. Yet, given the financial resources and limitations on the number of guards he could hire, the Parchman superintendent could do little more to hire high quality camp sergeants than he could to eliminate the trusty system or build new housing. Superintendent Cook’s administration of Parchman was not a paragon, but nothing in the record showed it to be anything more than an inability to cope with a virtually hopeless situation, which the jury equated with a negligent failure to do as good a job as could reasonably have been done under these limitations.

B. The Stabbing

[39] Slicker Davis’ vicious stabbing of Bogard on July 7, 1972, like Bogard’s shooting injury, is more an indictment of Parchman itself than a result of personal involvement by prison supervisors. Bogard attempts to establish the liability of Superintendent Collier by asserting that Collier should have employed either metal detectors or frequent body searches to eliminate the widespread possession by inmates of weapons such as Slicker Davis’ knife, that Collier should have provided for the segregation of violent inmates such as Slicker Davis from nonviolent inmates like Bogard, and that Bogard should not have been required as part of his duties as half-trusty to supervise inmates such as Slicker Davis when such contact was an obvious and predictable source of resentment and violence.

[40] As in the case of the shooting, the causative factors Bogard lists for his stabbing are essentially accurate. There is no disputing the existence of the widespread possession of weaponry at Parchman, the failure to insulate the nonviolent from the violent or disturbed, and the charged atmosphere of resentment, suspicion and retaliation that was created by putting inmates in charge of other inmates. In *Gates* it was stated that:

Defendants have failed to properly classify and assign inmates to barracks, resulting in the intermingling of inmates convicted of aggravated violent crimes with those who are first offenders or convicted of nonviolent crimes... .

Although many inmates possess knives or other handmade weapons, there is no established requirement or procedure for conducting shakedowns to discover such weapons, nor is possession of weapons reported or punished. At least 85 instances are revealed by the record where inmates have been physically assaulted by other inmates. Twenty-seven of these assaults involved armed attacks in which an inmate was either stabbed, cut or shot.

349 F. Supp. at 888-889.

[41] The jury found that Collier's own negligence was a contributing cause to the stabbing, but it strains credibility to assert that his failures to curb the possession of arms, properly classify inmates, or do away with the trusty system were in any sense the product of a subjective intent to cause harm.

[42] Collier was no less constrained by state law than Cook in being forced to use the trusty system. Allowing inmates such as Bogard to be used as half-trusty "hallboys" may have contributed to problems at Parchman, but half-trustys were necessary if Parchman were to be run. Mississippi, with its limit on money and guards, mandated that inmates should help run their own prison; the resentment which that requirement spawned was inevitable and beyond Collier's control.

[43] In hindsight it is obvious that it was a mistake to put Bogard and Slicker Davis in close contact. It is not clear, however, that the mistake can even be attributed to Collier, and it is definitely clear that if it was attributable to him, the mistake in no sense partook of an intent to harm Bogard. Camp 2, where Davis was housed, was reserved for those inmates suffering from a physical disability or who because of age or other infirmity were otherwise unable to perform Parchman's normal routine of farm work. Slicker Davis was apparently confined to Camp 2 because of an infectious disease. Davis had already been assigned to Camp 2 when Collier took over as Superintendent. Bogard's assignment to Camp 2 was also made prior to Collier's assumption of duties, that assignment followed as a matter of course after Bogard's shooting injury. Prior to the stabbing, there were no adverse reports concerning either Bogard or Davis which could have brought either man to Collier's attention, and Collier had apparently had no contact with either inmate before that date. Several experts testified that on the basis of Slicker Davis' file they would not have ordered him separated from other inmates. Collier's failure to examine Davis' file and then segregate Davis on his own initiative when no precipitating event had brought Davis to his attention can certainly not be characterized as the type of action or inaction which Navarette would condemn. It may well be that Parchman was generally deficient in its psychological testing of inmates and in its lack of physical facilities for the separation and supervision of the violent or disturbed, but as in the case of all the other major shortcomings of the prison, the primary cause was neglect by the State itself.

[44] As to the issue of weapons control, there was expert testimony that weapon possession is a problem in all prisons, and that prison administrators across the country have had only limited success in coping with the problem. Some prisons have installed airport-style weapons detectors and then abandoned their use because they fail to significantly reduce weapon possession. The record raises a substantial doubt as to whether metal detectors, had Collier decided to use them, and had he possessed funds to purchase them, would have even been obtainable. See 405 F. Supp. at 1211-12. Frequent physical searches are apparently the most effective means of combatting weapon possession, but a level of possession persists even under that method. The record shows that weapons searches did take place from time to time. Although weapons possession at Parchman was widespread and Collier appears to have taken no effective steps to bring it under control, his fault was not shown to be any worse than a negligent failure to adopt the best choice among the alternatives at his disposal.

C. The Summary Punishments

[45] The summary punishments Bogard complains of were of three types: incarceration in the punishment cell of the maximum security unit, incarceration in the dark hole, and the coke crate punishment. The incidents all occurred between June of 1969 and October of 1970. The punishments were alleged to be cruel and unusual, and inflicted without proper procedural due process.

[46] Bogard alleged that he was placed in a cell in the punishment wing of the maximum security unit six different times, for periods from two to thirty days. On at least two occasions, he claims, he was stripped naked when placed in the punishment cell, and as a matter of routine he was fed only once per day when confined there. In one instance he was allegedly confined in the punishment cell for three days and fed only once for the infraction of playing his radio too loudly. Bogard asserts four separate confinements in the dark hole, all

for periods of 24 hours. Each confinement included being stripped naked and having his head shaved with heavy duty clippers that he characterizes as sheep shears. Bogard complains of only one subjection to the coke crate punishment. The punishment was allegedly ordered by his residential camp sergeant for Bogard's failure to pick cotton fast enough; it consisted of being forced to stand on top of a coke crate box for an entire work day, for three consecutive days. These punishments are alleged to be cruel and unusual in their own right, and administered for petty offenses disproportionate to their severity. The dark hole and coke crate punishments were claimed to have been inflicted without any due process safeguards.

[47] There is ample evidence in the record that the punishment practices Bogard complains of were in routine use during the 1969-1970 period at Parchman. Gates established a lack of procedural due process in the use of severe punishments, and the fact that, as they were administered, the dark hole and punishment cell violated the eighth amendment. Gates also explicitly found that the Parchman superintendent and other prison officials acquiesced in the unconstitutional punishment procedures:

Mr. Cook defended the use of the dark hole as a necessary type of psychological punishment for inmates who are obstreperous, obstinate violators of penitentiary discipline, and favored that method in preference to inflicting corporal punishment by the lash. When this action was begun, however, the practice was to place inmates in the dark hole naked, without any hygienic materials, and often without adequate food. It was customary to cut the hair of an inmate confined in the dark hole by means of heavy-duty clippers described by inmates as sheep shears, which in some cases resulted in injury. Under the present practice inmates have frequently been kept in the dark hole for 48 hours and may be confined therein for up to 72 hours. While an inmate occupies the dark hole, the cell is not cleaned, nor is the inmate permitted to wash himself.

Although Superintendents Cook and Collier have issued instructions prohibiting mistreatment in the enforcement of discipline, the record is replete with innumerable instances of physical brutality and abuse in disciplining inmates who are sent to MSU (Maximum Security Unit). These include administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials and adequate food, handcuffing inmates to the fence and to cells for long periods of time, shooting at and around inmates to keep them standing or lying in the yard at MSU, and using a cattle prod to keep inmates standing or moving while at MSU. Indeed, the superintendents and other prison officials acquiesced in these punishment procedures.

349 F. Supp. at 890.

[48] The testimony of Cook and Byars indicates that they were fully aware of the nature of the dark hole and punishment cell and the indignities incident to those punishments. Head shaving with heavy clippers, for example, was defended by Cook as a badge of infamy that increased the psychological effectiveness of the dark hole; stripping of inmates for punishment was allegedly done for the inmates' own protection. Byers admitted in this testimony that he was aware of the use of the coke crate punishment at Camp 8, as well as the use of camp punishments at other residential camps.

[49] The jury found that Cook and Byars had subjected Bogard to cruel and unusual punishment and deprivations of due process. The jury did not answer the question which asked whether Bogard suffered injury as a result of these constitutional violations but the jury did award him a total of \$80,000 damages for the due process violations and cruel and unusual punishments. When the jury's verdict and the findings in *Gates* are combined, the result is a conclusion that Cook and Byers were personally involved in subjecting Bogard to constitutional violations.

[50] The qualified immunity issue is more complex in the context of the summary punishments than in the context of the stabbing or shooting. Virtually by definition, infliction of the punishments involved a subjective intent to cause harm. Cook and Byars knew what the punishments consisted of, and in the case of punishments such as the dark hole, had to personally authorize each instance of their use. Harm, in the sense

of “teaching an inmate a lesson,” was the obvious objective of punishment at Parchman. If intent of this sort is enough to satisfy the subjective prong of *Wood* and *Navarette*, the ultimate finding that the punishments were unconstitutional would complete the establishment of the defendant’s liability.

[51] To define the defendant’s subjective state of mind by a mechanical equation of punishment with intent, however, would ultimately eliminate the qualified immunity defense in the context of eighth amendment violations. If intent to harm is involved in any punishment that later turns out to be unconstitutional, the effect is to accomplish what the first prong of *Wood* specifically forbids: the imposition of liability for the failure to predict the future course of constitutional law. See *Wood*, 95 S. Ct. at 1001; [*O’Connor v. Donaldson*](#), 422 U.S. 563, 95 S. Ct. 2486, 2495, 45 L. Ed.2d 396 (1975); *Pierson v. Ray*, 386 U.S. 547, 557, 87 S. Ct. 1213, 1219, 18 L. Ed.2d 288 (1967). If Cook and Byars could not have known in 1969-1970 that the punishment practices at Parchman were unconstitutional, they may not now be held liable merely because punishment inherently tends to connote an intent to cause harm. The record does not support any assertion that Cook or Byars harbored any subjective malicious desire to “get” Bogard as a specific individual. The overall subjective intent inquiry thus requires a limited objective inquiry into what Cook and Byars should have known about the legality of the punishments they sanctioned. Only if the punishments suffered by Bogard were clearly unconstitutional in 1969-1970 can it be said that Byars or Cook acted in bad faith. Under this formulation of the qualified immunity issue, it can be seen that the liability of the defendants for the summary punishments does not turn on a jury question at all. Since no issue of particularized malice toward Bogard was present, the only factual issues were the actual existence of eighth amendment and due process violations against Bogard issues which the jury resolved in Bogard’s favor. Whether the defendants should have known that their conduct violated the constitution is a purely legal inquiry that may be determined on this appeal.

[52] In 1969 and 1970, there was yet to be a decision of either this court, the Mississippi Supreme Court, or the United States Supreme Court that could have alerted the defendants that the punishments Bogard suffered were unconstitutional. At that time, federal courts were still generally reluctant to interfere with prison administration. The so-called “hands off” doctrine, see 18 A.L.R. Fed. 7 (1974), usually resulted in the denial of relief under federal civil rights acts for practices such as corporal punishment, punitive segregation, or harsh confinement conditions.

[53] The grant of relief in prisoner suits of this type did not begin in this circuit until 1972... . It was *Gates v. Collier* in 1974, however, that first marked a broad-scale intervention by this court in the supervision of prison practices.

[54] 1974 also recorded the Supreme Court’s most meaningful recognition of due process rights of prisoners in [*Wolff v. McDonnell*](#), 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed.2d 935 (1974), but the Court expressly held that Wolff’s new pronouncement should not be given retroactive effect. This court’s decision affirming the district court in *Gates* was held in abeyance pending the decision in *Wolff*, *Gates v. Collier*, 501 F.2d at 1295 (1974), further attesting to the unsettled state of the law prior to that decision.

[55] Experts testified that punishments such as the dark hole were in common use in prisons around the country in 1969-1970. We acknowledged the national use of punishment cells similar to Parchman’s in *Novak*. 453 F.2d at 665. See also *Poindexter v. Woodson*, 510 F.2d 464, 465 (10th Cir. 1975) (noting the prevalence of solitary “strip cell” confinement in United States prisons). Clearly, the dark hole and punishment cells were long established procedures at Parchman. Perhaps most telling of all, Mississippi law expressly authorized use of the dark hole punishment for up to 24 hours. MISS. CODE § 47-5-145. The defendants cannot be held liable for failing to predict that an existing state statute would later be found constitutionally deficient. See *Jagnandan v. Giles*, 538 F.2d 1166, 1173 (5th Cir. 1976). In short, the law of 1970 was not highly protective of prisoners’ rights and courts were reluctant to intrude into the prison administrator’s domain. The defendants cannot reasonably be charged with knowledge that the punishment practices at Parchman were unconstitutional.

V. CONCLUSION

[56] Bogard proved his case against Parchman itself, but not against the individual defendants. The state was not and could not be brought before this Court, however, and it does not serve the ends of justice to fix monetary accountability on the state's employees when they did little more than administer their positions during a time of state perpetuation of intolerable conditions over which they had no meaningful control. The absence of evidence in the record of malicious intent by prison officials, and the still dormant state of judicial recognition of prisoners' rights in 1970 establishes that they were entitled to the defense of official immunity, which, as the district court correctly held, precluded their liability.

Affirmed.

Footnotes

1. Interrogatory number 36 asked the jury what damages would compensate Bogard for his various injuries. The jury awarded Bogard \$20,000 compensation for his cruel and unusual punishments and \$20,000 for his deprivations of due process during the Cook administration at Parchman, and another \$20,000 for cruel and unusual punishments and \$20,000 for deprivations of due process during Collier's administration. The jury found, in addition, that \$20,000 would compensate Bogard for his shooting injury and \$400,000 would compensate him for his stabbing injury. [↴](#)
2. Collier is not implicated in the shooting or the summary punishments because those incidents occurred prior to his assumption in office. The jury found that Cook was not implicated in the stabbing, which took place after he left Parchman. Byar's negligence was found by the jury not to be a proximate cause of either the shooting or stabbing, leaving him potentially liable only for the summary punishments. [↴](#)

Notes on *Bogard v. Cook*

1. An essential component of any scheme of constitutional protection is the legal system's willingness to award a meaningful remedy to persons injured by the government's deprivation of individual liberty. English common law^[1] and international human rights instruments demand that victims of official misconduct have recourse to effective relief.^[2] As Chief Marshall recognized in [Marbury v. Madison](#), 5 U.S. (1 Cranch) [137, 163 (1803)]

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Traditional courses in constitutional law, which analyze the boundaries of rights guaranteed by the United States Constitution but ignore the circumstances under which a remedy will or will not be afforded for transgression of those rights, fail to identify the true protections afforded by the Constitution. This book instead begins with the premise that constitutional rights have been violated and focuses upon the availability of remedies for such violations.

2. While the United States Constitution establishes individual rights protected against incursion by the government, the charter does not generally provide remedies for breach of those rights. Consequently, Congress and the courts have borne the responsibility of creating and demarcating remedies for deprivations of constitutional rights. In other words, where a constitutional right has been invaded by the government or its officials, the government itself furnishes the remedy. The extent of our government's willingness to afford redress for its own misconduct is perhaps the most telling test of whether it is indeed a "government of laws" as well as a rightful measure of the individual rights guaranteed by the Constitution.
3. *Bogard v. Cook* introduces several of the issues confronted in civil liberties litigation, although the contours of the substantive law have changed in the years following the *Bogard* decision. The overarching question is, given that an individual's constitutional rights have been violated, who should bear the loss resulting from that violation?
 - a. As a matter of policy, who should bear the risk of loss from constitutional deprivations? The individual government official who caused the violation? The government entity that employs the official who caused the violation? The individual government official and the entity? The victim?
 - b. How is the risk of loss allocated among private actors under our common law tort system? Should the risk allocation differ for constitutional violations caused by government actors?
 - c. Under what conditions should our legal system impose liability for constitutional violations? Should the government and its employees be strictly liable for all constitutional violations? Liable for violations caused by negligent conduct? Reckless conduct? Only intentional violations of the Constitution?
 - d. What degree of defendant's culpability must an injured person prove to recover damages for tortious conduct by private actors? Should the standard of culpability differ for deprivations of constitutional rights caused by government actors?
4. For each of the incidents in *Board*—the shooting, the stabbing and the summary punishment:
 - a. Which person(s) did Bogard seek to hold liable?
 - b. For what conduct did Bogard attempt to hold the defendant(s) liable?
 - c. Did the court find that the defendant(s) violated Bogard's constitutional rights?
 - d. With what degree of culpability did the court find the defendant(s) acted?
 - e. Was the defendant(s) held liable? Why or why not?

Notes

1. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 109 (London, A. Strahan 1803) ("[I]t is a [well] settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress."); *Ashby v. White*, (1703) 92 Eng. Rep. 126 (K.B.) (awarding 200 pounds to plaintiff for denial of the right to vote) ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it [A]nd indeed it is a vain thing to imagine a right without a remedy; for want of [a] right and want of [a] remedy are reciprocal."). See also ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 198 (10th ed. 1959) ("[T]he question

[of] whether the right to personal freedom ... is likely to be secure depend[s] a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up[on] the constitution[s] of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured.”); Lord Denning, *Misuse of Power*, AUSTR. L.J. 720, 720 (1981) (“The only admissible remedy for any [misuse] of power—in a civilized society—is by recourse to law. In order to ensure this recourse, it is important that the law itself should provide adequate and efficient remedies for [the] abuse or misuse of power from whatever quarter it may come.”); see also *Nelles v. Ontario* [1989] 2 S.C.R. 170 (Can.) (“[A]ccess to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the [Canadian] Charter [of Rights and Freedoms] which surely is to allow the courts to fashion remedies when constitutional infringements occur.”) (emphasis added).

2. See Universal Declaration of Human Rights, G.A. Res. 217A, at art. 8, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the [C]onstitution or by law.”); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 2, U.N. Doc. A/6316 (Dec. 16, 1966) (“Each State Party to the present Covenant undertakes: to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ”); International Convention on the Elimination of All Forms of Discrimination, G.A. Res. 2106 (XX, at art. 6, U.N. Doc. A/6014 (Dec. 12, 1965) (“State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”); American Convention on Human Rights art. 25(1), July 18, 1978, 1144 U.N.T.S. 128 (“Everyone has the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation[s] may have been committed by persons acting in the course of their official duties.”).

II. LIABILITY OF STATE AND LOCAL GOVERNMENT OFFICIALS: THE PRIMA FACIE CASE

A. Introduction to Section 1983

42 U.S.C. § 1983

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 any 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.

MONROE v. PAPE, 365 U.S. 167 (1961)



Mr. Justice Douglas delivered the opinion of the Court.

[1] This case presents important questions concerning the construction of R.S. § 1979, 42 U.S.C. § 1983, which reads as follows:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.”

[2] The complaint alleges that 13 Chicago police officers broke into petitioners’ home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on “open” charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, and that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant and that they acted “under color of the statutes, ordinances, regulations, customs and usages” of Illinois and of the City of Chicago. Federal jurisdiction was asserted under R.S. § 1979, which we have set out above, and 28 U.S.C. § 1343 ^[1]

28 U.S.C. § 1331. ^[2]

Subsection (a) provides: “The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.” In their complaint, petitioners also invoked R.S. §§ 1980, 1981, 42 U.S.C. §§ 1985, 1986. Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by § 1979. Accordingly, only that section is before us.

[3] The City of Chicago moved to dismiss the complaint on the ground that it is not liable under the Civil Rights Acts nor for acts committed in performance of its governmental functions. All defendants moved to dismiss, alleging that the complaint alleged no cause of action under those Acts or under the Federal Constitution. The District Court dismissed the complaint. The Court of Appeals affirmed, 272 F.2d 365, relying on its earlier decision, *Stift v. Lynch*, 267 F.2d 237. The case is here on a writ of certiorari which we granted because of a seeming conflict of that ruling with our prior cases. 362 U.S. 926.

I.

[4] Petitioners claim that the invasion of their home and the subsequent search without a warrant and the arrest and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their “rights, privileges, or immunities secured by the Constitution” within the meaning of R.S. § 1979. It has been said that when 18 U.S.C. § 241 made criminal a conspiracy “to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution,” it embraced only rights that an individual has by reason of his relation to the central government, not to state governments. *United States v. Williams*, 341 U.S. 70. *Cf. United States v. Cruikshank*, 92 U.S. 542; *Ex parte Yarbrough*, 110 U.S. 651; *Guinn v. United States*, 238 U.S. 347. But the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation.

[5] Section 1979 came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment. Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:

“The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution,” viz., the Fourteenth Amendment.

[6] Its purpose is plain from the title of the legislation, “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.” 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R.S. § 1979. *See Douglas v. Jeannette*, 319 U.S. 157, 161-162. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25; *Elkins v. United States*, 364 U.S. 206, 213.

II.

[7] There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. *See Home Tel. & Tel. Co. Los Angeles*, 227 U.S. 278, 287-296. The question with which we now deal is the narrower one

of whether Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Cf. *Williams v. United States*, 341 U.S. 97; *Screws v. United States*, 325 U.S. 91; *United States v. Classic*, 313 U.S. 299. We conclude that it did so intend.

[8] It is argued that “under color of” enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did. In this case it is said that these policemen, in breaking into petitioners’ apartment, violated the Constitution and laws of Illinois. It is pointed out that ^[3] under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioners that full redress which the common law affords for violence done to a person; and it is earnestly argued that no “statute, ordinance, regulation, custom or usage” of Illinois bars that redress.

[9] The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871, reading:

“A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States
“

[10] The legislation—in particular the section with which we are now concerned—had several purposes. There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section had three main aims.

[11] *First*, it might, of course, override certain kinds of state laws. Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws:

“The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.”

[12] *Second*, it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio:

“... it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.”

[13] But the purposes were much broader. The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The opposition to the measure complained that “It overrides the reserved powers of the States,” ^[4] just as they argued that the second section of the bill “absorb[ed] the entire jurisdiction of the States over their local and domestic affairs.”

[14] This Act of April 20, 1871, sometimes called “the third ‘force bill,’” was passed by a Congress that had the Klan “particularly in mind.” The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it. ^[5] This report was drawn on by many of the speakers. It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this “force bill.”

Mr. Lowe of Kansas said:

“While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective.

Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.”

[15] Mr. Beatty of Ohio summarized in the House the case for the bill when he said:

“... certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable.... Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.”

[16] While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law.

[17] Mr. Hoar of Massachusetts stated:

“Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens.”

* * * * *

[18] It was precisely that breadth of the remedy which the opposition emphasized. Mr. Kerr of Indiana referring to the section involved in the present litigation said:

“This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. The offenses committed against him may be the common violations of the municipal law of his State. It may give rise to numerous vexations and outrageous prosecutions, inspired by mere mercenary considerations, prosecuted in a spirit of plunder, aided by the crimes of perjury and subornation of perjury, more reckless and dangerous to society than the alleged offenses out of which the cause of action may have arisen. It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content and prosperity to the disturbed society of the South. The contrary will certainly be its effect.”

[19] Senator Thurman of Ohio spoke in the same vein about the section we are now considering:

“It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.”

[20] The debates were long and extensive. It is abundantly clear that one reason the legislation was

passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

* * * * *

[21] Opponents of the Act, however, did not fail to note that by virtue of § 1 federal courts would sit in judgment on the misdeeds of state officers. Proponents of the Act, on the other hand, were aware of the extension of federal power contemplated by every section of the Act. They found justification, however, for this extension in considerations such as those advanced by Mr. Hoar:

“The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights.”

[22] Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and over again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

[23] We had before us in *United States v. Classic*, *supra*, § 20 of the Criminal Code, 18 U.S.C. § 242, which provides a criminal punishment for anyone who “under color of any law, statute, ordinance, regulation, or custom” subjects any inhabitant of a State to the deprivation of “any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” Section 242 first came into the law as § 2 of the Civil Rights Act, Act of April 9, 1866, 14 Stat. 27. After passage of the Fourteenth Amendment, this provision was re-enacted and amended by §§ 17, 18, Act of May 31, 1870, 16 Stat. 140, 144. The right involved in the *Classic* case was the right of voters in a primary to have their votes counted. The laws of Louisiana required the defendants “to count the ballots, to record the result of the count, and to certify the result of the election.” *United States v. Classic*, *supra*, 325-326. But according to the indictment they did not perform their duty. In an opinion written by Mr. Justice (later Chief Justice) Stone, in which Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Frankfurter joined, the Court ruled, “Misuse 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.” *Id.*, 326. There was a dissenting opinion; but the ruling as to the meaning of “under color of” state law was not questioned.

[24] That view of the meaning of the words “under color of” state law, 18 U.S.C. § 242, was reaffirmed in *Screws v. United States*, *supra*, 108-113. The acts there complained of were committed by state officers in performance of their duties, *viz.*, making an arrest effective. It was urged there, as it is here, that “under color of” state law should not be construed to duplicate in federal law what was an offense under state law. *Id.* (dissenting opinion) 138-149, 157-161. It was said there, as it is here, that the ruling in the *Classic* case as to the meaning of “under color of” state law was not in focus and was ill-advised. *Id.* (dissenting opinion) 146-147. It was argued there, as it is here, that “under color of” state law included only action taken by officials pursuant to state law. *Id.* (dissenting opinion) 141-146. We rejected that view. *Id.*, 110-113 (concurring opinion) 114-117. We stated:

“The construction given § 20 [18 U.S.C. § 242] in the *Classic* case formulated a rule of law which has

become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only.

[25] Mr. Shellabarger, reporting out the bill which became the Ku Klux Act, said of the provision with which we now deal:

“The model for it will be found in the second section of the act of April 9, 1866, known as the ‘civil rights act.’ ... This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights....”

Thus, it is beyond doubt that this phrase should be accorded the same construction in both statutes—in § 1979 and in 18 U.S.C. § 242.

[26] Since the *Screws* and *Williams* decisions, Congress has had several pieces of civil rights legislation before it. In 1956 one bill reached the floor of the House. This measure had at least one provision in it penalizing actions taken “under color of law or otherwise.” A vigorous minority report was filed attacking, inter alia, the words “or otherwise.” But not a word of criticism of the phrase “under color of” state law as previously construed by the Court is to be found in that report.

[27] Section 131(c) of the Act of September 9, 1957, 71 Stat. 634, 637, amended 42 U.S.C. § 1971 by adding a new subsection which provides that no person “whether acting under color of law or otherwise” shall intimidate any other person in voting as he chooses for federal officials. A vigorous minority report was filed attacking the wide scope of the new subsection by reason of the words “or otherwise.” It was said in that minority report that those words went far beyond what this Court had construed “under color of law” to mean. But there was not a word of criticism directed to the prior construction given by this Court to the words “under color of” law.

[28] The Act of May 6, 1960, 74 Stat. 86, uses “under color of” law in two contexts, once when § 306 defines “officer of election” and next when § 601 (a) gives a judicial remedy on behalf of a qualified voter denied the opportunity to register. Once again there was a Committee report containing minority views. Once again no one challenged the scope given by our prior decisions to the phrase “under color of” law.

[29] If the results of our construction of “under color of” law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States’ rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which “under color of” law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.

[30] We conclude that the meaning given “under color of” law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it.

[31] In the *Screws* case we dealt with a statute that imposed criminal penalties for acts “wilfully” done. We construed that word in its setting to mean the doing of an act with “a specific intent to deprive a person of a federal right.” 325 U.S., at 103. We do not think that gloss should be placed on § 1979 which we have here. The word “wilfully” does not appear in § 1979. Moreover, § 1979 provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

[32] So far, then, the complaint states a cause of action. There remains to consider only a defense peculiar to the City of Chicago.

* * * * *

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

[33] Were this case here as one of first impression, I would find the “under color of any statute” issue very

close indeed. However, in *Classic* and *Screws* this Court considered a substantially identical statutory phrase to have a meaning which, unless we now retreat from it, requires that issue to go for the petitioners here.

[34] From my point of view, the policy of stare decisis, as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear beyond doubt from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified. Since I can find no such justifying indication in that legislative history, I join the opinion of the Court. However, what has been written on both sides of the matter makes some additional observations appropriate.

[35] Those aspects of Congress' purpose which are quite clear in the earlier congressional debates, as quoted by my Brothers Douglas and Frankfurter in turn, seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority by an official. One can agree with the Court's opinion that:

"It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."

without being certain that Congress meant to deal with anything other than abuses so recurrent as to amount to "custom, or usage." One can agree with my Brother Frankfurter, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes, without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern. If attention is directed at the rare specific references to isolated abuses of state authority, one finds them neither so clear nor so disproportionately divided between favoring the positions of the majority or the dissent as to make either position seem plainly correct.

[36] Besides the inconclusiveness I find in the legislative history, it seems to me by no means evident that a position favoring departure from *Classic* and *Screws* fits better than with which the enacting Congress was concerned than does the position the Court adopted 20 years ago. There are apparent incongruities in the view of the dissent which may be more easily reconciled in terms of the earlier holding in *Classic*.

[37] The dissent considers that the "under color of" provision of §1983 distinguishes between unconstitutional actions taken without state authority, which only the State should remedy, and unconstitutional actions authorized by the State, which the Federal Act was to reach. If so, then the controlling difference for the enacting legislature must have been either that the state remedy was more adequate for unauthorized actions than for authorized ones or that there was, in some sense, greater harm from unconstitutional actions authorized by the full panoply of state power and approval than from unconstitutional actions not so authorized or acquiesced in by the State. I find less than compelling the evidence that either distinction was important to that Congress.

I.

[38] If the state remedy was considered adequate when the official's unconstitutional act was unauthorized, why should it not be thought equally adequate when the unconstitutional act was authorized? For if one thing is very clear in the legislative history, it is that the Congress of 1871 was well aware that no action requiring state judicial enforcement could be taken in violation of the Fourteenth Amendment without that enforcement being declared void by this Court on direct review from the state courts. And presumably it must also have been understood that there would be Supreme Court review of the denial of a state damage remedy against an official on grounds of state authorization of the unconstitutional action. It therefore seems

to me that the same state remedies would, with ultimate aid of Supreme Court review, furnish identical relief in the two situations.

* * * * *

[39] Since the suggested narrow construction of § 1983 presupposes that state measures were adequate to remedy unauthorized deprivations of constitutional rights and since the identical state relief could be obtained for state-authorized acts with the aid of Supreme Court review, this narrow construction would reduce the statute to having merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings in cases involving authorized action. Such a function could be justified on various grounds. It could, for example, be argued that the state courts would be less willing to find a constitutional violation in cases involving “authorized action” and that therefore the victim of such action would bear a greater burden in that he would more likely have to carry his case to this Court, and once here, might be bound by unfavorable state court findings. But the legislative debates do not disclose congressional concern about the burdens of litigation placed upon the victims of “authorized” constitutional violations contrasted to the victims of unauthorized violations. Neither did Congress indicate an interest in relieving the burden placed on this Court in reviewing such cases.

[40] The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter, ^[6] is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. For example, the tone is surely one of overflowing protection of constitutional rights, and there is not a hint of concern about the administrative burden on the Supreme Court....

[41] Senator Carpenter reflected a similar belief that the protection granted by the statute was to be very different from the relief available on review of state proceedings:

“The prohibition in the old Constitution that no State should pass a law impairing the obligation of contracts was a negative prohibition laid upon the State. Congress was not authorized to interfere in case the State violated that provision. It is true that when private rights were affected by such a State law, and that was brought before the judiciary, either of the State or nation, it was the duty of the court to pronounce the act void; but there the matter ended. Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil.”

“I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution. It gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose.”

Id., at 577.

In my view, these considerations put in serious doubt the conclusion that § 1983 was limited to state-authorized unconstitutional acts, on the premise that state remedies respecting them were considered less adequate than those available for unauthorized acts.

* * * * *

Mr. Justice Frankfurter, dissenting except insofar as the Court holds that this action cannot be maintained against the City of Chicago.

[42] Abstractly stated, this case concerns a matter of statutory construction. So stated, the problem before the Court is denuded of illuminating concreteness and thereby of its far-reaching significance for our federal system. Again abstractly stated, this matter of statutory construction is one upon which the Court has already passed. But it has done so under circumstances and in settings that negate those considerations of social policy upon which the doctrine of *stare decisis*, calling for the controlling application of prior statutory construction, rests.

* * * * *

[43] If the question whether due process forbids this kind of police invasion were before us in isolation, the answer would be quick. If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation to which the language in the *Wolf* opinion was addressed: “we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.” 338 U.S., at 28. If that issue is not reached in this case it is not because the conduct which the record here presents can be condoned. But by bringing their action in a Federal District Court petitioners cannot rest on the Fourteenth Amendment simpliciter. They invoke the protection of a specific statute by which Congress restricted federal judicial enforcement of its guarantees to particular enumerated circumstances. They must show not only that their constitutional rights have been infringed, but that they have been infringed “under color of [state] statute, ordinance, regulation, custom, or usage,” as that phrase is used in the relevant congressional enactment.

* * * * *

[44] Insofar as the Court undertakes to demonstrate—as the bulk of its opinion seems to do—that § 1979 was meant to reach some instances of action not specifically authorized by the avowed, apparent, written law inscribed in the statute books of the States, the argument knocks at an open door. No one would or could deny this, for by its express terms the statute comprehends deprivations of federal rights under color of any “statute, ordinance, regulation, *custom*, or *usage*” of a State. (Emphasis added.) The question is, *what* class of cases other than those involving state statute law were meant to be reached. And, with respect to this question, the Court’s conclusion is undermined by the very portions of the legislative debates which it cites. For surely the misconduct of individual municipal police officers, subject to the effective oversight of appropriate state administrative and judicial authorities, presents a situation which differs *toto coelo* from one in which “Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress,” or in which murder rages while a State makes “no successful effort to bring the guilty to punishment or afford protection or redress,” or in which the “State courts ... [are] unable to enforce the criminal laws ... or to suppress the disorders existing,” or in which, in a State’s “judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another,” or “of ... hundreds of outrages ... not one [is] punished,” or “the courts of the ... States fail and refuse to do their duty in the punishment of offenders against the law,” or in which a “class of officers charged under the laws with their administration permanently and as a rule refuse to extend [their] protection.” These statements indicate that Congress made keenly aware by the post-bellum conditions in the South that States through their authorities could sanction offenses against the individual by settled practice which established state law as truly as written codes—designed § 1979 to reach, as well, official conduct which, because engaged in “permanently and as a rule,” or “systematically,” came through acceptance by law-administering officers to constitute “custom, or usage” having the cast of law. See *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369. They do not indicate an attempt to reach, nor does the statute by its terms include, instances of acts in

defiance of state law and which no settled state practice, no systematic pattern of official action or inaction, no “custom, or usage, of any State,” insulates from effective and adequate reparation by the State’s authorities.

[45] Rather, all the evidence converges to the conclusion that Congress by § 1979 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some “statute, ordinance, regulation, custom, or usage” sanctioned the grievance complained of. This purpose, manifested even by the so-called “Radical” Reconstruction Congress in 1871, accords with the presuppositions of our federal system. The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.

* * * * *

[46] Relevant also are the effects upon the institution of federal constitutional adjudication of sustaining under § 1979 damage actions for relief against conduct allegedly violative of federal constitutional rights, but plainly violative of state law. Permitting such actions necessitates the immediate decision of federal constitutional issues despite the admitted availability of state-law remedies which would avoid those issues. This would make inroads, throughout a large area, upon the principle of federal judicial self-limitation which has become a significant instrument in the efficient functioning of the national judiciary. See *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496, and cases following. Self-limitation is not a matter of technical nicety, nor judicial timidity. It reflects the recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power. Especially is this true where the circumstances under which those ultimate determinations must be made are not conducive to the most mature deliberation and decision. If § 1979 is made a vehicle of constitutional litigation in cases where state officers have acted lawlessly at state law, difficult questions of the federal constitutionality of certain official practices—lawful perhaps in some States, unlawful in others—may be litigated between private parties without the participation of responsible state authorities which is obviously desirable to protect legitimate state interests, but also to better guide adjudication by competent recordmaking and argument.

[47] Of course, these last considerations would be irrelevant to our duty if Congress had demonstrably meant to reach by § 1979 activities like those of respondents in this case. But where it appears that Congress plainly did not have that understanding, respect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country. The text of the statute, reinforced by its history, precludes such a reading.

[48] In concluding that police intrusion in violation of state law is not a wrong remediable under R.S. § 1979, the pressures which urge an opposite result are duly felt. The difficulties which confront private citizens who seek to vindicate in traditional common-law actions their state-created rights against lawless invasion of their privacy by local policemen are obvious, and obvious is the need for more effective modes of redress. The answer to these urgings must be regard for our federal system which presupposes a wide range of regional autonomy in the kinds of protection local residents receive. If various common-law concepts make it possible for a policeman—but no more possible for a policeman than for any individual hoodlum intruder—to escape without liability when he has vandalized a home, that is an evil. But, surely, its remedy devolves, in the first instance, on the States. Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state “statute, ordinance, regulation, custom, or usage” the police are specially shielded—§ 1979 provides a remedy which dismissal of petitioners’ complaint

in the present case does not impair. Otherwise, the protection of the people from local delinquencies and shortcomings depends, as in general it must, upon the active consciences of state executives, legislators and judges. ^[7] Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection, may in the long run do the individual a disservice by deflecting responsibility from the state lawmakers, who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.

[49] This is not to say that there may not exist today, as in 1871, needs which call for congressional legislation to protect the civil rights of individuals in the States. Strong contemporary assertions of these needs have been expressed. Report of the President's Committee on Civil Rights, *To Secure These Rights* (1947); Chafee, *Safeguarding Fundamental Human Rights: The Tasks of States and Nation*, 27 GEO. WASH. L. REV. 519 (1959). But both the insistence of the needs and the delicacy of the issues involved in finding appropriate means for their satisfaction demonstrate that their demand is for legislative, not judicial, response. We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960.

* * * * *



[Monroe v. Pape – Audio and Transcript of Oral Argument](#)

Footnotes

1. This section provides in material part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." [↗](#)
2. Subsection (a) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." In their complaint, petitioners also invoked R.S. §§ 1980, 1981, 42 U.S.C. §§ 1985, 1986. Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by § 1979. Accordingly, only that section is before us. [↗](#)
3. Illinois Const., Art. II, § 6, provides:
"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."
Respondents also point to ILL. REV. STAT., c. 38, §§ 252, 449.1; Chicago, Illinois, Municipal Code, § 11-40. [↗](#)
4. *Id.*, p. 265. The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of § 1: "If the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, *for a mere error of judgment*, [he is liable]" *Ibid.* (Italics added.) [↗](#)

5. [S. Rep. No. 1, 42d Cong., 1st Sess.](#) ↴
6. There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It 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. ↴
7. The common law seems still to retain sufficient flexibility to fashion adequate remedies for lawless intrusions. ↴

Notes on *Monroe v. Pape*

1. For additional information about the characters, context and facts giving rise to *Monroe v. Pape*, see Giles, *Police, Race and Crime in 1950s Chicago: Monroe v. Pape as Legal Noir*, in *CIVIL RIGHTS STORIES*, (Myriam E. Giles and Risa L. Goluboff eds. 2008); CHARLES F. ADAMSON: THE TOUGHEST COPY IN AMERICA (2001); Charles F. Adamson, *Pape's Law*, *CHICAGO MAGAZINE* (June 2000); Douglas Martin, [Frank Pape, Celebrated Chicago Police Detective, Dies at 91](#), *New York Times* (March 12, 2000); Stephan Benzkofer, [Legendary Lawmen, Part 6: Frank Pape](#), *Chicago Tribune* (January 1, 2012).

Mechanisms to Redress Violations of Federal Constitutional Rights

2. Except for the just compensation clause of the Fifth Amendment, the United States Constitution does not explicitly provide for damages to redress constitutional violations. Do the following mechanisms afford adequate protection of constitutional rights?

a. Criminal penalties against the official who violates the Constitution.

i. Following the death of George Floyd, the Hennepin County district attorney charged Officer Derek Chauvin with third degree murder and manslaughter. After being asked by Minnesota Governor Tim Walz to lead the prosecution, the Minnesota Attorney General additionally charged Chauvin with Second Degree Murder—Unintentional—While Committing a Felony, with assault alleged as the underlying felony. The Attorney General also charged Officers Thao, Kueng, and Lane with one count of aiding and abetting a second-degree murder and one count of aiding and abetting second degree manslaughter.

ii. Professor Philip Stinson has [compiled data on criminal arrest of nonfederal sworn law enforcement officers between 2005 and 2011/12](#). While approximately 1000 people are fatally shot

by on-duty police officers, each year, 110 law enforcement officers were charged with murder or manslaughter over the period of Professor Stinson's study. Fifty officers were acquitted. Of the 42 officers who were convicted on some counts, only five were found guilty of murder (18 cases are pending). See [Why It's So Rare For Police Officers To Face Legal Consequences](#)

iii. Following the all-white jury's acquittal of three police officers, and failure to reach a verdict against the fourth officer, in the state criminal trial arising out of the videotaped beating of Rodney King, the United States filed charges against the officers under 18 U.S.C. § 242, which provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

The racially mixed jury found Officers Koon and Powell guilty, and acquitted officers Wind and Briseno. For an in depth discussion of the two trials, [see Professor Douglas Linder's Famous Trials website](#).

iv. Federal statutes also impose criminal penalties for conspiracy to "injure, oppress, threaten, or intimidate" the exercise of a right secured by the Constitution (18 U.S.C. § 241); interference with prescribed federally protected activities, such as voting (18 U.S.C. § 245); intentionally damaging religious property based on the religious, ethnic, or racial characteristics of the property (18 U.S.C. § 247); interfering with an individual's access to reproductive health services or places of worship (18 U.S.C. § 248); and hate crimes (18 U.S.C. § 249). The Congressional Research Service published [an overview of these statutes](#).

b. The exclusionary rule. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the United States Supreme Court overruled *Wolf v. Colorado*, 338 U.S. 25 (1949) and ruled that evidence obtained by searches and seizures in violation of the Fourth and Fourteenth Amendments to United States Constitution could not be admitted in a state criminal prosecution.

c. Governmental actions for equitable relief.

i. In the aftermath of the police beating of Rodney King, in 1994 Congress passed the Violent Crime Control and Law Enforcement Act. 42 U.S.C. § 14141 provides:

1) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct

by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

2) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

ii. President Obama's administration initiated pattern or practice investigations of 25 police department and entered into 14 consent decrees. Jeff Sessions, appointed as Attorney General by President Trump, dropped Obama era investigations into police departments in Chicago and Louisiana, alleging that consent decrees diminished morale among police officers and led to a rise in violent crime. On November 7, 2018, Attorney General Jeff Sessions issued a Memorandum prescribing a new internal Justice Department policy limiting the use of consent decrees and settlements against state and local governmental entities to where one or more of the following factors is present:

1) The defendant has an established history of recalcitrance or is known to be unlikely to perform;

2) The defendant has unlawfully attempted to obstruct the investigation;

3) The defendant not only has engaged in a pattern or practice of deprivation rights, but in addition other remedies have proven ineffective, such that ensuring compliance without ongoing court supervision is unrealistic.

[Memorandum at 4](#). The memorandum further required that senior leaders of the Department of Justice approve the consent decree or settlement, and limited the duration of consent decrees to three years, absent a compelling justification for a longer term, The memorandum set forth the following rationale for the limitations:

"[F]ederal court decrees that impose wide-ranging and long-term obligations on, or require ongoing federal supervision of, state and local governments are extraordinary remedies that "raise sensitive federalism concerns." Such concerns are most acute when a federal judge ... effectively superintends the ongoing operations of the government entity subject to the decree. This supervision can deprive the elected representatives of the people of the affected jurisdiction of control of their government. Consent decrees can also have significant ramifications for state or local budget priorities, effectively taking these decisions, and accountability for them, away from the people's elected representatives." Memorandum at 2 (citations omitted).

Attorney General William Barr, who succeeded Jeff Sessions, endorsed the principles in Sessions' memo in [Supplementary Information published in the Federal Register](#) accompanying a final rule amending the Regulations of the Department of Justice regarding procedures for approving consent decrees in civil actions against state or local governmental entities. The new approval procedures were codified in [28 C.F.R. §0.160\(d\)\(6\)](#). On April 16, 2021, President Biden's

Attorney General Merrick Garland issued a [Memorandum rescinding Sessions' November 2018 Memorandum](#) Regarding Settlement Agreements and Consent Decrees and ordered withdrawal of the provisions of the United States Department of Justice Manual incorporating the November 2018 Memorandum. Attorney General Garland further directed the initiation of processes to revise the amendment to 28 C.F.R. §§ 0.160(d)(6)-(e) that Attorney General Barr had effectuated.

Attorney General Garland's April 16, 2021 Memorandum noted that Congress had "authorized the Department of Justice to file lawsuits against state and local governmental entities to obtain legal and equitable relief to remedy violation of federal law," and that "we will continue the Department's legacy of promoting the rule of law, protecting the public, and working collaboratively with state and local governmental entities to meet those ends." Memorandum, at 1, 4. [On April 21, 2021, General Garland announced](#) that in addition to its previously opened federal criminal investigation into the death of George Floyd, the Department of Justice had initiated a pattern or practice investigation into the City of Minneapolis and the Minneapolis Police Department's use of force; discriminatory policing; the Police Department's policies training, and supervision; and the Police Department's "systems of accountability, including complaint intake, investigation, review, disposition, and discipline." In announcing the investigation, [Attorney General Garland noted](#):

Yesterday's verdict in the state criminal trial [finding Officer Derek Chauvin guilty of second- and third-degree murder as well as second degree manslaughter in the death of George Floyd] does not address potential systemic policing issues in Minneapolis.

If the Justice Department concludes that there is reasonable cause to believe there is a pattern or practice of unconstitutional or unlawful policing, we will issue a report of our conclusions.

The Justice Department also has the authority to bring a civil lawsuit asking a federal court to provide injunctive relief that orders the MPD [Minneapolis Police Department] to change its policies and practices to avoid further violations.

Usually, when the Justice Department finds unlawful patterns or practices, the local police department enters into a settlement agreement or a consent decree to ensure that prompt and effective action is taken to align policing practices with the law.

Most of our nation's law enforcement officers do their difficult jobs honorably and lawfully.

I strongly believe that good officers do not want to work in systems that allow bad practices. Good officers welcome accountability because accountability is an essential part of building trust with the community and public safety requires public trust.

On April, 26, 2021, [Attorney General Garland announced an investigation](#) into the Louisville/Jefferson County Metro Government and the Louisville Metro Police Department to determine whether the Department engages in a pattern or practice of using unreasonable force; engages in unconstitutional stops, searches, and seizures and unlawfully executes search warrants on private homes; engages in discriminatory conduct on the basis of race; or fails to provide public services that comply with the Americans with Disabilities Act. And on August 5, 2021, [the Justice Department announced](#) it would open an investigation to determine whether the officers of the Phoenix Police Department discriminate against minorities; use excessive force or retaliate against peaceful protestors; or mistreat the homeless and the disabled.

iii. Following the release of a video of the shooting of Laquan McDonald, a black teenager, 16 times by a white officer, Jason VanDyke, the United States Department of Justice as well as the Mayor of Chicago's Police Accountability Task Force investigated and made recommendations in

response to allegations that the Chicago Police Department engages in a pattern and practice of civil rights violations and unconstitutional policing. The Attorney General of the State of Illinois then filed a civil action in federal court against the City of Chicago under 42 U.S.C. § 1983, the Illinois Constitution, the Illinois Civil Rights Act of 2003, and the Illinois Human Rights Act. The Complaint alleged that the Department had engaged in a pattern of using excessive force, including deadly force, disproportionately harming the City's black and Latinx residents. The State and the City entered into a 286-page Consent Decree requiring changes to the policies and operations of the Chicago Police Department, the Civilian Office of Police Accountability, and the Police Board. The Consent Decree provided for an independent monitor to assess and report on "whether the requirements of this Agreement have been implemented, and whether implementation is resulting in constitutional policing and increased community trust of the CPD [Chicago Police Department]." [Consent Decree, paragraph 610](#). The United States Department of Justice filed a Statement of Interest Opposing approval of the Consent Decree. <https://www.justice.gov/opa/press-release/file/1100631/download>. See also Jason Mazzone and Stephen Rushin, *State Attorneys General As Agents of Police Reform*, 69 DUKE L.J. 999 (2020).

3. Is a damage remedy an appropriate mechanism to ensure that government and its officials do not disregard individual liberties guaranteed by the Constitution?

a. In light of the similarities between the goals (deterrence) and mechanisms (cost-internalization) of private law damages and constitutional cost remedies, perhaps it should come as no surprise that courts and commentators have routinely applied conventional assumptions about the behavior of firms in market environments to government behavior. Discussions of constitutional cost remedies usually start from the assumption that the incentive effects of cost-internalization will be the same for government as for private firms and that cost-benefit analysis by government decisionmakers will result in socially optimal choices about activities that threaten constitutional rights. Courts and commentators usually take for granted that government will respond to cost-internalization more or less like a corporation, so that requiring government to compensate the victims of takings or constitutional torts ensures that government will take full account of the costs of its actions. If the government does *not* respond to costs and benefits in the same way as a private firm, however, then none of these predictions about the instrumental effects of constitutional cost remedies on government behavior is likely to be accurate. In fact, for reasons that are elaborated below, there is every reason to expect government to behave quite differently from private firms. Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay. The only way to predict the effects of constitutional cost remedies is to convert the financial costs they impose into political costs. This may be possible, but only by constructing models of government decision making that are capable of exchanging economic costs and benefits into political currency. As this Article goes on to demonstrate, any such model will be highly contextual, complex, and controversial. [Daryl J. Levinson Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs](#), 67 U. CHI. L. REV. 345, 347 (2000).

b. For those who accept the desirability of constitutional change, the right-remedy gap has a silver lining. Put simply, the limitations on money damages for constitutional violations facilitate constitutional change. The doctrines that deny full individual remediation reduce the cost of innovation, thereby advancing the growth and development of constitutional law. If constitutional tort doctrine were reformed to assure full remediation, the costs of compensation would constrict

the future of constitutional law. John C. Jeffries, Jr., [*The Right-Remedy Gap in Constitutional Law*](#), 109 YALE L.J. 87, 98 (1999).

c. [F]ar from having a uniformly negative influence on courts' willingness to expand rights, constitutional tort actions have shifted courts' attention to the injury suffered by individuals. In doing so, they have influenced courts to establish constitutional rights that protect individuals from governmental injury and regulate the government's power to inflict harm. The current concept of individual harm is an integral part of many constitutional rights. Rather than having a wholly negative effect on the reach of constitutional rights, the constitutional tort remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to the injuries of individuals. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 419 (2003).

4. In [*Binette v. Sabo*](#), 710 A.2d 688 (Conn. 1980), plaintiffs alleged the City of Torrington police chief and a city police officer entered their home without a warrant, and then pushed and struck the plaintiffs. Plaintiffs filed a civil action seeking compensatory and punitive damages for the officers' violation of plaintiffs' rights under the Connecticut Constitution. The Connecticut Supreme Court held that even though the state legislature had not authorized a civil action for deprivation of rights secured by the state constitution, plaintiffs could recover damages caused by the officers' violation of the state charter. The Supreme Court rejected defendants' assertion that because plaintiffs had a remedy under state tort law, the court should refuse to create a damage action for infringement of rights guaranteed by the state constitution:

[W]e agree with the fundamental principle underlying the United States Supreme Court's decision in *Bivens*, namely, that a police officer acting unlawfully in the name of the state "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. 392; see *id.*, 409 (Harlan, J., concurring) ("the injuries inflicted by officials acting under color of law ... are substantially different in kind [from those inflicted by private parties]"). The difference in the nature of the harm arising from a beating administered by a police officer or from an officer's unconstitutional invasion of a person's home, on the one hand, and an assault or trespass committed against one private citizen by another, on the other hand, stems from the fundamental difference in the nature of the two sets of relationships. A private citizen generally is obliged only to respect the privacy rights of others and, therefore, to refrain from engaging in assaultive conduct or from intruding, uninvited, into another's residence. A police officer's legal obligation, however, extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to *protect and defend* those rights. In order to discharge that considerable responsibility, he or she is vested with extraordinary authority. Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen's rights but affirmatively *violates* those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen.

Binette, 710 A.2d at 698.

The Appropriate Forum for Adjudication of Constitutional Rights

5. Does the background to Section 1983 demand or justify a disregard of traditional federalism notions? Are the concerns of the enacting Congress valid today?

a. In [*Jamison v. McClendon*](#), No. 3:16-CV-595-CWR-LRA (S.D. Miss. August 4, 2020), District Judge Reeves starkly recounted the actions on the ground following passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution that gave rise to enactment of Section 1983:

"In Mississippi, it became a criminal offense for blacks to hunt or fish," and a U.S. Army General reported that "white militias, with telltale names such as the Jeff Davis Guards, were springing up across" the state. In Shreveport, Louisiana, more than 2,000 black people were killed in 1865 alone. "In 1866, there were riots in Memphis and New Orleans; more than 30 African-Americans were murdered in each melee."

The Ku Klux Klan, formed in 1866 by six white men in a Pulaski, Tennessee law office, 'engaged in extreme violence against freed slaves and Republicans,' assaulting and

murdering its victims and destroying their property.” The Klan “spread rapidly across the South” in 1868, orchestrating a “huge wave of murder and arson” to discourage Blacks from voting. “[B]lack schools and churches were burned with impunity in North Carolina, Mississippi, and Alabama.”

The terrorism in Mississippi was unparalleled. During the first three months of 1870, 63 Black Mississippians “were murdered ... and nobody served a day for these crimes.” In 1872, the U.S. Attorney for Mississippi wrote that Klan violence was ubiquitous and that “only the presence of the army kept the Klan from overrunning north Mississippi completely.

Many of the perpetrators of racial terror were members of law enforcement. It was a twisted law enforcement, though, as it prevented the laws of the era from being enforced. When the Klan murdered five witnesses in a pending case, one of Mississippi’s District Attorneys complained, “I cannot get witnesses as all feel it is sure death to testify.” White supremacists and the Klan “threatened to unravel everything ... Union soldiers had accomplished at great cost in blood and treasure.”

Professor Leon Litwack described the state of affairs in stark words:

How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known. Nor could any accurate body count or statistical breakdown reveal the barbaric savagery and depravity that so frequently characterized the assaults made on freedmen in the name of restraining their savagery and depravity—the severed ears and entrails, the mutilated sex organs, the burnings at the stake, the forced drownings, the open display of skulls and severed limbs as trophies.

b. The United States Supreme Court expressly recognized that the legislative history of Section 1983:

[m]akes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officials might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, “whether that action be executive, legislative, or judicial.”

Mitchum v. Foster, 407 U.S. 225, 242 (1972) (§1983 is an “expressly authorized” exception to statute [28 U.S.C. §2283] barring federal court injunction to stay proceedings in state court).

c. In *Patsy v. Board of Regents*, 457 U.S. 496, 503-07 (1982), the Court relied upon the 1871 legislature’s view of the appropriate forum for adjudication of federal constitutional rights in holding that a Section 1983 plaintiff is not generally required to exhaust state administrative remedies:

At least three recurring themes in the debates over §1 cast doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing §1, Congress assigned to the federal courts a paramount role in protecting constitutional rights.

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal jurisdiction through §§1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated those rights.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief.

But see Prison Litigation Reform Act of 1995, 42 U.S.C. §1997e (“No action shall be brought with respect to prison conditions under [§1983] . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative procedures as are available are exhausted.”); *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (“[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a Section 1983 plaintiff must prove that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court’s issuance of a writ of habeas corpus. . . .”).

d. Former Supreme Court Justice Blackmun has expressed wariness over invoking traditional federalism concerns to limit the role Section 1983 plays in vindicating constitutional rights:

In my view, any plan to restrict the scope of §1983 comes with a heavy burden of justification—a burden that is both constitutional and historical. The constitutional burden is the need to demonstrate that the interests of federalism, comity, or judicial efficiency can be advanced without sacrificing protection for our constitutional rights. If increased state autonomy and reduced federal caseloads can be purchased only with the coin of more constitutional violations and fewer constitutional remedies, the price is high and is one I am not prepared to pay. Nor is it one, by the way, that critics of § 1983 usually attempt to justify.

The historical burden is the need to show, in light of the systematic disregard of civil rights by state governments and state courts that led to the original Civil Rights Acts, that constitutional claims can safely be committed to state courts, not only for the present but for the future. It is no reflection on the current good faith of state governments and state courts to observe that history is not a one-way street. While we all can work to prevent a return to the judicial indifference and paralysis of the past, none of us can guarantee that the day will not return when a litigant who cannot vindicate his constitutional rights in federal court will not be able to vindicate them at all. If that day should come, it will be far harder to reconstruct a statutory remedy that has been judicially interred or legislatively undone in the meantime than it would be to resort to a remedy that has been intact and working in the intervening years. In short, once we restrict the role of federal courts in protecting constitutional rights, we may find ourselves hard pressed to recover what has been given up.

When the Fourteenth Amendment became part of the Constitution, it committed this Nation to an order in which all governments, state as well as federal, were bound to respect the fundamental rights of individuals. That commitment, too, is a part of “Our Federalism,” no less than the values of state autonomy than the critics of § 1983 so passionately invoke on.

Hon. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L. REV. 1, 28 (1985).

e. Contrary to the cautions expressed by Justice Blackmun, Justice O'Connor has suggested that state courts should no longer be saddled by the distrust accorded when the federal remedy for constitutional violations was enacted.

State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitution questions where a *full* and *fair* adjudication has been given in the state court.

* * * * *

Proposals are sometimes made to restrict federal court jurisdiction over certain types of cases or issues. Among the proposals which have merit from the perspective of a state court judge are ... a requirement of exhaustion of state remedies as a prerequisite to bringing a federal action under Section 1983. If we are serious about strengthening our state courts and improving their capacity to deal with federal constitutional causes, then we will not allow a race to the courthouse to determine whether another will be heard first in the federal or state court. We should allow the state courts to rule first on the constitutionality of state statutes.

Hon. Sandra Day O'Connor, [*Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*](#), 22 WM. & MARY L. REV. 801, 814-815 (1981) (emphasis in original). See also Ruggero J. Aldisert, [*State Courts and Federalism in the 1980's*](#), 22 WM. & MARY L. REV. 821 (1981).

f. An empirical study compared the disposition of federal constitutional issues by federal and state courts. Michael E. Solimine and James L. Walker, [*Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*](#), 10 HASTINGS CONST. L.Q. 213 (1983). The authors evaluated a random sampling of reported decisions of federal district courts and state appellate and supreme courts for the years 1974 through 1980 involving claims based upon the First and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment. The study generated the following data:

Results of All Cases

Category	Percent
Claim Upheld	36%
Claim Denied	64%

Outcome Versus Forum by Case Type

Court	Claim Upheld	Claim Denied
Federal Court	41%	59%
State Court	32%	68%

Outcome Versus Forum by Case Type

Court	Civil Cases Upheld	Civil Cases Denied	Criminal Cases Upheld	Criminal Cases Denied
Federal Court	44.6%	55.4%	33.9%	66.1%
State Court	33.2%	66.8%	30.5%	69.5%

Id. at 239-42. Did the study examine a proper sampling of cases? See [Kevin M. Clermont and Theodore W. Eisenberg](#), *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. Rev. 947 (2002) (concluding that defendants are much more likely than plaintiffs to obtain reversal on appeal after trial in civil rights cases due to anti-plaintiff appellate bias). What do the results indicate with respect to the litigation of federal constitutional claims in state as opposed to federal courts?

- The *Monroe* decision, together with the Supreme Court's selective incorporation of the guarantees of the Bill of Rights into the Fourteenth Amendment, triggered a dramatic increase in the number of Section 1983 actions filed in federal courts. A total of 280 federal actions were filed under all civil rights statutes in 1960, the year before *Monroe* was decided. 1960 Annual Report of the Director for the Administrative Office of the United States Courts (Annual Report) at 232. The following chart, derived from the Annual Reports, documents the growth of civil rights filings in the aftermath of *Monroe*.

United States District Courts Civil Cases Commenced, By Nature of Suit For Selected Years From 1976 Through 1995

NATURE OF THE SUIT	1976	1979	1982	1985	1986	1990	1995
Civil Rights, General*	6,079	6,917	8,727	10,757	10,368	9,780	16,482
State Prisoner Civil Rights Actions**	6,958	11,195	16,741	18,491	*** 20,000	25,992	41,679

* Does not include civil rights actions concerning voting, employment, accommodations, welfare, or

prisoner civil rights actions.

** Does not include habeas corpus petitions.

*** Includes federal prisoner actions.

The surge in civil rights filings has been accompanied by a general expansion in federal litigation. Efforts to control mushrooming caseloads by authorizing additional federal judgeships have not alleviated the problem. In 1960, there were 226 district court judgeships with an average of 221 cases per judge. 1960 Annual Report, p.86. In 1980, after more than a doubling of authorized judgeships, the average caseload for the 516 judges was 327. 1987 Annual Report, p.7. By 2002, there were 665 district court judges with an average pending caseload of 471 cases. 2002 Annual Report.

- a. One study disputes the notion that the federal courts experienced a major increase in Section 1983 filings in the wake of *Monroe v. Pape*. Theodore Eisenberg and Stewart Schwab, [Reality of Constitutional Tort Litigation](#), 72 CORNELL L. REV. 641 (1987). The authors, analyzing filings in the United States District Court for the Central District of California, concluded:

Both national data published by the Administrative Office of the United States Supreme Court and our findings about a key federal district suggest that the image of a civil rights litigation explosion is overstated and borders on myth. Although the typical constitutional tort case is longer and more involved than the average civil filing, civil rights litigation—including the core Section 1983 cases—is not exploding. The explosion claim, usually based on quick citation to Administrative Office statistics, lumps all civil rights cases together, sometimes even including prisoner habeas corpus filings. Because much of the growth in civil rights litigation comes from modern statutes, particularly Title VII employment discrimination cases, these gross Administration Office statistics are overinclusive and mask as much as they reveal. Detailed examination of the Administrative Office data and of the cases filed shows a much more moderate figure.

* * * * *

The seventeen judges in the Central District in 1980-81 each averaged slightly more than one constitutional tort filing per month. To put this figure in the perspective of the Central District's workload, in 1980-81 the Central District had 6707 total civil filings. Combined prisoner and non-prisoner constitutional tort filings thus comprised approximately 3.5% of the District's civil caseload. This figure rises to 4.1% if the hybrid Title VII/Section 1983 cases are included.

Id. at 642-43, 671. See also Theodore Eisenberg, [Section 1983: Doctrinal Foundations and an Empirical Study](#), 67 CORNELL L. REV. 482 (1982).

- b. Do concerns with the burden that Section 1983 actions place on the federal docket justify returning to state courts claims of unconstitutional action by state and local officials?
 - i. In view of the great caseload increase in the federal courts and the expressed desire of the Reagan administration to hold down the federal budget, one would think that Congressional action might be taken to limit the use of Section 1983. It could be accomplished either directly, or indirectly by limiting or disallowing recovery of attorney's fees. Such a move would be welcomed by state courts, as well as by state legislatures and executive officers. Hon. Sandra Day O'Connor, [Trends in the Relationship Between Federal and State Courts from the Perspective of a State Court Judge](#), 22 WM. & MARY L. REV. 801,

810 (1981).

- ii. If critics are concerned by the sheer burden placed on the federal judiciary by § 1983 actions, they might do well to turn their attention, too, to other sources of federal litigation. My point is simply that if we want to nominate a particular group of cases for exclusion from the federal courts, we should look first at groups in which federal law is not sensitively at issue rather than at one in which fundamental constitutional rights are at stake. Hon. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L. REV. 1, 21 (1985).

7. May a state refuse to extend jurisdiction over Section 1983 actions in its state courts? In [Haywood v. Drown](#), 556 U.S. at 729 (2009), the Supreme Court struck down a New York statute that stripped state trial courts of jurisdiction over civil actions filed by prisoners against state correctional officers. The legislature divested jurisdiction because it believed damage actions against state correctional officers generally were “frivolous and vexatious.” *Haywood*, 556 U.S. at 733. Inmates seeking damages were relegated to an action filed in the court of claims. Prisoners could file that action only against the state; were subject to a 90-day notice requirement; could not seek a jury trial; and could not obtain injunctive relief, punitive damages, or attorneys’ fees. The Supreme Court held that by depriving the state’s trial courts of jurisdiction over prisoner Section 1983 actions, the legislature violated the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. While the Congress that enacted Section 1983 intended to “‘interpose the federal courts between the States and the people, as guardians of the people’s federal rights,’” *Haywood*, 556 U.S. at 735, quoting [Mitchum v. Foster](#), 407 U.S. 225, 242 (1972), it did not mean to deprive state courts of concurrent jurisdiction. The New York legislature’s judgment that suits for damages against state correctional officers are too numerous and generally frivolous,

“is contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages... .

That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant. The State cannot condition its enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability.”

Haywood, 556 U.S. at 736-737. The Court limited the scope of its holding. Because the state legislature had established courts of general jurisdiction, whose jurisdiction extends to Section 1983 actions, “this case does not require us to decide whether Congress may compel a state to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983.” *Haywood*, 556 U.S. at 739.

8. Section 1983 was not the only vehicle employed by Congress to enlarge the power of federal courts and thereby expand the federal government’s control over state activities. In addition to the Ku Klux Klan Act of 1871, 17 Stat. 13, Congress enacted four other civil rights statutes: Act of April 9, 1866, 14 Stat. 27 (outlawing Black Codes); Act of May 31, 1870, 16 Stat. 140 (protecting voting rights); Act of Feb. 28, 1871, 16 Stat. 433 (protecting voting rights); Act of March 1, 1875, 18 Stat. 335 (prohibiting discrimination in public accommodations). Federal habeas corpus, which principally had permitted federal court review of the constitutionality of confinement of prisoners by the United States, was expanded to allow review of the constitutionality of decisions of state courts. Act of Feb. 15, 1867, 14 Stat. 385

(currently codified at 28 U.S.C. § 2241 (c)(3)). Finally, in 1875, the jurisdiction of the federal courts was broadened to include general federal question jurisdiction. 28 U.S.C. § 1331. See [Developments in the Law—Section 1983 and Federalism](#), 90 HARV. L. REV. 1133, 1147-49 (1977).

The “Under Color of Law” Requirement

9. The Fourteenth Amendment to the United States Constitution is violated only by conduct deemed “state action.” In [Lugar v. Edmondson Oil Co.](#), 457 U.S. 922 (1982), the Supreme Court held that if challenged activities constituted “state action” within the meaning of the Fourteenth Amendment, such conduct also would satisfy the “under color of state law” element of Section 1983. However, in a footnote the Court observed:

Our conclusion ... is not inconsistent with the statement ... that “these two elements [state action and action under color of state law] denote two separate areas of inquiry.” [Citation omitted]. First, although we hold that conduct satisfying the state action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under color of state law requirement would satisfy the Fourteenth Amendment requirement of state action. If action under color of state law means nothing more than the individual act “with the knowledge of and pursuant to that statute,” ... then clearly under *Flagg Brothers* that would not, in itself, satisfy the state action requirement of the Fourteenth Amendment. Second ... § 1983 is applicable to other constitutional provisions and statutory provisions that contain no state action requirement. Where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

Lugar, 457 U.S. 922, 935 n.18.

10. Is a remedy available under Section 1983 when an alleged constitutional violation is inflicted by a private individual? What must be shown to find a private individual acted under the color of state law?
- a. In [Adickes v. S.H. Kress & Co.](#), 398 U.S. 144 (1970), Sandra Adickes, a white school teacher, brought a Section 1983 action against S.H. Kress & Company complaining of the refusal to serve her lunch at its restaurant facilities in Hattiesburg, Mississippi as well as her subsequent arrest on a charge of vagrancy. Mrs. Adickes alleged that the company acted under the color of state law because a Kress employee and a Hattiesburg policeman reached an understanding to deny her service and have her arrested because she was in the company of black students. The Supreme Court held:

[A] private person involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. “Private persons, jointly engaged with state officials in the prohibited action, are acting ‘under color’ of law for purposes of the statute. To act ‘under color’ of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents” ...

Adickes, 398 U.S. 144, 152 (1970).

- b. In West v. Atkins, 487 U.S. 42 (1988), the Court held that a private physician who was under contract to provide medical services to inmates at a state prison hospital on a part-time basis acted under color of law for purposes of § 1983 when treating a prisoner's injury. After noting that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law," *id* at 50, the Court found that the fact the physician was employed on a part-time contract basis did not justify a departure from this general rule.

It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.

Nor does the fact that Doctor Atkins' employment contract did not require him to work exclusively for the prison make him any less a state actor than if he performed those duties as a full-time, permanent member of the state prison medical staff. It is the physician's function while working for the State, not the amount of time he spends in the performance of those duties or the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law.

487 U.S. at 55-56. The Court also rejected the court of appeals' holding that professionals do not act under color of state law when they act in their professional capacities. *Id.* at 52.

- c. Westcliff, population 300, is the county seat of Custer County, Colorado, area 737 square miles, population 1,400. Appellee-defendant Robert Baker, the elected county sheriff, drew a salary of \$3,600 a year, and supplemented that by distributing milk products. Defendant-appellee, Lola Baker, his wife, assisted him by doing clerical work and handling telephone calls. Lola was not an officer, employee, or agent of Custer County or the State and received no compensation from either. She often accompanied her husband when he went on night patrol. She did so as a companion and not in any official capacity. On the evening of Sunday, July 30, the two were on patrol and came upon a car stalled on a road curve. To move the car the sheriff needed a vehicle other than the patrol car. He and his wife were on their way to get the desired vehicle when they came upon a street brawl. The sheriff broke up the disturbance. The participants moved down the street and continued fighting. The sheriff drove to the place of the renewed altercation and endeavored to stop it and to get the participants to return to their homes. After the sheriff had left the patrol car with his wife sitting in the front passenger seat, Scott Canda, one of the brawlers entered the back seat of the patrol car. Plaintiff also got in the back seat. He and Canda continued to exchange blows and profanity. The sheriff was outside the car. Some witnesses said that he was on the right side, others the back, and others the left side of the car. He was trying to quell the disturbance. The wife shouted to plaintiff and Canda that they stop the fighting. The sheriff was having his own troubles outside of the car. The wife struck plaintiff in the mouth with a Rol-a-Tape, a measuring instrument. The blow caused dental injuries to the plaintiff. Shortly thereafter the disturbance ended and everyone departed. In his complaint plaintiff alleged that

the negligence of the sheriff caused his injuries and gave him a cause of action under § 1983. With regard to the wife, he said that she was deputy officer acting under color of state law, and, hence, liable under § 1983. [*Price v. Baker*](#), 693 F.2d 952, 952-53 (10th Cir. 1982).

Did Lola Baker act under color of state law?

11. In addition to determining under what circumstances acts of private individuals may be held to be under color of law, courts have been called upon to decide whether persons employed by the state may engage in activities that are not under color of law for purposes of Section 1983. See Douglas Miller, [*Off Duty, Off the Wall, but not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*](#), 30 AKRON L. REV. 324 (1996); LARRY ALEXANDER AND PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND (1988); Steven L. Winter, [*The Meaning of "Under Color of" Law*](#), 91 MICH. L. REV. 323 (1992); Eric H. Zagrans, [*"Under Color of" What Law? A Reconstructed Model of Section 1983 Liability*](#), 71 VA. L. REV. 499 (1985).
 - a. Are injuries inflicted by an off-duty policeman "under color of law" within the meaning of Section 1983? Compare [*Pickrel v. City of Springfield*](#), 45 F.3d 1115 (7th Cir. 1995) (holding that a patron of a fast-food restaurant successfully alleged that a police officer, although off-duty and working for another employer, was acting under color of state law during his employment as a security guard at the restaurant) and [*Revene v. Charles County Commissioners*](#), 882 F.2d 870 (4th Cir. 1989) (holding that off-duty police officer who shot and killed two men and paralyzed a third while purportedly trying to break up a bar brawl acted under color of law) with [*Gibson v. City of Chicago*](#), 910 F.2d 1510 (7th Cir. 1990) (police officer who had been placed on medical leave as mentally unfit for duty did not act under color of state law at the time of shooting) and [*Hudson v. Maxey*](#), 856 F. Supp. 1223 (E.D. Mich. 1994) (holding that off-duty deputy sheriff who shot his girlfriend's ex-boyfriend after telling ex-boyfriend his occupation did not act under color of state law).
 - b. Are all harms caused while a governmental official is on duty inflicted "under color of law?" Compare [*Pippin v. Bennett*](#), 74 F.3d 578 (5th Cir. 1996) (holding that rape by sheriff of suspect in domestic violence shooting investigation was action taken under color of state law) and [*United States v. Tarpley*](#), 945 F.2d 806 (5th Cir. 1991) (holding that deputy sheriff who claimed to have special authority for his actions acted under color of state law when he assaulted his wife's former lover in his home), with [*Martinez v. Colon*](#), 54 F.3d 980 (1st Cir. 1995) (holding that in absence of any further indicia of state action, the use of a state-issued firearm by an officer on duty in tormenting a fellow officer is not enough to establish action under color of law), [*Morgan v. Tice*](#), 862 F.2d 1495 (11th Cir. 1989) (holding that town manager in his investigation of plaintiff as private individual did not act under color of state law) and [*Delcambre v. Delcambre*](#), 635 F.2d 407 (5th Cir. 1981) (per curiam) (holding that police chief's assault on sister-in-law was not conduct taken under color of law, even though it occurred at police headquarters).
 - c. In [*Polk County v. Dodson*](#), 454 U.S. 312, 325 (1981), the Court held that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding, acting as an *adversary* of the state. However, the public defender may act under color of state law when performing certain administrative or investigative functions.
 - d. Barbara Monsky, an employee of the clerk of court's office, filed a Section 1983 action against

a judge of the court. Monsky alleged that Judge Monahan brought his golden retriever to the courthouse, then unleashed the dog to commit offensive acts against Monsky and other women.

The district court dismissed the claim, holding Monsky had not demonstrated Judge Monahan had acted under color of law:

The test for state action, however, is not dogmatic. Arguing that, because an individual is a state employee, his conduct is state action is tantamount to the tail wagging the dog: Status as a state employee is not enough to establish action under the color of state law.

Judge Monahan did not abuse a power he possessed by virtue of state law. In fact, we can say with certainty that there is no Connecticut State law authorizing a Superior Court judge to bring a dog into the courthouse.¹ Judge Monahan's choice to bring his dog to work appears to stem from personal pursuits.

[C]ontrary to plaintiff's dogged assertions, the fact that defendant was "about to assume the judicial robe" does not change his behavior—behavior that otherwise was entirely personal, into state action. In toto, we find that, by filing this suit in federal court, plaintiff is barking up the wrong tree.

[*Monsky v. Monahan*](#), 947 F. Supp. 53, 55 (D. Conn. 1996).

12. Section 1983 by no means affords the exclusive remedy for violations of federal constitutional or statutory rights. Among other federal statutes that protect civil rights are the following: [18 U.S.C. § 241 \(1976\)](#) (criminal action for conspiracy to interfere with constitutional rights); [18 U.S.C. § 242 \(1976\)](#) (criminal action for willful deprivation of constitutional rights); [18 U.S.C. § 245](#) (criminal sanctions for willfully interfering with persons engaging in certain activities such as voting, participating in programs receiving federal funds and serving as a grand or petit juror); [Title III of Omnibus Crime Control and Safe Streets Act of 1968](#), 18 U.S.C. § 2510 et seq. (1976 & Supp. 1979) (civil action for improper interception, use or disclosure of wire or oral communications); [28 U.S.C. § 1443](#) (providing for removal from state courts to federal district court of certain cases involving equal rights under the law); [28 U.S.C. § 2241-55](#) (federal habeas corpus; providing relief to those in custody by authority of the United States, pursuant to federal law, or in violation of the Constitution or laws of the United States); [42 U.S.C. § 1973\(j\) \(1976\)](#) (criminal and civil sanctions for violation of voting rights); [42 U.S.C. § 1981 \(1976\)](#) (civil action for interference with equal rights under law); [42 U.S.C. § 1982 \(1976\)](#) (civil action for interference with property rights of citizens); [42 U.S.C. § 1985 \(1976 & Supp. 1979\)](#) (civil action for conspiracy to interfere with constitutional rights); [42 U.S.C. § 1986 \(1976\)](#) (civil action for failure to prevent conspiracy to interfere with constitutional rights); [Civil Rights of Institutionalized Persons Act](#), 42 U.S.C. § 1997 et seq. (1980) (civil action for equitable relief for "egregious or frequent conditions" depriving institutionalized persons of constitutional rights pursuant to a "pattern of resistance to the full enjoyment of such rights."); [Title II of Civil Rights Act of 1964](#), 42 U.S.C. § 2000a et seq. (prohibiting discrimination in public accommodations); [Title VII of Civil Rights Act of 1964](#), 42 U.S.C. § 2000e et seq. (Prohibiting discrimination in employment); [Fair Housing Act of 1968](#), 42 U.S.C. § 3601 et seq. (prohibiting housing discrimination); [Age Discrimination Act of 1975](#), 42 U.S.C. § 1601 et seq. (Prohibiting discrimination on the basis of age in federally assisted programs); [Foreign Intelligence Surveillance Act of 1978](#), 50 U.S.C. § 1801 et seq. (1981) (civil action for improper electronic surveillance); [Americans with Disabilities Act of 1990](#), 3 U.S.C.A. § 421 (prohibits employment discrimination on the basis of disability); [Individuals with Disabilities Education Act](#), 20 U.S.C.A.

§ 1400 (ensures that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and to protect these children's' rights and the concurrent rights of their parents); [Rehabilitation Act of 1973](#), 29 U.S.C.A. § 720 *et. seq.* (requires federal contractors to engage in affirmative action to hire handicapped individuals); [Equal Pay Act](#), 29 U.S.C.A. § 206 (amended Section 6 of the FLSA); [1986 Immigration Reform & Control Act](#), 8 U.S.C.A. § 1324b (a) (extended employment discrimination protection to illegal aliens).

Notes

1. State officials may, in fact, have a bone to pick with the defendant regarding this practice.

B. Standard of Culpability

Introduction to the Standard of Culpability in Section 1983 Actions

1. As a result of *Monroe v. Pape*, does Section 1983 afford a federal cause of action in every situation where a state actor causes injury?
 - a. Consider whether the following situations are actionable under Section 1983:
 - i. A city policeman, while on routine patrol, negligently strikes a pedestrian with his patrol car. The pedestrian files a Section 1983 action against the officer alleging a deprivation of liberty and property without due process of law inflicted under color of state law.
 - ii. An inmate of a state prison slips on greasy stairs in the prison and injures his back. The prisoner sues under Section 1983, alleging cruel and unusual punishment and a deprivation of liberty and property without due process of law caused by persons acting under color of state law.
 - iii. A school board terminates the contract of a high school football coach. The coach files a Section 1983 action alleging that the board, acting under color of law, deprived him of property without due process of law.
 - b. “[S]ection 1983 has profoundly disturbed those analysts concerned about maintaining a ‘proper balance’ between the national and state governments. The statute has increasingly been used as a device for bringing federal court suits which resemble state tort actions against state and local officials. Under the rubric of the due process or cruel and unusual punishment clauses, almost any common law tort can be converted into a constitutional violation and thereby made the basis of a section 1983 action.” *Developments in the Law – Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1172-73 (1977) (notes omitted). While federal law obviously should not totally occupy the entire field of state tort law, how can the possibilities described above be avoided? Does the language of the statute provide any limits on the reach of federal action? Did the *Monroe* Court make this result inevitable by directing that, “[s]ection 1979 [42 U.S.C. § 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” 365 U.S. at 187. Are there any violations of state tort law that would not likewise constitute an invasion of the Fourteenth Amendment? See *Ingraham v. Wright*, 430 U.S. 651 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Paul v. Davis*, 424 U.S. 693 (1976).
2. In *Collins v. City of Harker*, 503 U.S. 115 (1992), the widow of an employee of the city sanitation department filed an action under Section 1983 to recover damages for her husband’s death as a result of asphyxia suffered when he entered a manhole to unstop a sewer line. Plaintiff sued the municipality, alleging that it had neglected to properly train its employees about the perils of working with sewer lines and had failed to provide suitable safety equipment and warnings. The court of appeals affirmed dismissal of the complaint, reasoning that plaintiff had failed to establish that the city’s action was taken in its capacity as a governing authority as opposed to in its role as an employer. The court construed Section 1983 to demand that in addition to proving a constitutional deprivation, plaintiff must establish abuse of governmental power. The Supreme Court reversed this aspect of the court of appeals’ opinion:

The Court of Appeals' analysis rests largely on the fact that the city had, through allegedly tortious conduct, harmed one of its employees rather than an ordinary citizen over whom it exercised governmental power. The employment relationship, however, is not of controlling significance. On the one hand, if the city had pursued a policy of equally deliberate indifference to the safety of pedestrians that resulted in a fatal injury to one who inadvertently stepped into an open manhole, the Court of Appeals' holding would not speak to this situation at all, although it would seem that a claim by such a pedestrian should be analyzed in a similar manner as the claim by this petitioner. On the other hand, a logical application of the holding might also bar potentially meritorious claims by employees if, for example, the city had given an employee a particularly dangerous assignment in retaliation for a political speech, cf. *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), or because of his or her gender, cf. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections. Neither the fact that the petitioner's decedent was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983.

503 U.S. at 119-20.

3. One suggested factor distinguishing injuries redressable through state tort law from constitutional harm cognizable under Section 1983 has been the state-of-mind or degree of culpability of the state actor causing the injury. Is this a proper distinction? If not, how can Section 1983 be limited to avoid federalizing state tort law?
 - a. As a matter of policy, what degree of defendant's culpability should a person deprived of a constitutional right have to prove to recover compensatory damages? Only that the defendant violated the Constitution? A constitutional violation and defendant's negligence? A constitutional violation and defendant's recklessness? A constitutional violation and defendant's specific intent to invade victim's constitutional rights?
 - b. Under the common law, what degree of culpability must be proven to recover compensatory damages for tortious actions of private actors? Should the standard of culpability differ for obtaining an award for constitutional violations caused by government actors?
4. What is the standard of culpability under Section 1983 established by *Monroe v. Pape*? What authority does the *Monroe* Court cite for its holding that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"? 365 U.S. at 187. In *Black v. Bayer*, 672 F.2d 309, 314-15 (3rd Cir. 1982), the court of appeals, considering the Section 1983 liability of private attorneys appointed to represent defendants in criminal cases, observed:

To understand the current teachings of the Supreme Court relating to ... federal § 1983 cases, it is helpful to review briefly the development of relevant precepts. The Court has demonstrated much agility in weaving back and forth among concepts of constitutional deprivation, statutory construction, and state tort liability. Although students of jurisprudence may shudder at the promiscuous mingling of federal constitutional protection notions—derived from the text of a written federal Constitution—with precepts of tort liability—generally the product of evolving state court

decisions strongly influenced by the American Law Institute's Restatement of the Law—it will serve no useful purpose at this late hour for an inferior court to enter the lists on this formidable issue. The Supreme Court has spoken. The Court has cited no authority for generously mixing tort and constitutional law in interpreting § 1983, but it has stated its position vigorously and repeatedly.

What are the proper sources to consult to determine the standard of culpability under Section 1983?

***PARRATT v. TAYLOR*, 451 U.S. 527 (1981)**

Justice Rehnquist delivered the opinion of the Court.

[1] The respondent is an inmate at the Nebraska Penal and Correctional Complex who ordered by mail certain hobby materials valued at \$ 23.50. The hobby materials were lost and respondent brought suit under 42 U. S. C. § 1983 to recover their value. At first blush one might well inquire why respondent brought an action in federal court to recover damages of such a small amount for negligent loss of property, but because 28 U.S.C. § 1343, the predicate for the jurisdiction of the United States District Court, contains no minimum dollar limitation, he was authorized by Congress to bring his action under that section if he met its requirements and if he stated a claim for relief under 42 U. S. C. § 1983. Respondent claimed that his property was negligently lost by prison officials in violation of his rights under the Fourteenth Amendment to the United States Constitution. More specifically, he claimed that he had been deprived of property without due process of law.^[1]

[2] The United States District Court for the District of Nebraska entered summary judgment for respondent, and the United States Court of Appeals for the Eighth Circuit affirmed in a per curiam order. 620 F.2d 307 (1980). We granted certiorari. 449 U.S. 917 (1980).

I

[3] The facts underlying this dispute are not seriously contested. Respondent paid for the hobby materials he ordered with two drafts drawn on his inmate account by prison officials. The packages arrived at the complex and were signed for by two employees who worked in the prison hobby center. One of the employees was a civilian and the other was an inmate. Respondent was in segregation at the time and was not permitted to have the hobby materials. Normal prison procedures for the handling of mail packages is that upon arrival they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package and to sign a receipt. No inmate other than the one to whom the package is addressed is supposed to sign for a package. After being released from segregation, respondent contacted several prison officials regarding the whereabouts of his packages. The officials were never able to locate the packages or to determine what caused their disappearance.

[4] In 1976, respondent commenced this action against the petitioners, the Warden and Hobby Manager of the prison, in the District Court seeking to recover the value of the hobby materials which he claimed had been lost as a result of the petitioners' negligence. Respondent alleged that petitioners' conduct deprived him of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Respondent chose to proceed in the United States District Court under 28 U. S. C. § 1343 and 42 U. S. C. § 1983, even though the State of Nebraska had a tort claims procedure which provided a remedy to persons who suffered tortious losses at the hands of the State.

[5] On October 25, 1978, the District Court granted respondent's motion for summary judgment. The District Court ruled that negligent actions by state officials can be a basis for an action under 42 U. S. C. § 1983; petitioners were not immune from damages actions of this kind; and the deprivation of the hobby kit "[implicated] due process rights." The District Court explained:

"This is not a situation where prison officials confiscated contraband. The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for [respondent], which loss should not go without redress." App. to Pet. for Cert. 9.

II

[6] In the best of all possible worlds, the District Court's above-quoted statement that respondent's loss should not go without redress would be an admirable provision to be contained in a code which governed the administration of justice in a civil-law jurisdiction. For better or for worse, however, our traditions arise from the common law of case-by-case reasoning and the establishment of precedent. In 49 of the 50 States the common-law system, as modified by statute, constitutional amendment, or judicial decision governs. Coexisting with the 50 States which make it up, and supreme over them to the extent of its authority under Art. IV of the Constitution, is the National Government. At an early period in the history of this Nation, it was held that there was no federal common law of crimes, *United States v. Hudson & Goodwin*, 7 Cranch 32 (1812), and since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), there has been no general common law applicable in federal courts merely by reason of diversity-of-citizenship jurisdiction. Therefore, in order properly to decide this case we must deal not simply with a single, general principle, however just that principle may be in the abstract, but with the complex interplay of the Constitution, statutes, and the facts which form the basis for this litigation.

* * * * *

[7] While we have twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983, see *Procunier v. Navarette*, 434 U.S. 555 (1978), and *Baker v. McCollan*, 443 U.S. 137 (1979), we have in each of those cases found it unnecessary to decide the issue. In *Procunier*, *supra*, we held that regardless of whether the § 1983 complaint framed in terms of negligence stated a claim for relief, the defendants would clearly have been entitled to qualified immunity and therefore not liable for damages. In *Baker*, *supra*, we held that no deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States had occurred, and therefore it was unnecessary to decide whether mere negligence on the part of the actor would have rendered him liable had there been such a deprivation. These two decisions, however, have not aided the various Courts of Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims such as the present one which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation and relief is sought under § 1983. The diversity in approaches is legion. We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past.

[8] Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan*, *supra*, we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983. We explained:

"[The] question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." 443 U.S., at 139-140.

[9] Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to

contain a state-of-mind requirement.^[2] The Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 (1961), when we explained after extensively reviewing the legislative history of § 1983, that

“[it] is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.” *Id.*, at 180.

[10] In distinguishing the criminal counterpart which had earlier been at issue in *Screws v. United States*, 325 U.S. 91 (1945), the *Monroe* Court stated:

“In the *Screws* case we dealt with a statute that imposed criminal penalties for acts ‘willfully’ done. We construed that word in its setting to mean the doing of an act with ‘a specific intent to deprive a person of a federal right.’ 325 U.S., at 103. We do not think that gloss should be put on [§ 1983] which we have here. The word ‘willfully’ does not appear in [§ 1983]. Moreover, [§ 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the grounds of vagueness. [Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” 365 U.S., at 187.

[11] Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a “civil remedy” for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

III

[12] Since this Court’s decision in *Monroe v. Pape*, *supra*, it can no longer be questioned that the alleged conduct by the petitioners in this case satisfies the “under color of state law” requirement. Petitioners were, after all, state employees in positions of considerable authority. They do not seriously contend otherwise. Our inquiry, therefore, must turn to the second requirement — whether respondent has been deprived of any right, privilege, or immunity secured by the Constitution or laws of the United States.

[13] The only deprivation respondent alleges in his complaint is that “his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law.” App. 8. As such, respondent’s claims differ from the claims which were before us in *Monroe v. Pape*, *supra*, which involved violations of the Fourth Amendment, and the claims presented in *Estelle v. Gamble*, 429 U.S. 97 (1976), which involved alleged violations of the Eighth Amendment. Both of these Amendments have been held applicable to the States by virtue of the adoption of the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Robinson v. California*, 370 U.S. 660 (1962). Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter. The pertinent text of the Fourteenth Amendment provides:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.” (Emphasis supplied.)

[14] Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation.^[3]

Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law." *Baker v. McCollan*, 443 U.S., at 145. Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

[15] This Court has never directly addressed the question of what process is due a person when an employee of a State negligently takes his property. In some cases this Court has held that due process requires a predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established state procedure and "process" could be offered before any actual deprivation took place. For example, in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Court struck down on due process grounds a New York statute that allowed a trust company, when it sought a judicial settlement of its trust accounts, to give notice by publication to all beneficiaries even if the whereabouts of the beneficiaries were known. The Court held that personal notice in such situations was required and stated that "when notice is a person's due, process which is a mere gesture is not due process." *Id.*, at 315. More recently, in *Bell v. Burson*, 402 U.S. 535 (1971), we reviewed a state statute which provided for the taking of the driver's license and registration of an uninsured motorist who had been involved in an accident. We recognized that a driver's license is often involved in the livelihood of a person and as such could not be summarily taken without a prior hearing. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), we struck down the Florida prejudgment replevin statute which allowed secured creditors to obtain writs in ex parte proceedings. We held that due process required a prior hearing before the State authorized its agents to seize property in a debtor's possession. See also *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur.

[16] We have, however, recognized that postdeprivation remedies made available by the State can satisfy the Due Process Clause. In such cases, the normal predeprivation notice and opportunity to be heard is pretermitted if the State provides a postdeprivation remedy. In *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), we upheld the right of a State to seize and destroy unwholesome food without a preseizure hearing. The possibility of erroneous destruction of property was outweighed by the fact that the public health emergency justified immediate action and the owner of the property could recover his damages in an action at law after the incident. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), we upheld under the Fifth Amendment Due Process Clause the summary seizure and destruction of drugs without a preseizure hearing. Similarly, in *Fahey v. Mallonee*, 332 U.S. 245 (1947), we recognized that the protection of the public interest against economic harm can justify the immediate seizure of property without a prior hearing when substantial questions are raised about the competence of a bank's management. In *Bowles v. Willingham*, 321 U.S. 503 (1944), we upheld in the face of a due process challenge the authority of the Administrator of the Office of Price Administration to issue rent control orders without providing a hearing to landlords before the order or regulation fixing rents became effective. See also *Corn Exchange Bank v. Coler*, 280 U.S. 218 (1930); *McKay v. McClinnis*, 279 U.S. 820 (1929); *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29 (1928); and *Ownbey v. Morgan*, 256 U.S. 94 (1921). These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial

taking, can satisfy the requirements of procedural due process. As we stated in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974):

“Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless mandated by a long line of cases in this Court, culminating in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972). The pre-*Sniadach* cases are said by petitioner to hold that ‘the opportunity to be heard must precede any actual deprivation of private property.’ Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been ‘[where] only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.’ *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931).” *Id.*, at 611 (footnote omitted).

[17] Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an “opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). However, as many of the above cases recognize, we have rejected the proposition that “at a meaningful time and in a meaningful manner” always requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

[18] The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner’s property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under “color of law,” is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities.

[19] A case remarkably similar to the present one is *Bonner v. Coughlin*, 517 F.2d 1311 (CA7 1975), modified en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978). There, a prisoner alleged that prison officials “made it possible by leaving the door of Plaintiff’s cell open, for others without authority to remove Plaintiff’s trial transcript from the cell.” 517 F.2d, at 1318. The question presented was whether negligence may support a recovery under § 1983. Then Judge Stevens, writing for a panel of the Court of Appeals for the Seventh Circuit, recognized that the question that had to be decided was “whether it can be said that the deprivation was ‘without due process of law.’” *Ibid.* He concluded:

“It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment’s prohibition against ‘State’ deprivations of property; in the latter situation, however, even though there is action ‘under color of’ state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids

the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." *Id.*, at 1319.

[20] We believe that the analysis recited above in *Bonner* is the proper manner in which to approach a case such as this. This analysis is also quite consistent with the approach taken by this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), where the Court was confronted with the claim that corporal punishment in public schools violated due process. Arguably, the facts presented to the Court in *Ingraham* were more egregious than those presented here inasmuch as the Court was faced with both an intentional act (as opposed to negligent conduct) and a deprivation of liberty. However, we reasoned:

"At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost.' *Mathews v. Eldridge*, 424 U.S., at 348. We think that point has been reached in this case. In view of the low incidence of abuse, the openness of our schools, *and the common-law safeguards that already exist*, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility." *Id.*, at 682. (Emphasis supplied.)

IV

[21] Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State. See Neb. Rev. Stat. § 81-8,209 *et seq.* (1976). Through this tort claims procedure the State hears and pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question but respondent did not use it. It is argued that the State does not adequately protect the respondent's interests because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

[22] Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). We

do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Accordingly, the judgment of the Court of Appeals is

Reversed.

* * * * *

Justice Blackmun, concurring.

[23] While I join the Court's opinion in this case, I write separately to emphasize my understanding of its narrow reach. This suit concerns the deprivation only of property and was brought only against supervisory personnel, whose simple "negligence" was assumed but, on this record, not actually proved. I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty. *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977). I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process. See, e. g., *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Roe v. Wade*, 410 U.S. 113 (1973).

[24] Most importantly, I do not understand the Court to suggest that the provision of "postdeprivation remedies," *ante*, at 538, within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property. While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," *ante*, at 541, it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks.

Justice Powell, concurring in the result.

[25] This case presents the question whether a state prisoner may sue to recover damages under 42 U. S. C. § 1983, alleging that a violation of the Due Process Clause of the Fourteenth Amendment occurred when two shipments mailed to him were lost due to the negligence of the prison's warden and "hobby manager." Unlike the Court, I do not believe that such negligent acts by state officials constitute a deprivation of property within the meaning of the Fourteenth Amendment, regardless of whatever subsequent procedure a State may or may not provide. I therefore concur only in the result.

* * * * *

[26] A "deprivation" connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss.^[4] The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations.^[5] This is the view adopted by an

overwhelming number of lower courts, which have rejected due process claims premised on negligent acts without inquiring into the existence or sufficiency of the subsequent procedures provided by the States. In addition, such a rule would avoid trivializing the right of action provided in § 1983. That provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law. See n. 12, *infra*.^[6]

[27] Such an approach has another advantage; it avoids a somewhat disturbing implication in the Court's opinion concerning the scope of due process guarantees. The Court analyzes this case solely in terms of the procedural rights created by the Due Process Clause. Finding state procedures adequate, it suggests that no further analysis is required of more substantive limitations on state action located in this Clause. *Cf. Paul v. Davis, supra*, at 712-714 (assessing the claim presented in terms of the "substantive aspects of the Fourteenth Amendment"); *Ingraham v. Wright*, 430 U.S. 651, 679, n. 47 (1977) (leaving open the question whether "corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause").

"the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place," *id.*, at 140, n. 1, and went on to hold that there had been no deprivation of liberty without due process of law. The Court reasoned that there is no duty to investigate "every claim of innocence," *id.*, at 146, and no constitutional requirement of an "error-free investigation of such a claim," *ibid.* It relied on the fact that the sheriff had acted reasonably in relying on a facially valid arrest warrant, thus implicitly distinguishing a case involving an intentional deprivation of liberty without cause.

To be sure, even where there has been an intentional deprivation of property, due process claims also must satisfy the requirement that the act be sufficiently linked to an official's state-created duties or powers to constitute "state action." See n. 10, *infra*.

[28] The Due Process Clause imposes substantive limitations on state action, and under proper circumstances^[7] these limitations may extend to intentional and malicious deprivations of liberty^[8] and property^[9] even where compensation is available under state law. The Court, however, fails altogether to discuss the possibility that the kind of state action alleged here constitutes a violation of the substantive guarantees of the Due Process Clause. As I do not consider a negligent act the kind of deprivation that implicates the procedural guarantees of the Due Process Clause, I certainly would not view negligent acts as violative of these substantive guarantees. But the Court concludes that there has been such a deprivation. And yet it avoids entirely the question whether the Due Process Clause may place substantive limitations on this form of governmental conduct.

[29] In sum, it seems evident that the reasoning and decision of the Court today, even if viewed as compatible with our precedents, create new uncertainties as well as invitations to litigate under a statute that already has burst its historical bounds.^[10]

Justice Marshall, concurring in part and dissenting in part.

[30] I join the opinion of the Court insofar as it holds that negligent conduct by persons acting under color of state law may be actionable under 42 U. S. C. § 1983. *Ante*, at 534-535. I also agree with the majority that in cases involving claims of negligent deprivation of property without due process of law, the availability of an adequate postdeprivation cause of action for damages under state law may preclude a finding of a violation of the Fourteenth Amendment. I part company with the majority, however, over its conclusion that there was an adequate state-law remedy available to respondent in this case. My disagreement with the majority is not because of any shortcomings in the Nebraska tort claims procedure.^[11]

Rather, my problem is with the majority's application of its legal analysis to the facts of this case.

[31] It is significant, in my view, that respondent is a state prisoner whose access to information about his legal rights is necessarily limited by his confinement. Furthermore, there is no claim that either petitioners or any other officials informed respondent that he could seek redress for the alleged deprivation of his property by filing an action under the Nebraska tort claims procedure. This apparent failure takes on additional significance in light of the fact that respondent pursued his complaint about the missing hobby kit through the prison's grievance procedure. ^[12]

In cases such as this, I believe prison officials have an affirmative obligation to inform a prisoner who claims that he is aggrieved by official action about the remedies available under state law. If they fail to do so, then they should not be permitted to rely on the existence of such remedies as adequate alternatives to a § 1983 action for wrongful deprivation of property. Since these prison officials do not represent that respondent was informed about his rights under state law, I cannot join in the judgment of the Court in this case.

[32] Thus, although I agree with much of the majority's reasoning, I would affirm the judgment of the Court of Appeals.

Footnotes

1. As we explained in *Board of Regents v. Roth*, 408 U.S. 564 (1972), property interests “are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.*, at 577. It is not contended that under Nebraska law respondent does not enjoy a property interest in the hobby materials here in question. ¹
2. Title 18 U. S. C. § 242 provides in pertinent part: “Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.” (Emphasis supplied.) ²
3. Petitioners argue that even if a negligent deprivation of respondent's property occurred, there is no evidence in the record of negligence on their part. There is merit to petitioners' arguments. Petitioners were not personally involved in the handling of the packages and respondent's basic allegation appears to be that subordinates of petitioners violated established procedures which, if properly followed, would have ensured the proper delivery of respondent's packages. In the past, this Court has refused to accept § 1983 actions premised on theories of respondeat superior. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). On the other hand, there is no indication in the record that the petitioners ever raised in the District Court the argument that the loss of property was not caused by their negligence. Certainly, the District Court did not consider this an open question. In such a context, and with little or no factual development at the trial level, we can only accept for purposes of this opinion the District Court's assumption that petitioners were negligent and that this negligence contributed to respondent's loss. ³
4. According to Webster's New International Dictionary of the English Language (2d ed. 1945), to “deprive” is to “dispossess; bereave; divest; to hinder from possessing; debar; shut out.” ⁴

5. In analogous contexts, we have held that the intent of state officials is a relevant factor to consider in determining whether an individual has suffered a denial of due process. In *United States v. Lovasco*, 431 U.S. 783, 790 (1977), involving preindictment prosecutorial delay, we held that “proof of prejudice is generally a necessary but not sufficient element of a due process claim, and ... the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.”

Similarly, in *Baker v. McCollan*, 443 U.S. 137 (1979), the Court reviewed a claimed violation of due process occurring when a sheriff arrested the individual named in an arrest warrant and failed for a time to realize that the warrant itself had named the wrong person. The Court there noted that “the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place,” *id.*, at 140, n. 1, and went on to hold that there had been no deprivation of liberty without due process of law. The Court reasoned that there is no duty to investigate “every claim of innocence,” *id.*, at 146, and no constitutional requirement of an “error-free investigation of such a claim,” *ibid.* It relied on the fact that the sheriff had acted reasonably in relying on a facially valid arrest warrant, thus implicitly distinguishing a case involving an intentional deprivation of liberty without cause. To be sure, even where there has been an intentional deprivation of property, due process claims also must satisfy the requirement that the act be sufficiently linked to an official’s state-created duties or powers to constitute “state action.” See n.10, *infra*. [↩](#)

6. We have previously expressed concerns about the prospect that the Due Process Clause may become a vehicle for federal litigation of state torts. In *Paul v. Davis*, *supra*, we held that an official action damaging the reputation of a private citizen, although an actionable tort under state law, did not constitute a deprivation of “liberty” within the meaning of the Fourteenth Amendment. In so holding we relied principally on the fact that the individual’s interest in his reputation was not accorded a “legal guarantee of present enjoyment” under state law, since it was “simply one of a number [of interests] which the State may protect against injury by virtue of its tort law.” *Id.*, at 711-712. Attention to the “guarantees” provided by state law is at least as appropriate in a case involving an alleged deprivation of “property.” It is clear that the hobby kit was respondent’s “property.” But it also is clear that under state law no remedy other than tort law protects property from interferences caused by the negligence of others. The reasoning of *Paul v. Davis* would suggest, therefore, that the enjoyment of property free of negligent interference is not sufficiently “guaranteed” by state law to justify a due process claim based on official negligence. A State perhaps could constitutionalize certain negligent actions by state officials by criminalizing negligence, thus extending its guarantee to this kind of interference. Instead, the States merely have created systems for civil compensation of tort victims. In this sense, state law draws a clear distinction between negligently caused injuries and intentional thefts or assaults. [↩](#)

7. Even intentional injuries inflicted by state officials must be “state action” to implicate the due process guarantees, and must be “under color of” state law in order to be actionable under § 1983. In this area we have drawn a distinction between mere “torts of state officials” and “acts done ‘under color’ of law . . . which deprived a person of some right secured by the Constitution or laws of the United States.” *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion of Douglas, J.) (discussing the criminal analogue of § 1983 — now codified as 18 U. S. C. § 242). Actionable deprivations must be based on “[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.” *Ibid.* (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). See also *Screws*, *supra*, at 134 (Rutledge, J., concurring in result) (the Constitution protects the “right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power”) (emphasis added). Where state officials cause

injuries in ways that are equally available to private citizens, constitutional issues are not necessarily raised. As Justice Douglas put it in *Screws*: “The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.” 325 U.S., at 108. [↵](#)

8. See, e. g., *Rochin v. California*, 342 U.S. 165 (1952); *Hall v. Tawney*, 621 F.2d 607, 613 (CA4 1980) (corporal punishment of students may have violated due process if it “amounted to a brutal and inhumane abuse of official power literally shocking to the conscience”); *Bellows v. Dainack*, 555 F.2d 1105, 1106, n. 1 (CA2 1977) (use of excessive force by policeman during the course of an arrest constitutes a deprivation of “liberty” without due process). [↵](#)
9. See, e. g., *Kimbrough v. O’Neil*, 545 F.2d 1059, 1061 (CA7 1976) (en banc) (“a taking with intent (or reckless disregard) of a claimant’s property by a State agent violates the Due Process Clause of the Fourteenth Amendment and is actionable under Section 1983”); *Carter v. Estelle*, 519 F.2d 1136, 1136-1137 (CA5 1975) (per curiam) (same). See also *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656, n. 23 (1981) (Brennan, J., dissenting) (when property is taken by the government but not in furtherance of a “public use,” “the government entity may not be forced to pay just compensation under the Fifth Amendment, [but] the landowner may nevertheless have a damages cause of action under 42 U. S. C. § 1983 for a Fourteenth Amendment due process violation”). [↵](#)
10. Section 1983 was enacted in 1871 as one of the statutes intended to implement the Fourteenth Amendment. For many years it remained a little-used, little-known section of the Code. In the past two decades, however, resourceful counsel and receptive courts have extended its reach vastly. This statute with a clearly understood and commendable purpose no longer is confined to deprivations of individual rights as intended in 1871. As a result, § 1983 has become a major vehicle for general litigation in the federal courts by individuals and corporations.

Professor Christina Whitman recently has addressed this expansion of § 1983 with a comprehensive assessment of arguable pluses and minuses. See Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980). There will be no pluses, however, if the striking escalation of suits under § 1983 against state and local officials is augmented by suits based on negligent conduct. Professor Whitman noted, for example, that civil rights petitions by state prisoners in federal court increased from 218 cases in 1966 to 11,195 in 1979. *Id.*, at 6. See also the Annual Report of the Director of the Administrative Office of the U.S. Courts 62 (1980), reporting a further increase in this number to 12,397 in 1980. The societal costs of using this statute for a purpose never contemplated are high indeed:

“First, the existence of the statutory cause of action means that every expansion of constitutional rights [through § 1983] will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every [such] expansion . . . displaces state lawmaking authority by diverting decision-making to the federal courts.” Whitman, *supra*, at 25.

The present case, involving a \$23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals. There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of right to a court of appeals, and potentially, consideration of a petition for certiorari in this Court. It is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an overburdened federal system that never was designed to be utilized in this way. Congress, recognizing

the problem with respect to prisoner petitions, enacted last year the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247, 94 Stat. 349, authorizing federal courts to continue § 1983 prisoner cases for up to 90 days to allow recourse to administrative remedies. The grievance procedures, however, must be certified by the Attorney General or determined by the court to be in compliance with not insubstantial procedural requirements. *Id.*, § 7, 42 U. S. C. § 1997e (1976 ed., Supp. IV). As a result, the Act continues to allow resort to the federal courts in many cases of this kind. In view of increasing damages-suit litigation under § 1983, and the inability of courts to identify principles that can be applied consistently, perhaps the time has come for a revision of this century-old statute—a revision that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action. [↴](#)

11. To be sure, the state remedies would not have afforded respondent all the relief that would have been available in a § 1983 action. See ante, at 543-544. I nonetheless agree with the majority that “they are sufficient to satisfy the requirements of due process.” Ante, at 544. [↴](#)
12. In fact, the prison officials did not raise the issue of the availability of a state-law remedy in either the District Court or the Court of Appeals. The issue was first presented in the petition for rehearing filed in the Court of Appeals. [↴](#)

Notes on *Parratt v. Taylor*

1. What is the standard of culpability in Section 1983 actions according to *Parratt*? The Supreme Court had previously granted certiorari in *Baker v. McCollan*, 443 U.S. 137 (1979), to consider whether negligent conduct is actionable under Section 1983. *Baker* arose out of the arrest and confinement of Linnie McCollan pursuant to a warrant intended for his brother Leonard. Linnie brought a Section 1983 action alleging that the sheriff’s negligent failure to establish proper identification procedures deprived him of his liberty without due process of law. The Supreme Court, however, found that persons arrested pursuant to a valid warrant are not entitled to a separate judicial determination of probable cause to detain them pending trial. Because McCollan had not suffered an invasion of his Fourteenth Amendment rights, the Court concluded that it had no cause to determine the degree of culpability necessary to establish liability under Section 1983. Can *Parratt* be reconciled with *Baker v. McCollan*? Is the Court’s ruling on the culpability issue in *Parratt* dictum? But see *Wood v. Strickland*, 420 U.S. 308, 314 (1975) (“[T]he immunity question involves the construction of a federal statute, and our practice is to deal with possibly dispositive statutory issues before questions turning on the construction of the Constitution.”); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).
2. As *Parratt v. Taylor* exemplifies, most of the debate surrounding the standard of culpability under Section 1983 focused upon whether the statute allows recovery for negligent, as opposed to reckless or intentional, deprivations of constitutional rights. The courts generally did not address the equally important question of whether Section 1983 imposes “strict liability” for invasions of rights protected by the Constitution.
 - a. Does *Parratt* require that, in addition to proving a constitutional violation caused by a person acting under color of state law, a Section 1983 plaintiff must prove that the government official acted negligently?
 - b. What standard of culpability is imposed by the language of 42 U.S.C. § 1983? See *Gomez v. Toledo*, 446

U.S. 635, 640 (1980) ("By the plain terms of §1983, two—and only two—allegations are required in order to state a claim under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who deprived him of that right acted under color of state or territorial law.").

c. What standard of culpability is indicated by the following excerpts from the legislative history of Section 1983?

i. Senator Edmunds, manager of the bill in the Senate, stated that the Act was "so very simple and really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871) [cited in *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 685 (1978)].

ii. Representative Bingham declared the bill's purpose to be:

The enforcement...of the Constitution on behalf of every individual citizen of the Republic...to the extent of the rights guaranteed to him by the Constitution.

Globe App. 81 [cited in *Monell*, 436 U.S. 658, 685 n.45].

iii. Senator Thurman, opposing the bill, remarked:

It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts, and without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character...

[T]here is no limitation whatsoever upon the terms that are employed (in the bill), and they are as comprehensive as can be used.

Globe App. at 216-217 [cited in *Monell*, 436 U.S. 658, 385 n.45 and in *Monroe v. Pape*, 365 U.S. at 179-80].

iv. Representative Shellenbarger described how the courts should interpret § 1:

The Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people...Chief Justice Jay and also Story say:

"Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws." 1 Story on Constitution, sec. 429.

Globe App., at 68 [cited in *Monell*, 436 U.S. at 684].

3. How does the Supreme Court in *Parratt* distinguish injuries inflicted by state officials that are to be

redressed by state tort law from violations of the Fourteenth Amendment cognizable under Section 1983? Has the Court pre-empted Section 1983 actions for every constitutional infringement whenever there is an adequate post-deprivation state remedy?

- a. Justice Blackmun's concurrence in *Parratt* emphasized the "narrow reach" of the Court's opinion, including the limiting fact that the "suit concerns the deprivation only of property." 451 U.S. at 545. The lower federal courts subsequently divided over the issue of whether the availability of an adequate state post-deprivation remedy affords due process of law for deprivations of liberty as opposed to property. Compare *Thibodeaux v. Bordelon*, 740 F.2d 329, 337-38 (5th Cir. 1984) with *Wilson v. Beebe*, 770 F.2d 578, 584 (6th Cir. 1985) (en banc). In *Zinerman v. Burch*, 494 U.S. 113 (1990) Justice Blackmun authored the majority opinion holding the *Parratt* analysis equally applicable to claimed deprivations of liberty:

It is true that *Parratt*...concerned deprivations of property. It is also true that Burch's interest in avoiding six months confinement is of an order different from inmate Parratt's interest in mail-order materials valued at \$23.50. But the reasoning of *Parratt*...emphasizes the State's inability to provide pre-deprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake. In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. See *Loudermill*, 470 U.S., at 542, 105 S. Ct., at 1493; *Memphis Light*, 436 U.S. at 18, 98 S. Ct., at 1564; *Fuentes*, 407 U.S., at 80-84, 92 S. Ct., at 1018. Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, see *Ingraham*, 430 U.S., at 682, 97 S. Ct., at 1418, or where the state is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process. Thus, the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule.

Id. at 132.

- b. The *Parratt* Court was confronted with a negligent, unintentional deprivation of property. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court held that the *intentional* destruction of a prisoner's personal property in the course of a cell shakedown similarly does not violate the Fourteenth Amendment if an adequate post-deprivation state remedy exists

The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording pre-deprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent.

Hudson v. Palmer, 468 U.S. 517, 533 (1984).

- c. Although the Supreme Court has extended *Parratt* to random and unauthorized intentional acts of state employees, it has also held that a person deprived of property pursuant to an "established state procedure" is not relegated to post-deprivation state remedies. *Logan v. Zimmerman Brush Co.*,

455 U.S. 422 (1982). Laverne Logan, allegedly fired because of a physical disability, filed a charge of discrimination with the Illinois Fair Employment Practices Commission in compliance with the Illinois Fair Employment Practices Act. The Commission, however, inadvertently scheduled a required fact-finding conference five days after the statute's prescribed 120-day time limit. Upon motion by the employer, the discrimination charge was dismissed because of the Commission's failure to timely convene the conference. Logan challenged the dismissal of the charge as a deprivation of a protected property interest in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 428. The employer argued that even if Logan had been deprived of a property right, under *Parratt* due process was afforded by a post-deprivation state tort action under the Illinois Court of Claims Act. The Supreme Court rejected the employer's contention, reasoning as follows:

This argument misses *Parratt's* point. In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of...property as a result of a random and unauthorized act by a state employee...not a result of some established state procedure." 451 U.S., at 541, 101 S. Ct., at 1915. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference – whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. See *id.*, at 545, 101 S. Ct., at 1981 (second concurring opinion). Unlike the complainant in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

451 U.S. at 435-36.

- d. The Court further circumscribed the reach of *Parratt* in *Zinerman v. Burch*, 494 U.S. 113 (1990), a Section 1983 action alleging a deprivation of liberty arising out of respondent's admission to a state hospital for treatment of mental illness. Burch did not attack the constitutionality of the Florida statutes that authorized his admission to the hospital, consequently he could not avoid the dictates of *Parratt* by claiming his deprivation was caused by an established state procedure. Instead, Burch averred that his admission as a voluntary patient contravened the Florida statutory scheme because the officials involved in his admission and treatment knew or should have known he was incompetent to make an informed decision and therefore should have afforded Burch the procedural safeguards provided by the state's involuntary placement protocol. In a 5-4 opinion, the Supreme Court held that Burch was not relegated to state post-deprivation remedies, finding *Parratt* distinguishable on three grounds:

First, petitioners cannot claim that the deprivation of Burch's liberty was unpredictable.

* * * * *

Second, we cannot say that predeprivation process was impossible here.

* * * * *

Third, petitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the procedural safeguards required

before deprivations occur. The deprivation here is “unauthorized” only in the sense that it was not an act sanctioned by state law, but, instead, was a “depriv[ation] of constitutional rights ... by an official’s abuse of his position.” *Monroe*, 365 U.S., at 172.

We conclude that petitioners cannot escape § 1983 liability by characterizing their conduct as a “random, unauthorized” violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy. Burch, according to the allegations of his complaint, was deprived of a substantial liberty interest without either valid consent or an involuntary placement hearing, by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards. Such a deprivation is foreseeable, due to the nature of mental illness, and will occur, if at all, at a predictable point in the admission process. Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation safeguards would be of use in preventing the kind of deprivation alleged.

494 U.S. at 136-139.

Justice O’Connor’s dissenting opinion repudiated the majority’s effort to find *Parratt* inapplicable to deprivations caused by state officials with delegated authority:

[T]he Court suggests that this case differs from *Parratt* and *Hudson* because petitioners possessed a sort of delegated power. See *ante*, at 988-990. Yet petitioners no more had the delegated power to depart from the admission procedures and requirements than did the guard in *Hudson* to exceed the limits of his established search and seizure authority, or the prison official in *Parratt* wrongfully to withhold or misdeliver mail. Petitioner’s delegated duty to act in accord with Florida’s admission procedures is akin to the mailhandler’s duty to follow and implement the procedures surrounding delivery of packages, or the guard’s duty to conduct the search properly. In the appropriate circumstances and pursuant to established procedures, the guard in *Hudson* was charged with seizing property pursuant to a search. The official in *Parratt* no doubt possessed some power to withhold certain packages from prisoners. *Parratt* and *Hudson* distinguish sharply between deprivations caused by unauthorized acts and those occasioned by established state procedures. See *Hudson*, 468 U.S. at 532, 104 S. Ct. at 3203; *Parratt*, 451 U.S., at 541, 101 S. Ct., at 1916; accord *Logan*, 455 U.S. at 435-436, 102 S. Ct., at 1157-58. The delegation argument blurs this line and ignores the unauthorized nature of petitioner’s alleged departure from established practices.

494 U.S. at 145-46.

- e. Following *Parratt*, the lower courts uniformly held that the availability of state remedies will not preclude claimed invasions of substantive rights, as opposed to post-deprivation violations of procedural due process. As the court explained in *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986),

Unlike procedural due process claims, which challenge the adequacy of the procedures used by the government in deciding how to treat individuals, substantive due process claims allege that certain governmental conduct would remain unjustified even if it were accompanied by the most stringent of procedural safeguards. Such substantive claims are outside the scope of *Parratt* because the constitutional violation is complete at the moment when the harm occurs. The existence of state

post-deprivation remedies therefore has no bearing on whether the plaintiff has a constitutional claim.

In *Zinerman v. Burch*, 494 U.S. 113, 124-25 (1990), the Supreme Court acknowledged this significant limit on the reach of the *Parratt* doctrine:

In *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law.

Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.

This general rule applies in a straightforward way to two of the three kinds of § 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment. First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under § 1983 for state officials' violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S., at 331. As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. *Id.*, at 338 (Stevens, J., concurring in judgments). A plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state- tort remedy that might be available to compensate him for the deprivation of these rights.

494 U.S. at 124-25. See also *Manuel v. City of Joliet*, Illinois, 139 S. Ct. 2777 (2017) (Holding that allegation that arrest and pretrial detention were based on made-up evidence is governed by Fourth Amendment rather than Due Process Clause, and reversing lower court ruling that plaintiff who filed Section 1983 action was relegated to adequate state law remedy). But see *Albright v. Oliver*, 510 U.S. 266, 283-285 (1994) (Kennedy, J. concurring) (where injury is caused by a random and unauthorized act, post-deprivation state remedy bars substantive as well as procedural due process claim); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 872-892 (2003).

4. The assertion that due process was supplied by an adequate post-deprivation state remedy was not raised by the petitioners in *Parratt* until their petition for rehearing filed in the court of appeals. In *Prudential Federal Savings and Loan Association*, 478 U.S. 1311 (1986), the petitioners made an application for a writ of injunction pending appeal raising constitutional issues. These issues, however, had not been presented to the state's highest court until a petition for rehearing. Justice Rehnquist, serving as Circuit Justice, denied the application, ruling the claims were not properly presented to the Supreme Court. Justice Rehnquist relied on the seemingly established rule that "[q]uestions first presented to the highest State Court on a petition for rehearing came too late for consideration here..." *Id.*, citing *Radio Station WOW v. Johnson, Inc.*, 326 U.S. 120, 128 (1945). Why did the court entertain the adequacy of post-deprivation state remedies argument in *Parratt*?
5. What criteria must a post-deprivation state court remedy fulfill to satisfy the Due Process Clause of the Fourteenth Amendment? Must the state remedy be equally effective to that afforded by Section 1983? Cf.

Carlson v. Green, 446 U.S. 14 (1980). The Supreme Court granted certiorari in *Daniels v. Williams*, 474 U.S. 327 (1986) to determine, among other things, whether a post-deprivation state cause of action accords due process where recovery may be barred by a sovereign immunity defense.

DANIELS v. WILLIAMS, 474 U.S. 327 (1986)

Justice Rehnquist delivered the opinion of the Court.

* * * * *

[1] In this §1983 action, petitioner seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. He claims that, while an inmate at the city jail in Richmond, Virginia, he slipped on a pillow negligently left on the stairs by respondent, a correctional deputy stationed at the jail. Respondent's negligence, the argument runs, "deprived" petitioner of his "liberty" interest in freedom from bodily injury, see *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); because respondent maintains that he is entitled to the defense of sovereign immunity in a state tort suit, petitioner is without an "adequate" state remedy, cf. *Hudson v. Palmer*, 468 U.S. 517, 534-536 (1984). Accordingly, the deprivation of liberty was without "due process of law."

* * * * *

[2] In *Parratt v. Taylor*, we granted certiorari, as we had twice before, "to decide whether mere negligence will support a claim for relief under § 1983." 451 U.S., at 532. After examining the language, legislative history, and prior interpretations of the statute, we concluded that § 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534-535. We adhere to that conclusion. But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. See, e.g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment).

[3] In *Parratt*, before concluding that Nebraska's tort remedy provided all the process that was due, we said that the loss of the prisoner's hobby kit, "even though negligently caused, amounted to a deprivation [under the Due Process Clause]." 451 U.S., at 536-537. Justice Powell, concurring in the result, criticized the majority for "[passing] over" this important question of the state of mind required to constitute a "deprivation" of property. *Id.*, at 547. He argued that negligent acts by state officials, though causing loss of property, are not actionable under the Due Process Clause. To Justice Powell, mere negligence could not "[work] a deprivation in the constitutional sense." *Id.*, at 548 (emphasis in original). Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." *Id.*, at 548-549; see also *id.*, at 545 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.

[4] The Due Process Clause of the Fourteenth Amendment provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.

E.g., *Davidson v. New Orleans*, 96 U.S. 97 (1878) (assessment of real estate); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license); *Ingraham v. Wright*, 430 U.S. 651 (1977) (paddling student); *Hudson v. Palmer*, 468 U.S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers of government," *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819)). See also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)"); *Parratt, supra*, at 549 (Powell, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e.g.*, *Rochin, supra*, it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment).

[5] We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

[6] The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government. When dealing with a claim that such a document creates a right in prisoners to sue a government official because he negligently created an unsafe condition in the prison, we bear in mind Chief Justice Marshall's admonition that "we must never forget, that it is a *constitution* we are expounding," *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original). Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, 424 U.S. 693, 701 (1976), quoted in *Parratt v. Taylor*, 451 U.S., at 544.

[7] The only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond city jail and petitioner was an inmate confined in that jail. But while the Due Process Clause of the Fourteenth Amendment obviously speaks to some facets of this relationship, see, *e.g.*, *Wolff v. McDonnell, supra*, we do not believe its protections are triggered by lack of due care by prison officials. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). Where a government official's act causing injury to life, liberty, or property is merely negligent, "no procedure for compensation is *constitutionally* required." *Parratt, supra*, at 548 (Powell, J., concurring in result) (emphasis added).^[1]

[8] That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed.^[2] It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

[9] In support of his claim that negligent conduct can give rise to a due process “deprivation,” petitioner makes several arguments, none of which we find persuasive. He states, for example, that “it is almost certain that some negligence claims are within § 1983,” and cites as an example the failure of a State to comply with the procedural requirements of *Wolff v. McDonnell*, *supra*, before depriving an inmate of good-time credit. We think the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause. But we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct does not implicate the Due Process Clause of the Fourteenth Amendment.

[10] Petitioner also suggests that artful litigants, undeterred by a requirement that they plead more than mere negligence, will often be able to allege sufficient facts to support a claim of intentional deprivation. In the instant case, for example, petitioner notes that he could have alleged that the pillow was left on the stairs with the intention of harming him. This invitation to “artful” pleading, petitioner contends, would engender sticky (and needless) disputes over what is fairly pleaded. What’s more, requiring complainants to allege something more than negligence would raise serious questions about what “more” than negligence—intent, recklessness, or “gross negligence”—is required,^[3] and indeed about what these elusive terms mean. See Reply Brief for Petitioner 9 (“what terms like willful, wanton, reckless or gross negligence mean” has “left the finest scholars puzzled”). But even if accurate, petitioner’s observations do not carry the day. In the first place, many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary:

“I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized.” *LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring).

More important, the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear. See *O. HOLMES, THE COMMON LAW* 3 (1923). In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation.

* * * * *

Justice Stevens, concurring in the judgments.

* * * * *

[11] I would not reject these claims, as the Court does, by attempting to fashion a new definition of the term “deprivation” and excluding negligence from its scope. No serious question has been raised about the presence of “state action” in the allegations of negligence, and the interest in freedom from bodily harm surely qualifies as an interest in “liberty.” Thus, the only question is whether negligence by state actors can result in a deprivation. “Deprivation,” it seems to me, identifies, not the actor’s state of mind, but the victim’s infringement or loss. The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing—being “deprived” of—an aspect of liberty as the result, in part, of a form of state action.

[12] Thus, I would characterize each loss as a “deprivation” of liberty. Because the cases raise only procedural due process claims, however, it is also necessary to examine the nature of petitioners’ challenges to the state procedures. To prevail, petitioners must demonstrate that the state procedures for redressing injuries of this kind are constitutionally inadequate. Petitioners must show that they contain a defect so serious that we can characterize the procedures as fundamentally unfair, a defect so basic that we are forced to conclude that the deprivation occurred without due process.

[13] Daniels’ claim is essentially the same as the claim we rejected in *Parratt*. The Court of Appeals for the

Fourth Circuit determined that Daniels had a remedy for the claimed negligence under Virginia law. Although Daniels vigorously argues that sovereign immunity would have defeated his claim, the Fourth Circuit found to the contrary, and it is our settled practice to defer to the Courts of Appeals on questions of state law. It is true that Parratt involved an injury to “property” and that Daniels’ case involves an injury to “liberty,” but, in both cases, the plaintiff claimed nothing more than a “procedural due process” violation. In both cases, a predeprivation hearing was definitionally impossible. And, in both cases, the plaintiff had state remedies that permitted recovery if state negligence was established. Thus, a straightforward application of *Parratt* defeats Daniels’ claim.

* * * * *



[Daniels v. Williams – Audio and Transcript of Oral Argument](#)

Notes on *Daniels v. Williams*

1. Does *Daniels* clarify whether Section 1983 imposes a culpability requirement beyond that set forth by the Constitution?
2. As Justice Rehnquist noted in [Baker v. McCollan](#), 443 U.S. 137, 140 n.1 (1979), the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether § 1983 contains some qualification of that nature before a defendant may be held to respond in damages....
 - a. Often the question of whether particular government action violates the Constitution does not depend on the intent of the defendant or the reasonableness of his conduct, but instead turns on whether the official has contravened a legal standard established by judicial decisions. For example, while the Fourth Amendment prohibits “unreasonable searches and seizures,” the factual question of the reasonableness of the officer’s conduct under the circumstances is generally inapposite to whether she has violated the amendment. [Anderson v. Creighton](#), 483 U.S. 635, 643 (1987). Instead, the courts measure the officer’s actions against the legal standard of probable cause and the requirement that a warrant be obtained. See [Dunaway v. New York](#), 442 U.S. 200, 213-14 (1979) (“[R]espondent urges us to adopt a multifactor balancing test of ‘reasonable police conduct under the circumstances’ to cover all seizures that do not amount to technical arrests... . [T]he requisite ‘balancing’ has been performed in centuries of precedent and is embodied in the principle that seizures are ‘reasonable’ only if supported by probable cause.”).
 - b. While the intent or reasonableness of the official’s conduct is at times immaterial to the constitutional standard, certain rights guaranteed by the Constitution are violated only where the officer acted recklessly or with an intent to deprive plaintiff of the constitutional right. See [Mobile v. Bolden](#), 446 U.S. 55, 66 (1980) (“the basic principle [is] that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.”); [Weatherford v. Bursey](#), 429 U.S. 545 (1977) (presence of undercover agent at meetings between criminal defendant and his attorney did not deprive accused of right to effective assistance of counsel absent intent to intrude into attorney-client relationship to learn defense plan); [Mount Healthy City School District Board of Education v. Doyle](#), 429 U.S. 274, 287 (1977) (teacher must prove that First Amendment activities were a “motivating factor” in decision not to rehire him to establish constitutional violation); [Estelle v. Gamble](#), 429 U.S. 97, 106 (1977) (proof of negligence in administering medical care to a prisoner is insufficient to state a

claim for violation of the Eighth Amendment. The prisoner must demonstrate “deliberate indifference to serious medical needs.”)

3. Does *Daniels* hold that negligent conduct may never constitute a deprivation of life, liberty or property?

- a. While both *Parratt* and *Daniels* dealt with negligent conduct that was inadvertent, negligence may also consist of intentional acts that are unreasonable because of the risk of harm posed to others. In such instances, the difference between negligence and recklessness is that

the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such quantum of risk as is necessary to make it negligent is a difference in the degree of risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

Restatement (Second) of Torts § 500, Comment g. Should the Fourteenth Amendment be interpreted to proscribe intentional, as opposed to inadvertent, actions that are negligent but not reckless?

- b. In a companion case to *Daniels*, the Court held that a prisoner who claimed that prison officials negligently failed to protect him from attack from another inmate did not establish a “deprivation” within the meaning of the Fourteenth Amendment. [*Davidson v. Cannon*](#), 474 U.S. 344 (1986). “As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials.” *Davidson*, 474 U.S. at 348. Justice Blackmun, joined by Justice Marshall, dissented from the majority’s holding that negligence could never constitute a “deprivation” of liberty:

I agree that mere negligent activity *ordinarily* will not amount to an abuse of state power. Where the Court today errs, in my view, is in elevating this sensible rule of thumb to the status of inflexible constitutional dogma. The Court declares that negligent activity can *never* implicate the concerns of the Due Process Clause. I see no justification for this rigid view. In some cases, by any reasonable standard, governmental negligence is an abuse of power. This is one of those cases.

It seems to me that when a State assumes sole responsibility for one’s physical security and then ignores his call for help, the State cannot claim that it did not know a subsequent injury was likely to occur. Under such circumstances, the State should not automatically be excused from responsibility. In the context of prisons, this means that once the State has taken away an inmate’s means of protecting himself from attack by other inmates, a prison official’s negligence in providing protection can amount to a deprivation of the inmate’s liberty, at least absent extenuating circumstances. Such conduct by state officials seems to me to be the “arbitrary action” against which the Due Process Clause protects. The official’s actions in such cases thus are not remote from the purpose of the Due Process Clause and § 1983.

Negligence in such a case implicates the “[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.” *Monroe v. Pape*, 365 U.S. 167, 184 (1961), quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). The deliberate decision not to protect Davidson from a known threat was directly related to the often violent life of prisoners. And protecting inmates from attack is central to one of the State’s primary missions in running a prison—the maintenance of internal security. See *Hudson v. Palmer*, 468 U.S. 517, 524 (1986).

The Fourteenth Amendment is not trivialized ... by recognizing that in some situations

negligence can lead to a deprivation of liberty. On the contrary, excusing the State's failure to provide reasonable protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity.

Id. at 353-56.

- c. The provisions of the Bill of Rights are made applicable to the states only by virtue of selective incorporation through the Due Process Clause of the Fourteenth Amendment. Does *Daniels* consequently hold that a state or local official cannot be deemed to have violated any provision of the Bill of Rights by negligent conduct?

4. The *Daniels* Court expressly declined to consider whether recklessness or "gross negligence" may constitute a "deprivation" within the meaning of the Due Process Clause of the Fourteenth Amendment. [474 U.S. 327, 334 n.3 \(1986\)](#).

- a. Although some courts have held that "gross negligence," as opposed to "mere negligence" amounts to a Fourteenth Amendment violation, see [Dell Fargo v. City of San Juan Bautista](#), 857 F.2d 638, 640-41 (9th Cir. 1988) and cases cited at 640 n.3, at least one court has found that allegations of gross negligence do not state a Fourteenth Amendment violation. [Myers v. Morris](#), 810 F.2d 1437, 1468 (8th Cir. 1987). In [Metzger v. Osbeck](#), 841 F.2d 518, 523-24 (3rd Cir. 1988), Judge Weis vigorously dissented from the majority's determination that the Due Process Clause proscribes grossly negligent conduct:

I also must disagree with the majority's footnote that this case can be sent to the jury on a theory of "gross negligence." In cases of this nature, the use of "gross" as opposed to "simple" negligence will not serve to overcome the distinction between an ordinary tort and a constitutional violation. As Chief Judge Gibbons pointed out in his dissent in *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984), *aff'd sub. nom. Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed.2d 677 (1986): "The prevailing view is that there are no 'degrees' of care or negligence, as a matter of law; there are only different amounts of care as a matter of fact; and 'gross negligence' is merely the same thing as ordinary negligence, 'with the addition,' as Baron Rolfe once put it, 'of a vituperative epithet.'" See *id.* at 853 (*quoting* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 182 (4th ed. 1971)).

Cf. Farmer v. Brennan, 511 U.S. 825, 836, n.4 (1994) ("Between the poles [of negligence and intent] lies 'gross negligence' too, but the term is a 'nebulous' one, in practice meaning little different from recklessness as generally understood in civil law. ")

- b. In [Davidson v. Cannon](#), 474 U.S. 344, 358 (1986), Justice Blackmun, in a dissenting opinion joined by Justice Marshall, opined that reckless conduct would rise to a Due Process violation:

Reckless or deliberate indifference is all that a prisoner need prove to show that denial of essential medical care violated the Eighth Amendment's ban on cruel and unusual punishment. The Due Process Clause provides broader protection than does the Eighth Amendment, so a violation of the Due Process Clause certainly should not require a more culpable mental state. [citations omitted]

Justice Brennan, in a separate dissenting opinion, agreed that a deprivation is established by proof of recklessness or deliberate indifference. *Id.* at 349.

- c. In [*Farmer v. Brennan*](#), 511 U.S. 825 (1994), the Court interpreted the standard of culpability of “deliberate indifference” for purposes of establishing a violation of the Eighth Amendment arising out of prison officials’ alleged failure to protect a transsexual inmate from a sexual assault by another inmate. The Court first approved the court of appeals’ decisions equating deliberate indifference with recklessness, a level of culpability lying between negligence and purpose or knowledge. *Id.* at 836. It then turned to the issue of whether plaintiff could prevail by proving recklessness as defined by the civil law—a act or failure to act “in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.” *Id.* The Court held that to establish a violation of the Eighth Amendment for denying an inmate humane conditions of confinement, a plaintiff must prove recklessness as that term is used in the criminal law—disregard of a risk of harm of which the person is aware.

[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual “conditions”; it outlaws cruel and unusual “punishments.” An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. See PROSSER AND KEETON §§ 2, 34, pp. 6, 213-214; see also Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680; *United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed.2d 805 (1963). But an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837-38.

The Court made clear, however, that its decision was based upon the text and precedents under the Eighth Amendment and not necessarily a universally applicable construction of the term “deliberate indifference.”

Our decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and our cases, not merely on a parsing of the phrase “deliberate indifference.” And we do not reject petitioner’s arguments for a thoroughly objective approach to deliberate indifference without recognizing that on the crucial point (whether a prison official must know of a risk, or whether it suffices that he should know) the term does not speak with certainty. Use of “deliberate,” for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental. *Cf. Estelle*, 429 U.S. at 105, 97 S. Ct. at 291-292 (distinguishing “deliberate indifference” from “accident” or “inadverten[ce]”). And even if “deliberate” is better read as implying knowledge of a risk, the concept of constructive knowledge is familiar enough that the term “deliberate indifference” would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk’s obviousness.

Id. at 840.

- d. In [*Collins v. City of Harker Heights*](#), 503 U.S. 115 (1992), the Supreme Court rejected plaintiff’s effort to impose liability under Section 1983 for the city’s failure to train its employees about the dangers of working in sewer lines and manholes. Construing the plaintiff’s complaint as resting upon the substantive aspect of the Due Process Clause, the Court reasoned:

[T]he city’s alleged failure to train its employees, or to warn them about known risks of harm,

was [not] an omission that can be properly characterized as arbitrary or conscience-shocking in a constitutional sense. Petitioner's claim is analogous to a fairly typical state tort claim: The city breached its duty of care to her husband by failing to provide a safe working environment.... [T]he Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."

503 U.S. at 128-29.

In [*County of Sacramento v. Lewis*](#), 523 U.S. 833 (1998), the Court considered the standard of culpability governing a claimed violation of substantive due process arising out of a high speed automobile chase that resulted in the death of plaintiffs' sixteen-year-old son. Reversing the Ninth Circuit's determination that deliberate indifference to or reckless disregard for life was the appropriate standard of fault, the Supreme Court held that only governmental action that shocks the conscience offends the substantive dimension of the Due Process Clause. The Court then elaborated on the meaning of the shocks the conscience standard:

It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process... It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. [citation omitted]

Whether the point of the conscience-shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence,'" ... is a matter for closer calls. To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment, and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance. We held in *City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 77 L. Ed.2d 605, 103 S. Ct. 2979 (1983), that "the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.*, at 244 (citing *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16, 545, 60 L. Ed.2d 447, 99 S. Ct. 1861 (1979)). Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, see *Estelle v. Gamble*, 429 U.S. 97, 104, 50 L. Ed.2d 251, 97 S. Ct. 285 (1976), it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial....

Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking....

Thus, attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit). As the very term "deliberate indifference" implies,

the standard is sensibly employed only when actual deliberation is practical, see *Whitley v. Albers*, 475 U.S. at 320, n.11 and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare....

Nor does any substantial countervailing interest excuse the State from making provision for the decent care and protection of those it locks up; "the State's responsibility to attend to the medical needs of prisoners [or detainees] does not ordinarily clash with other equally important governmental responsibilities." *Whitley v. Albers*, *supra*, at 320.

But just as the description of the custodial prison situation shows how deliberate indifference can rise to a constitutionally shocking level, so too does it suggest why indifference may well not be enough for liability in the different circumstances of a case like this one. We have, indeed, found that deliberate indifference does not suffice for constitutional liability (albeit under the Eighth Amendment) even in prison circumstances when a prisoner's claim arises not from normal custody but from response to a violent disturbance... . In those circumstances, liability should turn on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 475 U.S. at 320-321 (internal quotation marks omitted). The analogy to sudden police chases (under the Due Process Clause) would be hard to avoid.

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other.... A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.

To recognize a substantive due process violation in these circumstances when only mid-level fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.... But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." *Daniels v. Williams*, 474 U.S. at 332. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

Lewis, 523 U.S. at 848-54.

5. A culpability requirement in Section 1983 actions also may be introduced by the qualified immunity defense, which allows a defendant to avoid liability when his actions, albeit unconstitutional, are not blameworthy. Consequently, proper analysis of the standard of fault in suits under Section 1983 must consider a) any culpability that plaintiff must prove to establish a constitutional violation; b) any additional culpability requirement imposed by the statute as part of the plaintiff's *prima facie* case; and c) the elements of the qualified immunity defense. The interrelationship of the three sources of culpability will be explored in Chapter III, *infra*.
6. Having found no constitutional violation in *Daniels* and *Davidson*, the Court had no occasion to determine whether the state post-deprivation remedy was rendered inadequate by the availability of a sovereign

immunity defense. Justices Blackmun and Stevens did address the issue and arrived at contrary conclusions. Justice Blackmun, joined by Justice Marshall in dissent in *Davidson*, opined that the state tort action was not an adequate post-deprivation remedy because the prisoner's complaint would have been dismissed before being heard on the merits due to the sovereign immunity defense.

Conduct that is wrongful under § 1983 surely cannot be immunized by state law. A State can define defenses, including immunities, to state-law causes of action, as long as the state rule does not conflict with federal law.... But permitting a state immunity defense to control in a § 1983 action “would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.”...

Davidson has been denied “an opportunity ... granted at a meaningful time and in a meaningful manner” ... “for [a] hearing appropriate to the nature of the case.”... Lacking a meaningful postdeprivation remedy in state court, *Davidson* was deprived of his liberty without due process of law.

[*Davidson v. Cannon*](#), 474 U.S. 344, 359-60 (1986) (Blackmun, J. dissenting).

Justice Stevens, on the other hand, found that the state tort remedy afforded sufficient due process notwithstanding the immunity defense.

Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, in my judgment, the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate. There is no reason to believe that the Due Process Clause of the Fourteenth Amendment and the legislation enacted pursuant to § 5 of that Amendment should be construed to suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair. *Davidson's* challenge has been only to the fact of sovereign immunity; he has not challenged the difference in treatment of a prisoner assaulted by a prisoner and a nonprisoner assaulted by a prisoner, and I express no comment on the fairness of that differentiation.

474 U.S. at 342-43 (Stevens, J. concurring in the judgment).

Notes

1. Accordingly, we need not decide whether, as petitioner contends, the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy “inadequate” under *Parratt* and *Hudson v. Palmer*, 468 U.S. 517 (1984).
2. See, e.g., the Virginia Tort Claims Act, VA. CODE § 8.01-195.1 et seq. (1984), which applies only to actions accruing on or after July 1, 1982, and hence is inapplicable to this case.
3. Despite his claim about what he might have pleaded, petitioner concedes that respondent was at most negligent. Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or “gross negligence,” is enough to trigger the protections of the Due Process Clause.

C. Duty and Causation

***RIZZO v. GOODE*, 423 U.S. 362 (1976)**



Philadelphia Mayor Frank Rizzo. Warren M Winterbottom. [AP](#).

Mr. Justice Rehnquist delivered the opinion of the Court.

[1] The District Court for the Eastern District of Pennsylvania, after parallel trials of separate actions filed in 1970, entered an order in 1973 requiring petitioners “to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct” in accordance with a comprehensive opinion filed together with the order. The proposed program, negotiated between petitioners and respondents for the purpose of complying with the order, was incorporated six months later into a final judgment. Petitioner City Police Commissioner was thereby required, *inter alia*, to put into force a directive governing the manner by which citizens’ complaints against police officers should henceforth be handled by the department. The Court of Appeals for the Third Circuit, upholding the District Court’s finding that the existing procedures for handling citizen complaints were “inadequate,” affirmed the District Court’s choice of equitable relief: “The revisions were ... ordered because they appeared to have the potential for prevention of future police misconduct.” 506 F.2d 542, 548 (CA3 1974). We granted certiorari to consider petitioners’ claims that the judgment of the District Court represents an unwarranted intrusion by

the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions. We find ourselves substantially in agreement with these claims, and we therefore reverse the judgment of the Court of Appeals.

I

[2] The central thrust of respondents' efforts in the two trials was to lay a foundation for equitable intervention, in one degree or another, because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers. This mistreatment was said to have been directed against minority citizens in particular and against all Philadelphia residents in general. The named individual and group respondents were certified to represent these two classes. The principal petitioners here—the Mayor, the City Managing Director, and the Police Commissioner—were charged with conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future.

[3] Hearing some 250 witnesses during 21 days of hearings, the District Court was faced with a staggering amount of evidence; each of the 40-odd incidents might alone have been the piece de resistance of a short, separate trial. The District Court carefully and conscientiously resolved often sharply conflicting testimony, and made detailed findings of fact, which both sides now accept, with respect to eight of the incidents presented by the *Goode* respondents and with respect to 28 of those presented by *COPPAR*.

[4] The principal antagonists in the eight incidents recounted in *Goode* were Officers DeFazio and D'Amico, members of the city's "Highway Patrol" force. They were not named as parties to the action. The District Court found the conduct of these officers to be violative of the constitutional rights of the citizen complainants in three of the incidents, and further found that complaints to the police Board of Inquiry had resulted in one case in a relatively mild five-day suspension and in another case a conclusion that there was no basis for disciplinary action.

[5] In only two of the 28 incidents recounted in *COPPAR* (which ranged in time from October 1969 to October 1970) did the District Court draw an explicit conclusion that the police conduct amounted to a deprivation of a federally secured right; it expressly found no police misconduct whatsoever in four of the incidents; and in one other the departmental policy complained of was subsequently changed. As to the remaining 21, the District Court did not proffer a comment on the degree of misconduct that had occurred: whether simply improvident, illegal under police regulations or state law, or actually violative of the individual's constitutional rights. Respondents' brief asserts that of this latter group, the facts as found in 14 of them "reveal [federal] violations." While we think that somewhat of an overstatement, we accept it, arguendo, and thus take it as established that, insofar as the *COPPAR* record reveals, there were 16 incidents occurring in the city of Philadelphia over a year's time in which numbers of police officers violated citizens' constitutional rights. Additionally, the District Court made reference to citizens' complaints to the police in seven of those 16; in four of which, involving conduct of constitutional dimension, the police department received complaints but ultimately took no action against the offending officers.

[6] The District Court made a number of conclusions of law, not all of which are relevant to our analysis. It found that the evidence did not establish the existence of any policy on the part of the named petitioners to violate the legal and constitutional rights of the plaintiff classes, but it did find that evidence of departmental procedure indicated a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct. It found that as to the larger plaintiff class, the residents of Philadelphia, only a small percentage of policemen commit violations of their legal and constitutional rights, but that the frequency with which such violations occur is such that "they cannot be dismissed as rare, isolated instances." *COPPAR v. Rizzo*, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973). In the course of its opinion, the District Court commented:

“In the course of these proceedings, much of the argument has been directed toward the proposition that courts should not attempt to supervise the functioning of the police department. Although, contrary to the defendants’ assertions, the Court’s legal power to do just that is firmly established, ... I am not persuaded that any such drastic remedy is called for, at least initially, in the present cases.” *Id.*, at 1320.

[7] The District Court concluded by directing petitioners to draft, for the court’s approval, “a comprehensive program for dealing adequately with civilian complaints,” to be formulated along the following “guidelines” suggested by the court:

“(1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the ‘dos and don’ts’ of permissible conduct in dealing with civilians (for example, manifestations of racial bias, derogatory remarks, offensive language, etc.; unnecessary damage to property and other unreasonable conduct in executing search warrants; limitations on pursuit of persons charged only with summary offenses; recording and processing civilian complaints, etc.). (2) Revision of procedures for processing complaints against police, including (a) ready availability of forms for use by civilians in lodging complaints against police officers; (b) a screening procedure for eliminating frivolous complaints; (c) prompt and adequate investigation of complaints; (d) adjudication of nonfrivolous complaints by an impartial individual or body, insulated so far as practicable from chain of command pressures, with a fair opportunity afforded the complainant to present his complaint, and to the police officer to present his defense; and (3) prompt notification to the concerned parties, informing them of the outcome.” *Id.*, at 1321.

[8] While noting that the “guidelines” were consistent with “generally recognized minimum standards” and imposed “no substantial burdens” on the police department, the District Court emphasized that respondents had no constitutional right to improved police procedures for handling civilian complaints. But given that violations of constitutional rights of citizens occur in “unacceptably” high numbers, and are likely to continue to occur, the court-mandated revision was a “necessary first step” in attempting to prevent future abuses. *Ibid.* On petitioners’ appeal the Court of Appeals affirmed.

II

[9] These actions were brought, and the affirmative equitable relief fashioned, under the Civil Rights Act of 1871, 42 U.S.C. § 1983. It provides that “[e]very person who, under color of [law] subjects, or causes to be subjected, any ... person within the jurisdiction [of the United States] to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] suit in equity.” The plain words of the statute impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which “subjects, or causes to be subjected” the complainant to a deprivation of a right secured by the Constitution and laws.

[10] The findings of fact made by the District Court at the conclusion of these two parallel trials—in sharp contrast to that which respondents sought to prove with respect to petitioners—disclose a central paradox which permeates that court’s legal conclusions. Individual police officers not named as parties to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them but as to the members of the classes they represented. In sum, the genesis of this lawsuit—a heated dispute between individual citizens and certain policemen—has evolved into an attempt by the federal judiciary to resolve a

“controversy” between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeals’ words, “[appear] to have the potential for prevention of future police misconduct.” 506 F.2d, at 548. The lower courts have, we think, overlooked several significant decisions of this Court in validating this type of litigation and the relief ultimately granted.

A

[11] We first of all entertain serious doubts whether on the facts as found there was made out the requisite Art. III case or controversy between the individually named respondents and petitioners. In *O’Shea v. Littleton*, 414 U.S. 488 (1974), the individual respondents, plaintiffs in the District Court, alleged that petitioners, a county magistrate and judge, had embarked on a continuing, intentional practice of racially discriminatory bond setting, sentencing, and assessing of jury fees. No specific instances involving the individual respondents were set forth in the prayer for injunctive relief against the judicial officers. And even though respondents’ counsel at oral argument had stated that some of the named respondents had in fact “suffered from the alleged unconstitutional practices,” the Court concluded that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.” *Id.*, at 495-496. The Court further recognized that while “past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury,” the attempt to anticipate under what circumstances the respondents there would be made to appear in the future before petitioners “takes us into the area of speculation and conjecture.” *Id.*, at 496-497. These observations apply here with even more force, for the individual respondents’ claim to “real and immediate” injury rests not upon what the named petitioners might do to them in the future—such as set a bond on the basis of race—but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman’s perception of departmental disciplinary procedures. This hypothesis is even more attenuated than those allegations of future injury found insufficient in *O’Shea* to warrant invocation of federal jurisdiction. Thus, insofar as the individual respondents were concerned, we think they lacked the requisite “personal stake in the outcome,” *Baker v. Carr*, 369 U.S. 186, 204 (1962), i.e., the order overhauling police disciplinary procedures.

B

[12] That conclusion alone might appear to end the matter, for *O’Shea* also noted that “if none of the named plaintiffs ... establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class” which they purport to represent. 414 U.S., at 494. But, unlike *O’Shea*, this case did not arise on the pleadings. The District Court, having certified the plaintiff classes, bridged the gap between the facts shown at trial and the classwide relief sought with an unprecedented theory of § 1983 liability. It held that the classes’ § 1983 actions for equitable relief against petitioners were made out on a showing of an “unacceptably high” number of those incidents of constitutional dimension—some 20 in all—occurring at large in a city of three million inhabitants, with 7,500 policemen.

[13] Nothing in *Hague v. CIO*, 307 U.S. 496 (1939), the only decision of this Court cited by the District Court,^[1] or any other case from this Court, supports such an open-ended construction of § 1983. In *Hague*, the pattern of police misconduct upon which liability and injunctive relief were grounded was the adoption and enforcement of deliberate policies by the defendants there (including the Mayor and the Chief of Police) of excluding and removing the plaintiff’s labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City. These policies were implemented “by force and violence” on the part of individual

policemen. There was no mistaking that the defendants proposed to continue their unconstitutional policies against the members of this discrete group.

[14] Likewise, in *Allee v. Medrano*, 416 U.S. 802 (1974), relied upon by the Court of Appeals and respondents here, we noted:

“The complaint charged that the enjoined conduct was but one part of a *single plan* by the defendants, and the District Court found a *pervasive pattern of intimidation* in which the law enforcement authorities sought to suppress appellees’ constitutional rights. In this blunderbuss effort the police not only relied on statutes ... found constitutionally deficient, but concurrently exercised their authority under valid laws in an unconstitutional manner.” *Id.*, at 812 (emphasis added).

The numerous incidents of misconduct on the part of the *named* Texas Rangers, as found by the District Court and summarized in this Court’s opinion, established beyond peradventure not only a “persistent pattern” but one which flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights and place them in fear of coming back. *Id.*, at 814-815.

[15] Respondents stress that the District Court not only found an “unacceptably high” number of incidents but held, as did the Court of Appeals, that “when a *pattern* of frequent police violations of rights is shown, the law is clear that injunctive relief may be granted.” 357 F. Supp., at 1318 (emphasis added). However, there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere; indeed, the District Court found “that the problems disclosed by the record ... are fairly typical of [those] afflicting police departments in major urban areas.” *Ibid.* Thus, invocation of the word “pattern” in a case where, unlike *Hague* and *Medrano*, the defendants are not causally linked to it, is but a distant echo of the findings in those cases. The focus in *Hague* and *Medrano* was not simply on the number of violations which occurred but on the common thread running through them: a “pervasive pattern of intimidation” flowing from a deliberate plan by the *named* defendants to crush the nascent labor organizations. *Medrano, supra*, at 811. The District Court’s unadorned finding of a statistical pattern is quite dissimilar to the factual settings of these two cases.

[16] The theory of liability underlying the District Court’s opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners’ failure to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano*. Respondents posit a constitutional “duty” on the part of petitioners (and a corresponding “right” of the citizens of Philadelphia) to “eliminate” future police misconduct; a “default” of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners’ stead and take whatever preventive measures are necessary, within its discretion, to secure the “right” at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

[17] Respondents claim that the theory of liability embodied in the District Court’s opinion is supported by desegregation cases such as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). But this case, and the long line of precedents cited therein, simply reaffirmed the body of law originally enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954):

“Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings....

“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” *Swann, supra*, at 11, 15.

[18] Respondents, in their effort to bring themselves within the language of *Swann*, ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas

in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as *Swann* and *Brown* were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. Under the well-established rule that federal “judicial powers may be exercised only on the basis of a constitutional violation,” *Swann, supra*, at 16, this case presented no occasion for the District Court to grant equitable relief against petitioners.

C

[19] Going beyond considerations concerning the existence of a live controversy and threshold statutory liability, we must address an additional and novel claim advanced by respondent classes. They assert that given the citizenry’s “right” to be protected from unconstitutional exercises of police power, and the “need for protection from such abuses,” respondents have a right to mandatory equitable relief in some form when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct. The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees. But on the facts of this case, not only is this novel claim quite at odds with the settled rule that in federal equity cases “the nature of the violation determines the scope of the remedy,” *ibid.*, important considerations of federalism are additional factors weighing against it. Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the “special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.” *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951), *quoted in O’Shea v. Littleton*, 414 U.S., at 500.

[20] Section 1983 by its terms confers authority to grant equitable relief as well as damages, but its words “allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding.” *Giles v. Harris*, 189 U.S. 475, 486 (1903) (Holmes, J.). Even in an action between private individuals, it has long been held that an injunction is “to be used sparingly, and only in a clear and plain case.” *Irwin v. Dixion*, 9 How. 10, 33 (1850). When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with “the well-established rule that the Government has traditionally been granted the widest latitude in the ‘dispatch of its own internal affairs,’ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961),” *quoted in Sampson v. Murray*, 415 U.S. 61, 83 (1974). The District Court’s injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department’s “latitude in the ‘dispatch of its own internal affairs.’”

[21] When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975).

[22] So strongly has Congress weighted this factor of federalism in the case of a state criminal proceeding that it has enacted 28 U.S.C. § 2283 to actually deny to the district courts the authority to issue injunctions against such proceedings unless the proceedings come within narrowly specified exceptions. Even though an action brought under § 1983, as this was, is within those exceptions, *Mitchum v. Foster*, 407 U.S. 225 (1972), the underlying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight. Where an injunction against a criminal proceeding is sought under

§ 1983, “the principles of equity, comity, and federalism” must nonetheless restrain a federal court. 407 U.S., at 243.

[23] But even where the prayer for injunctive relief does not seek to enjoin the state criminal proceedings themselves, we have held that the principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances. In *O’Shea v. Littleton*, *supra*, at 502, we held that “a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted.” And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

[24] Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here. Indeed, in the recent case of *Mayor v. Educational Equality League*, 415 U.S. 605 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying: “There are also delicate issues of federal-state relationships underlying this case.” *Id.*, at 615.

[25] Contrary to the District Court’s flat pronouncement that a federal court’s legal power to “supervise the functioning of the police department ... is firmly established,” it is the foregoing cases and principles that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.

[26] For the foregoing reasons the judgment of the Court of Appeals which affirmed the decree of the District Court is

Reversed.

Mr. Justice Stevens took no part in the consideration or decision of this case.

Mr. Justice Blackmun, with whom Mr. Justice Brennan and Mr. Justice Marshall join, dissenting.

[27] To be sure, federal-court intervention in the daily operation of a large city’s police department, as the Court intimates, is undesirable and to be avoided if at all possible. The Court appropriately observes, however, *ante*, at 367, that what the Federal District Court did here was to engage in a careful and conscientious resolution of often sharply conflicting testimony and to make detailed findings of fact, now accepted by both sides, that attack the problem that is the subject of the respondents’ complaint. The remedy was one evolved with the defendant officials’ assent, reluctant though that assent may have been, and it was one that the police department concededly could live with. Indeed, the District Court, in its memorandum of December 18, 1973, stated that “the resolution of all the disputed items was more nearly in accord with the defendants’ position than with the plaintiffs’ position,” and that the relief contemplated by the earlier orders of March 14, 1973, see *COPPAR v. Rizzo*, 357 F. Supp. 1289 (ED Pa.), “did not go beyond what the defendants had always been willing to accept.” App. 190a. No one, not even this Court’s majority, disputes the apparent efficacy of

the relief or the fact that it effectuated a betterment in the system and should serve to lessen the number of instances of deprivation of constitutional rights of members of the respondent classes. What is worrisome to the Court is abstract principle, and, of course, the Court has a right to be concerned with abstract principle that, when extended to the limits of logic, may produce untoward results in other circumstances on a future day. See *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

[28] But the District Court here, with detailed, careful, and sympathetic findings, ascertained the existence of violations of citizens' constitutional rights, of a *pattern* of that type of activity, of its likely continuance and recurrence, and of an official indifference as to doing anything about it. The case, accordingly, plainly fits the mold of *Allee v. Medrano*, 416 U.S. 802 (1974), and *Hague v. CIO*, 307 U.S. 496 (1939), despite the observation, 357 F. Supp., at 1319, that the evidence "does not establish the existence of any overall Police Department *policy* to violate the legal and constitutional rights of citizens, nor to discriminate on the basis of race" (emphasis supplied). I am not persuaded that the Court's attempt to distinguish those cases from this one is at all successful. There must be federal relief available against persistent deprivation of federal constitutional rights even by (or, perhaps I should say, particularly by) constituted authority on the state side.

[29] The Court entertains "serious doubts," *ante*, at 371-372, as to whether there is a case or controversy here, *citing O'Shea v. Littleton*, 414 U.S. 488 (1974). *O'Shea*, however, presented quite different facts. There, the plaintiff-respondents had alleged a fear of injury from actions that would be subsequent to some future, valid arrest. The Court said:

"We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners. Under these circumstances, where respondents do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or indicate that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court." *Id.*, at 497-498.

Here, by contrast, plaintiff-respondents are persons injured by past unconstitutional conduct (an allegation not made in the *O'Shea* complaint) and fear injury at the hands of the police regardless of whether they have violated a valid law.

[30] To the extent that Part II-A of the Court's opinion today indicates that some constitutional violations might be spread so extremely thin as to prevent any individual from showing the requisite case or controversy, I must agree. I do not agree, however, with the Court's substitution of its judgment for that of the District Court on what the evidence here shows. The Court states that what was shown was minimal, involving only a few incidents out of thousands of arrests in a city of several million population. Small as the ratio of incidents to arrests may be, the District Court nevertheless found a pattern of operation, even if no policy, and one sufficiently significant that the violations "cannot be dismissed as rare, isolated instances." 357 F. Supp., at 1319. Nothing the Court has said demonstrates for me that there is no justification for that finding on this record. The Court's criticism about numbers would be just as forceful, or would miss the mark just as much, with 100 incidents or 500 or even 3,000, when compared with the overall number of arrests made in the city of Philadelphia. The pattern line will appear somewhere. The District Court drew it this side of the number of proved instances. One properly may wonder how many more instances actually existed but were unproved because of the pressure of time upon the trial court, or because of reluctant witnesses, or because of inherent fear to question constituted authority in any degree, or because of a despairing belief, unfounded though it may be, that nothing can be done about it anyway and that it is not worth the effort. That it was worth the effort is convincingly demonstrated by the result in the District Court, by the affirmance, on the issues before us, by a unanimous panel of the Third Circuit, and by the support given the result below by the Commonwealth of Pennsylvania, the Philadelphia Bar Association, The Greater Philadelphia Movement, and the other entities that have filed briefs as amici curiae here in support of the respondents.

[31] The Court today appears to assert that a state official is not subject to the strictures of 42 U.S.C.

§ 1983 unless he directs the deprivation of constitutional rights. *Ante*, at 375-377. In so holding, it seems to me, the Court ignores both the language of § 1983 and the case law interpreting that language. Section 1983 provides a cause of action where a person acting under color of state law “subjects, or causes to be subjected,” any other person to a deprivation of rights secured by the Constitution and laws of the United States. By its very words, § 1983 reaches not only the acts of an official, but also the acts of subordinates for whom he is responsible. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court said that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,” *id.*, at 187, and:

“It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.” *Id.*, at 180. (Emphasis added.)

[32] I do not find it necessary to reach the question under what circumstances failure to supervise will justify an award of money damages, or whether an injunction is authorized where the superior has no consciousness of the wrongs being perpetrated by his subordinates.^[2]

It is clear that an official may be enjoined from consciously permitting his subordinates, in the course of their duties, to violate the constitutional rights of persons with whom they deal. In rejecting the concept that the official may be responsible under § 1983, the Court today casts aside reasoned conclusions to the contrary reached by the Courts of Appeals of 10 circuits.^[3]

[33] In the instant case, the District Court found that although there was no departmental policy of racial discrimination, “such violations do occur, with such frequency that they cannot be dismissed as rare, isolated instances; and that little or nothing is done by the city authorities to punish such infractions, or to prevent their recurrence,” 357 F. Supp., at 1319, and that it “is the policy of the department to discourage the filing of such complaints, to avoid or minimize the consequences of proven police misconduct, and to resist disclosure of the final disposition of such complaints.” *Id.*, at 1318. Needless to say, petitioners were under a statutory duty to supervise their subordinates. See Philadelphia Home Rule Charter, c. 2, § 5-200. I agree with the District Court that its findings are sufficient to bring petitioners within the ambit of § 1983.

[34] Further, the applicability of § 1983 to controlling officers allows the district courts to avoid the necessity of injunctions issued against individual officers and the consequent continuing supervision by the federal courts of the day-to-day activities of the men on the street. The District Court aptly stated:

“Respect and admiration for the performance of the vast majority of police officers cannot justify refusal to confront the reality of the abuses which do exist. But deference to the essential role of the police in our society does mandate that intrusion by the courts into this sensitive area should be limited, and should be directed toward insuring that the police themselves are encouraged to remedy the situation.” 357 F. Supp., at 1320.

[35] I would regard what was accomplished in this case as one of those rightly rare but nevertheless justified instances—just as *Allee* and *Hague*—of federal-court “intervention” in a state or municipal executive area. The facts, the deprival of constitutional rights, and the pattern are all proved in sufficient degree. And the remedy is carefully delineated, worked out within the administrative structure rather than superimposed by edict upon it, and essentially, and concededly, “livable.” In the City of Brotherly Love—or in any other American city—no less should be expected. It is a matter of regret that the Court sees fit to nullify what so meticulously and thoughtfully has been evolved to satisfy an existing need relating to constitutional rights that we cherish and hold dear.



[Rizzo v. Goode – Audio and Transcript of Oral Argument](#)

Footnotes

1. *Lankford v. Gelston*, 364 F.2d 197 (CA4 1966), was also cited by the District Court for the proposition that federal courts have the legal power to “supervise the functioning of the police department.” 357 F. Supp., at 1320. But the court in *Lankford* intimated no such power, and the facts which confronted it are obviously distinguishable. There, in executing an “evil practice that has long and notoriously persisted in the Police Department,” the police, searching over a 19-day period for two black men who murdered one of their ranks, conducted some 300 warrantless searches of private residences in a predominately Negro area “at all hours of the day and night” on nothing more than “unverified anonymous [telephone] tips.” 364 F.2d, at 198, and 205 n.9. This “series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court” arose out of what several experienced police officers testified was a “routine practice” in “serious cases.” *Id.*, at 200-201. Injunctive relief under § 1983 was granted against the defendant Police Commissioner because the wholesale raids were the “effectuation of a plan conceived by high ranking [police] officials,” a practice which in the interim the defendant had “renounced only obliquely, if at all,” and as to which “the danger of repetition has not been removed.” *Id.*, at 202, 204. [↩](#)
2. In this regard, however, this Court recently has approved the imposition of criminal liability without “consciousness of wrongdoing” for failure to supervise subordinates. *United States v. Park*, 421 U.S. 658 (1975). The concept, thus, is far from novel doctrine. [↩](#)
3. “Under section 1983, equitable relief is appropriate in a situation where governmental officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct. *Hague v. CIO*, 307 U.S. 496. (1939). From a legal standpoint, it makes no difference whether the plaintiffs’ constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors’ mere acquiescence in such behavior. In either situation, if the police officials had a duty, as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred during the Convention, they are proper defendants in this action.” *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (CA7 1969). [↩](#)

Notes on *Rizzo v. Goode*

1. Among other things, *Rizzo v. Goode* addresses whether individual state and local government officials are suable under Section 1983 for constitutional violations directly caused by subordinate officials under their supervision. On what basis does the Supreme Court find that Section 1983 does not impose liability upon supervisory officials on a pure respondeat superior theory? Is this consistent with “the background of tort liability”? See [Carter v. Carlson](#), 447 F.2d 358, 370 n.39 (D.C. Cir. 1971), *rev’d on other grounds*, [409 U.S. 418 \(1973\)](#) (“a superior officer is not subject to vicarious liability for the torts of his subordinate, whether at common law or under § 1983, because they are both servants of the same employer.”). At common law, who would be held vicariously liable for the constitutional harm caused by the line officers in *Rizzo*?
2. May a supervisor be held vicariously liable under Section 1983 for the act of a subordinate if state law authorizes such liability? In [Baskin v. Parker](#), 602 F.2d 1205, 1208 (5th Cir. 1979), the United States Court of

Appeals for the Fifth Circuit, relying on the Supreme Court's repudiation of vicarious municipal liability in [Monell v. New York City Department of Social Services](#), 436 U.S. 658 (1978) (see Chapter IV, *infra*), refused to apply a state statute that created respondeat superior liability to an action under Section 1983:

After parsing the language used in § 1983 and tracing legislative history, the *Monell* Court concluded that the official sued (in that case the city government) could not be held liable unless action by the officer or pursuant to this official policy caused a constitutional tort. In other words, it rejected respondeat superior as a theory of recovery under § 1983. We interpret *Monell's* ruling as uniformly applicable to § 1983 actions in any state. Using the varying contours of local law to define the reach of a federal statutory right of action would make the availability of vicarious liability depend upon the location and, in some states, the nature of the tort. These incidental and irrelevant vagaries should not mold the contours of this national constitutional tort. Adopting each state's law into § 1983 would create a *lex loci* doctrine of respondeat superior granted or withheld on the basis of state rather than federal policy.

The language of the statute governing the remedies available in civil rights actions, 42 U.S.C. § 1988, supports our conclusion that state vicarious liability doctrines are inapplicable in § 1983 suits. Section 1988 allows state remedies to supplement remedies available under federal law when the federal remedies “are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law.” Section 1988 also provides that the state remedies adopted must not be inconsistent with the Constitution and the laws of the United States. Allowing Louisiana's vicarious liability rules to govern this case would be directly contrary to *Monell's* construction of § 1983, and thus to the requirements of § 1988.

See also [Jett v. Dallas Independent School District](#), 491 U.S. 701 (1989) (rejecting use of [42 U.S.C. § 1983](#) to impose vicarious municipal liability for racial discrimination under 42 U.S.C. § 1981.)

3. The *Rizzo* Court found that “there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct.” [423 U.S. at 371](#). The lower federal courts have most readily deemed *Rizzo's* “affirmative link” requirement satisfied where the supervisor expressly or tacitly authorized the very conduct that offends the Constitution. See [Sanders v. Kennedy](#), 794 F.2d 478, 482 (9th Cir. 1986) (Police chief and city council members were improperly dismissed from an action where the complaint alleged that the plaintiff's “rights were violated pursuant to an ‘official policy, practice and custom’ of the City of Anaheim and its Police Department.”); [Maggette v. Dalsheim](#), 709 F.2d 800, 803 (2nd Cir. 1983) (personal involvement requirement satisfied by allegations that prison superintendent “promulgated and ordered the carrying out of policies that were themselves violations of the constitutional rights.”).
4. While the authorization theory generally is founded upon approval in advance of the subordinate's unconstitutional act, may liability be predicated on the supervisor's failure to remedy the constitutional violation after it occurs? In [Williams v. Smith](#), 781 F.2d 319 (2nd Cir. 1986), a prisoner averred that he had been unconstitutionally denied the opportunity to present a witness at a prison disciplinary hearing. He sued the prison superintendent who, in addition to affirming the disciplinary action, was directly responsible for the proper conduct of disciplinary proceedings at the prison. The court of appeals reversed the lower court's dismissal of the action against the superintendent, reasoning that the plaintiff had a right to prove that the supervisory official “actively affirm[ed] the conviction on appeal”

or accepted “a custom or policy at Attica allowing that unconstitutional practice to occur.” *Id.* at 324. *Contra Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) (mere review of result of disciplinary hearing does not establish affirmative link required to hold supervisor liable for due process violations at the hearing).

5. One of the frequently sought means of meeting *Rizzo*’s “affirmative link” requirement is the theory that the supervisor has failed to properly train subordinate officials, who in turn transgressed constitutional norms. In *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988), plaintiff alleged that he had been beaten by deputies while in police custody and sued the sheriff for failing to properly train the deputies. The court of appeals accepted the theory of liability, ruling that “[a] superior or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable.” *Id.* at 1528. While generally approving of liability for failure to train, some lower federal courts have stricken failure to train claims premised on a single instance of misconduct. *Colburn v. Upper Darby Township*, 838 F.2d 663, 673 (3rd Cir. 1988). The viability of and standards for supervisory liability founded on a failure to train theory now may be governed by the Supreme Court’s analysis of municipal liability for failure to train in *City of Canton v. Harris*, Chapter IV, *infra*.
6. In *McClelland v. Facticeau*, 610 F.2d 693 (10th Cir. 1979), Cecil McClelland brought a Section 1983 action against two police chiefs for various invasions of rights arising out of his arrest and incarceration prior to posting bond. The police chiefs did not personally participate in the asserted violations. McClelland claimed, however, that the deprivation of his rights occurred because of the chiefs’ failure to act despite knowledge of prior instances of misconduct by the subordinate officials who McClelland encountered. Reversing the district court’s grant of summary judgment in favor of the police chiefs, the court of appeals accepted McClelland’s theory of liability:

We agree with those courts that have found a cause of action under section 1983 when the defendant was in a position of responsibility, knew or should have known of the misconduct, yet failed to act to prevent future harm. E.g., *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976); *Wright v. McMann*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885, 93 S. Ct. 116, 34 L. Ed.2d 141 (1972). The standard to be applied is the conduct of a reasonable person, under the circumstances, in the context of the authority of each police chief and what he knew or should have known. We find there is a genuine issue of fact whether defendants breached this duty.

The rules and regulations cited of both police hierarchies indicate that the immediate and direct duty to supervise has been delegated, but the police chiefs have retained the ultimate responsibility for what goes on in the departments. The perimeters of their duty are uncertain and must be determined at trial.

In order to establish a breach here, plaintiff must show that the defendant was adequately put on notice of prior misbehavior. Although both Schmerheim and Vigil denied any knowledge of wrongdoing by the three subordinates, McClelland countered by tendering newspaper articles and affidavits indicating that it was well known that rights were being violated in the Farmington jail and by state police officer Facticeau, and showing Schmerheim was a party in two lawsuits involving the deaths of prisoners incarcerated in Farmington jail. Distant rumors that are too vague to prompt action by reasonable persons, or information that is reasonably believed to lack credibility do not provide sufficient notice.... We hold, however that McClelland’s showing was adequate to raise an issue of fact on the sufficiency of notice because the accusations contained in the material were recent and serious....

If publicity or police misconduct was widespread and credible it may be inferred police chiefs

who admitted reading the daily newspapers knew of it. They had ultimate responsibility for what went on in the departments, and it might be found that they should and could have taken steps that would have prevented the deprivation of McClelland's rights. Defendants can, of course, refute these inferences at trial, but we cannot hold that they are entitled to judgment now as a matter of law.

610 F.2d at 697-98.

Can the failure to prevent recurrence of misconduct theory adopted in *McClelland* be reconciled with *Rizzo v. Goode*? How much notice of prior wrongs must the supervisor possess before he is obligated to intervene to prevent a recurrence of the misconduct? Compare [Febus-Rodriguez v. Betancourt-Lebron](#), 14 F.3d 87 (1st Cir. 1994) (five previous unrelated complaints against an officer do not provide notice to supervisor of likelihood of constitutional violation) with [Gutierrez-Rodriguez v. Cartagena](#), 882 F.2d 553 (1st Cir. 1989) (superintendent liable for failing to act in face of knowledge of 13 citizen complaints and prior incidents of brutality). How many deprivations of constitutional rights were proven in *Rizzo*? How many violations would the *Rizzo* plaintiffs have had to prove to establish an actionable pattern?

7. While the *McClelland* court appeared to endorse supervisory liability for negligent conduct, other courts have erected a more onerous standard of culpability:

[S]upervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable, because negligence is no longer culpable under section 1983.... Gross negligence is not enough either. The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate or reckless indifference.

[Jones v. City of Chicago](#), 856 F.2d 985, 992-93 (7th Cir. 1988). See also [Maldonado-Denis v. Castillo-Rodriguez](#), 23 F.3d 576, 582 (1st Cir. 1994) ("One way in which a supervisor's action may [render him liable] is by formulating a policy, or engaging in a custom, that leads to the challenged occurrence.... Thus, even if a supervisor lacks actual knowledge of censurable conduct, he may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness, and he had the power and authority to alleviate it.").

8. May the supervisor be held liable even if the official who physically inflicted the harm did not violate the Constitution? In [Chew v. Gates](#), 27 F.3d 1432 (9th Cir. 1994), plaintiff sued Los Angeles Police Officer Daniel Bunch as well as Police Chief Darryl Gates to recover damages after a police dog, Volker, bit Chew, who had fled after being stopped for a traffic violation. In considering a defense of issue preclusion raised by Chief Gates, the court determined the jury could find Officer Bunch not liable for his handling of the dog yet still hold Chief Gates responsible:

A judgment that Bunch is not liable for releasing Volker, given all the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including Chew, the remaining defendants caused a violation of Chew's constitutional rights. Supervisory liability may be imposed under Section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury...

The jury in this case could have concluded that it was reasonable for Bunch to release Volker—even knowing what he was likely to do to Chew—given the fact that the procedures

adopted by the city left him with no other means of apprehending the suspect that involved less risk of bodily injury to himself or the suspect.

27 F.3d at 1438.

9. Absent proof of habit, evidence that a state official has violated the Constitution on prior occasions generally will not be admissible in a Section 1983 action. See [Fed. R. Evid. 404](#). If plaintiff also joins the official's supervisor as a defendant on a theory of failing to prevent recurrence of unconstitutional acts, however, may evidence of the subordinate's previous constitutional violations be admitted to establish the supervisor had notice of these violations? In [Fletcher v. O'Donnell](#), 867 F.2d 791 (3rd Cir. 1989), plaintiff alleged that police officer O'Donnell had used excessive force in the course of an arrest. He sued the City of Allentown as well as Officer O'Donnell, alleging that the officer acted pursuant to the City's custom of tolerating use of excessive force. In order to establish the city's custom, plaintiff attempted to introduce evidence that Officer O'Donnell had used excessive force on prior occasions. The trial court refused to admit the evidence, ruling that it not only was irrelevant to the claim against O'Donnell, but also would unduly prejudice him. The court of appeals reversed:

[P]rejudice was not a valid reason for preventing Fletcher from proving a custom of toleration of use of excessive force by using the only evidence which would suffice for that purpose. There were other means available to protect O'Donnell from such prejudice, including a limiting instruction. Indeed the court could have heard the evidence outside the presence of the jury in the first instance, in order to determine whether Fletcher could establish a prima facie case of prejudice. Finally, the court could even consider a severance.

Id. at 794.

10. The Rizzo Court's analysis of the standards for equitable relief will be examined in the chapter on remedies. See Part VI(B), *infra*.

ASHCROFT v. IQBAL, 556 U.S. 662 (2009)



Robert Mueller



Metropolitan Detention Center. [Federal Bureau of Prisons](#)

Justice Kennedy delivered the opinion of the Court.

[1] Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

[2] In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

[3] Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

[4] Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." [Dept. of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1](#), 11–12 (Apr.2003) (hereinafter *OIG Report*), http://www.usdoj.gov/oig/special/0306/full.pdf?bcsi_scan_61073EC0F74759AD=0&bcsi_scan_filename=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

[5] In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of 'high interest'" to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112–113.

[6] Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal v. Hasty*, 490 F.3d 143, 147–148 (C.A.2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.*, at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. *Ibid.*

ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

[7] Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 “John Doe” federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed.2d 619 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04–CV–1809 (JG)(JA), ¶¶ 10–11, App. to Pet. for Cert. 157a (hereinafter Complaint).

[8] The 21-cause-of-action complaint does not challenge respondent’s arrest or his confinement in the MDC’s general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent’s jailors “kicked him in the stomach, punched him in the face, and dragged him across” his cell without justification, *id.*, ¶ 113, App. to Pet. for Cert. 176a; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *id.*, ¶¶ 143–145, App. to Pet. for Cert. 182a; and refused to let him and other Muslims pray because there would be “[n]o prayers for terrorists,” *id.*, ¶ 154, App. to Pet. for Cert. 184a.

[9] The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11.” *Id.*, ¶ 47, at 164a. It further alleges that “[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” *Id.*, 69, at 168a. Lastly, the complaint posits that petitioners “each knew of, condoned, and willfully and maliciously agreed to subject” respondent to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” *Id.*, ¶ 96, at 172a–173a. The pleading names Ashcroft as the “principal architect” of the policy, *id.*, 10, at 157a, and identifies Mueller as “instrumental in [its] adoption, promulgation, and implementation.” *Id.*, ¶ 11, at 157a.

[10] Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent’s complaint as true, the court held that “it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against” petitioners. *Id.* at 136a–137a (relying on *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed.2d 929 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

[11] The Court of Appeals considered *Twombly*’s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals’ opinion discussed at length how to apply this Court’s “standard for assessing the adequacy of pleadings.” 490 F.3d, at 155. It concluded that *Twombly* called for a “flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Id.*, at 157–158. The court found that petitioners’ appeal did not present one of “those contexts” requiring amplification. As a consequence, it held respondent’s pleading adequate to

allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. *Id.*, at 174.

[12] Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise ... between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity." *Id.*, at 178. We granted certiorari, 554 U.S. ___, 128 S. Ct. 2931, 171 L. Ed.2d 863 (2008), and now reverse.

* * * * *

III

[13] In *Twombly*, *supra*, at 553-554, 127 S. Ct. 1955, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

[14] In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed.2d 456 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." 534 U.S., at 68, 122 S. Ct. 515. See also *Wilkie*, 551 U.S., at 549-550, 127 S. Ct. 2588. That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed.2d 846 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed.2d 648 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

[15] In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983." *Hartman*, 547 U.S., at 254, n.2, 126 S. Ct. 1695. Cf. *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed.2d 818 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Iqbal Brief 46 ("[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*"). See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978) (finding no vicarious liability for a municipal "person" under 42 U.S.C. § 1983); see also *Dunlop v. Munroe*, 7 Cranch 242, 269, 3 L.Ed. 329 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Robertson v. Sichel*, 127 U.S. 507, 515-516, 8 S. Ct. 1286, 3 L.Ed. 203 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability

is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

[16] The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540–541, 113 S. Ct. 2217, 124 L. Ed.2d 472 (1993) (First Amendment); *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed.2d 597 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed.2d 870 (1979). It instead involves a decisionmaker’s undertaking a course of action “‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.” *Ibid.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

[17] Respondent disagrees. He argues that, under a theory of “supervisory liability,” petitioners can be liable for “knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.” *Iqbal* Brief 45-46. That is to say, respondent believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution. We reject this argument. Respondent’s conception of “supervisory liability” is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

* * * * *

[18] To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.*, at 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” ...

[19] Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555, 127 S. Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation” (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the

hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S. Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

* * * * *

B

[20] Under *Twombly*’s construction of Rule 8, we conclude that respondent’s complaint has not “nudged [his] claims” of invidious discrimination “across the line from conceivable to plausible.” ...

* * * * *

[21] We next consider the factual allegations in respondent’s complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11.” Complaint ¶ 47, App. to Pet. for Cert. 164a. It further claims that “[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” *Id.*, ¶ 69, at 168a. Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees “of high interest” because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

[22] The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, *Twombly*, *supra*, at 567, 127 S. Ct. 1955, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

[23] But even if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent’s constitutional claims against petitioners rest solely on their ostensible “policy of holding post–September–11th detainees” in the ADMAX SHU once they were categorized as “of high interest.” Complaint ¶ 69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post–September–11 detainees as “of high interest” because of their race, religion, or national origin.

[24] This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of “of high interest” for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving “restrictive conditions of confinement” for post–September–11 detainees until they were “‘cleared’ by the FBI.” *Ibid.* Accepting the

truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudge[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U.S., at 570, 127 S. Ct. 1955.

[25] To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, *id.*, at 551, 127 S. Ct. 1955, whereas here the complaint alleges discrete wrongs—for instance, beatings—by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

[26] It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

[27] Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

[28] Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. *Iqbal* Brief 37-38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554, 127 S. Ct. 1955. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U.S., at 555-556, and n.3.

2

[29] Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." *Iqbal* Brief 27. We have held, however, that the question presented by a motion to dismiss a complaint for

insufficient pleadings does not turn on the controls placed upon the discovery process. *Twombly*, *supra*, at 559, 127 S. Ct. 1955 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side” (internal quotation marks and citation omitted)).

[30] Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” *Siebert v. Gilley*, 500 U.S. 226, 236, 111 S. Ct. 1789, 114 L. Ed.2d 277 (1991) (KENNEDY, J., concurring in judgment). There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, “a national and international security emergency unprecedented in the history of the American Republic.” 490 F.3d, at 179.

[31] It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

[32] We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

[33] Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners’ discriminatory intent “generally,” which he equates with a conclusory allegation. *Iqbal* Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him “on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” Complaint ¶ 96, App. to Pet. for Cert. 172a–173a. Were we required to accept this allegation as true, respondent’s complaint would survive petitioners’ motion to dismiss. But the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.

[34] It is true that Rule 9(b) requires particularity when pleading “fraud or mistake,” while allowing “[m]alice, intent, knowledge, and other conditions of a person’s mind [to] be alleged generally.” But “generally” is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. See 5A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1301,

p.291 (3d ed. 2004) (“[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general ‘short and plain statement of the claim’ mandate in Rule 8(a) ... should control the second sentence of Rule 9(b)”). And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label “ general allegation,” and expect his complaint to survive a motion to dismiss.

V

[35] We hold that respondent’s complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

[36] This case is here on the uncontested assumption that *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed.2d 619 (1971), allows personal liability based on a federal officer’s violation of an individual’s rights under the First and Fifth Amendments, and it comes to us with the explicit concession of petitioners Ashcroft and Mueller that an officer may be subject to *Bivens* liability as a supervisor on grounds other than respondeat superior. The Court apparently rejects this concession and, although it has no bearing on the majority’s resolution of this case, does away with supervisory liability under *Bivens*. The majority then misapplies the pleading standard under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to conclude that the complaint fails to state a claim. I respectfully dissent from both the rejection of supervisory liability as a cognizable claim in the face of petitioners’ concession, and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.

I

A

[37] Respondent Iqbal was arrested in November 2001 on charges of conspiracy to defraud the United States and fraud in relation to identification documents, and was placed in pretrial detention at the Metropolitan Detention Center in Brooklyn, New York. *Iqbal v. Hasty*, 490 F.3d 143, 147–148 (C.A.2 2007). He alleges that FBI officials carried out a discriminatory policy by designating him as a person “‘of high interest’” in the investigation of the September 11 attacks solely because of his race, religion, or national origin. Owing to this designation he was placed in the detention center’s Administrative Maximum Special Housing Unit for over six months while awaiting the fraud trial. *Id.*, at 148. As I will mention more fully below, Iqbal contends

that Ashcroft and Mueller were at the very least aware of the discriminatory detention policy and condoned it (and perhaps even took part in devising it), thereby violating his First and Fifth Amendment rights.^[4]

[38] Iqbal claims that on the day he was transferred to the special unit, prison guards, without provocation, “picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room.” First Amended Complaint in No. 04–CV–1809 (JG)(JA), ¶ 113, App. to Pet. for Cert. 176a (hereinafter Complaint). He says that after being attacked a second time he sought medical attention but was denied care for two weeks. *Id.*, ¶¶ 187–188, at 189a. According to Iqbal’s complaint, prison staff in the special unit subjected him to unjustified strip and body cavity searches, *id.*, ¶¶ 136–140, at 181a, verbally berated him as a “terrorist” and “Muslim killer,” *id.*, ¶¶ 87, at 170a–171a, refused to give him adequate food, *id.*, ¶ 91, at 171a–172a, and intentionally turned on air conditioning during the winter and heating during the summer, *id.*, ¶ 84, at 170a. He claims that prison staff interfered with his attempts to pray and engage in religious study, *id.*, ¶¶ 153–154, at 183a–184a, and with his access to counsel, *id.*, ¶¶ 168, 171, at 186a–87a.

[39] The District Court denied Ashcroft and Mueller’s motion to dismiss Iqbal’s discrimination claim, and the Court of Appeals affirmed. Ashcroft and Mueller then asked this Court to grant certiorari on two questions:

“1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

“2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.” Pet. for Cert. I.

The Court granted certiorari on both questions. The first is about pleading; the second goes to the liability standard.

[40] In the first question, Ashcroft and Mueller did not ask whether “a cabinet-level officer or other high-ranking official” who “knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts committed by subordinate officials” was subject to liability under *Bivens*. In fact, they conceded in their petition for certiorari that they would be liable if they had “actual knowledge” of discrimination by their subordinates and exhibited “deliberate indifference” to that discrimination. Pet. for Cert. 29 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed.2d 811 (1994)). Instead, they asked the Court to address whether Iqbal’s allegations against them (which they call conclusory) were sufficient to satisfy Rule 8(a)(2), and in particular whether the Court of Appeals misapplied our decision in *Twombly* construing that rule. Pet. for Cert. 11–24.

[41] In the second question, Ashcroft and Mueller asked this Court to say whether they could be held personally liable for the actions of their subordinates based on the theory that they had constructive notice of their subordinates’ unconstitutional conduct. *Id.*, at 25–33. This was an odd question to pose, since Iqbal has never claimed that Ashcroft and Mueller are liable on a constructive notice theory. Be that as it may, the second question challenged only one possible ground for imposing supervisory liability under *Bivens*. In sum, both questions assumed that a defendant could raise a *Bivens* claim on theories of supervisory liability other than constructive notice, and neither question asked the parties or the Court to address the elements of such liability.

[42] The briefing at the merits stage was no different. Ashcroft and Mueller argued that the factual allegations in Iqbal’s complaint were insufficient to overcome their claim of qualified immunity; they also contended that they could not be held liable on a theory of constructive notice. Again they conceded, however, that they would be subject to supervisory liability if they “had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being ‘of high interest’ and they were deliberately indifferent to that discrimination.” Brief for Petitioners 50; see also Reply Brief for Petitioners 21–22. Iqbal

argued that the allegations in his complaint were sufficient under Rule 8(a)(2) and *Twombly*, and conceded that as a matter of law he could not recover under a theory of *respondeat superior*. See Brief for Respondent Iqbal 46. Thus, the parties agreed as to a proper standard of supervisory liability, and the disputed question was whether Iqbal's complaint satisfied Rule 8(a)(2).

[43] Without acknowledging the parties' agreement as to the standard of supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here. *Ante*, at 1947–1949. I agree that, absent Ashcroft and Mueller's concession, that determination would have to be made; without knowing the elements of a supervisory liability claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim. See *Twombly*, 550 U.S., at 557–558, 127 S. Ct. 1955. But deciding the scope of supervisory *Bivens* liability in this case is uncalled for. There are several reasons, starting with the position Ashcroft and Mueller have taken and following from it.

[44] First, Ashcroft and Mueller have, as noted, made the critical concession that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability. Iqbal seeks to recover on a theory that Ashcroft and Mueller at least knowingly acquiesced (and maybe more than acquiesced) in the discriminatory acts of their subordinates; if he can show this, he will satisfy Ashcroft and Mueller's own test for supervisory liability. See *Farmer, supra*, at 842, 114 S. Ct. 1970 (explaining that a prison official acts with "deliberate indifference" if "the official acted or failed to act despite his knowledge of a substantial risk of serious harm"). We do not normally override a party's concession, see, e.g., *United States v. International Business Machines Corp.*, 517 U.S. 843, 855, 116 S. Ct. 1793, 135 L. Ed.2d 124 (1996) (holding that "[i]t would be inappropriate for us to [e]xamine in this case, without the benefit of the parties' briefing," an issue the Government had conceded), and doing so is especially inappropriate when, as here, the issue is unnecessary to decide the case, see *infra*, at 1958–1959. I would therefore accept Ashcroft and Mueller's concession for purposes of this case and proceed to consider whether the complaint alleges at least knowledge and deliberate indifference.

[45] Second, because of the concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. *Mapp v. Ohio*, 367 U.S. 643, 676–677, 81 S. Ct. 1684, 6 L. Ed.2d 1081 (1961) (Harlan, J., dissenting). We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. See *infra*, at 1957–1959. This Court recently remarked on the danger of "bad decisionmaking" when the briefing on a question is "woefully inadequate," *Pearson v. Callahan*, 555 U.S. 223, 229, 129 S. Ct. 808, 819, 172 L. Ed.2d 565 (2009), yet today the majority answers a question with no briefing at all. The attendant risk of error is palpable.

[46] Finally, the Court's approach is most unfair to Iqbal. He was entitled to rely on Ashcroft and Mueller's concession, both in their petition for certiorari and in their merits briefs, that they could be held liable on a theory of knowledge and deliberate indifference. By overriding that concession, the Court denies Iqbal a fair chance to be heard on the question.

B

[47] The majority, however, does ignore the concession. According to the majority, because Iqbal concededly cannot recover on a theory of *respondeat superior*, it follows that he cannot recover under any theory of supervisory liability. *Ante*, at 1948–1949. The majority says that in a *Bivens* action, "where masters do not answer for the torts of their servants," "the term 'supervisory liability' is a misnomer," and that "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid*. Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates,

and it is this very principle that the majority rejects. *Ante*, at 1952 (“[P]etitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic”).

[48] The dangers of the majority’s readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which “an employer is subject to liability for torts committed by employees while acting within the scope of their employment,” Restatement (Third) of Agency § 2.04 (2005), or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate. See, e.g., *Whitfield v. Melendez–Rivera*, 431 F.3d 1, 14 (C.A.1 2005) (distinguishing between *respondeat superior* liability and supervisory liability); *Bennett v. Eastpointe*, 410 F.3d 810, 818 (C.A.6 2005) (same); *Richardson v. Goord*, 347 F.3d 431, 435 (C.A.2 2003) (same); *Hall v. Lombardi*, 996 F.2d 954, 961 (C.A.8 1993) (same).

[49] In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate’s constitutional violation and acquiesces, see, e.g., *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (C.A.3 1995); *Woodward v. Worland*, 977 F.2d 1392, 1400 (C.A.10 1992); or where supervisors “ ‘know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,’” *International Action Center v. United States*, 365 F.3d 20, 28 (C.A.D.C. 2004) (Roberts, J.) (quoting *Jones v. Chicago*, 856 F.2d 985, 992 (C.A.7 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, see, e.g., *Hall, supra*, at 961; or where the supervisor was grossly negligent, see, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902 (C.A.1 1988). I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.

[50] Neither is the majority, but what is most remarkable about its foray into supervisory liability is that its conclusion has no bearing on its resolution of the case. The majority says that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned, or even were aware of their subordinates’ discriminatory conduct are “conclusory” and therefore are “not entitled to be assumed true.” *Ante*, at 1951. As I explain below, this conclusion is unsound, but on the majority’s understanding of Rule 8(a)(2) pleading standards, even if the majority accepted Ashcroft and Mueller’s concession and asked whether the complaint sufficiently alleges knowledge and deliberate indifference, it presumably would still conclude that the complaint fails to plead sufficient facts and must be dismissed.^[5]

II

[51] Given petitioners’ concession, the complaint satisfies Rule 8(a)(2). Ashcroft and Mueller admit they are liable for their subordinates’ conduct if they “had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being ‘of high interest’ and they were deliberately indifferent to that discrimination.” Brief for Petitioners 50. Iqbal alleges that after the September 11 attacks the Federal Bureau of Investigation (FBI) “arrested and detained thousands of Arab Muslim men,” Complaint ¶ 47, App. to Pet. for Cert. 164a, that many of these men were designated by high-ranking FBI officials as being “‘of high interest,’” *id.*, ¶¶ 48, 50, at 164a, and that in many cases, including Iqbal’s, this designation was made “because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees’ involvement in supporting terrorist activity,” *id.*, ¶ 49. The complaint further alleges that Ashcroft was the “principal architect of the policies and practices challenged,” *id.*, ¶ 10, at 157a, and that Mueller “was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged,” *id.*, ¶ 11. According to the complaint, Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” *Id.*, ¶

96, at 172a-173a. The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

[52] Ashcroft and Mueller argue that these allegations fail to satisfy the “plausibility standard” of *Twombly*. They contend that Iqbal’s claims are implausible because such high-ranking officials “tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.” Brief for Petitioners 28. But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. See *Twombly*, 550 U.S., at 555, 127 S. Ct. 1955 (a court must proceed “on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”; *id.*, at 556, 127 S. Ct. 1955 (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable”); see also *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed.2d 338 (1989) (Rule 12(b)(6) does not countenance ... dismissals based on a judge’s disbelief of a complaint’s factual allegations”). The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.

[53] Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*’s words, a plaintiff must “allege facts” that, taken as true, are “suggestive of illegal conduct.” 550 U.S., at 564, n.8, 127 S. Ct. 1955. In *Twombly*, we were faced with allegations of a conspiracy to violate § 1 of the Sherman Act through parallel conduct. The difficulty was that the conduct alleged was “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Id.*, at 554, 127 S. Ct. 1955. We held that in that sort of circumstance, “[a]n allegation of parallel conduct is ... much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.*, at 557, 127 S. Ct. 1955 (brackets omitted). Here, by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct. The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller’s own admission, are sufficient to make them liable for the illegal action. Iqbal’s complaint therefore contains “enough facts to state a claim to relief that is plausible on its face.” *Id.*, at 570, 127 S. Ct. 1955.

[54] I do not understand the majority to disagree with this understanding of “plausibility” under *Twombly*. Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11,” Complaint ¶ 47, App. to Pet. for Cert. 164a, and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001,” *id.*, ¶ 69, at 168a. See *ante*, at 1951. I think the majority is right in saying that these allegations suggest only that Ashcroft and Mueller “sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity,” *ante*, at 1952, and that this produced “a disparate, incidental impact on Arab Muslims,” *ante*, at 1951-1952. And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

[55] But these allegations do not stand alone as the only significant, nonconclusory statements in the

complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. See Complaint ¶ 10, App. to Pet. for Cert. 157a (Ashcroft was the “principal architect” of the discriminatory policy); *id.*, 11 (Mueller was “instrumental” in adopting and executing the discriminatory policy); *id.*, 96, at 172a–173a (Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to harsh conditions “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest”).

[56] The majority says that these are “bare assertions” that, “much like the pleading of conspiracy in *Twombly*, amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim” and therefore are “not entitled to be assumed true.” *Ante*, at 1951 (quoting *Twombly*, *supra*, at 555, 127 S. Ct. 1955). The fallacy of the majority’s position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI’s International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI’s New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. See Complaint ¶¶ 47–53, App. to Pet. for Cert. 164a–165a. Viewed in light of these subsidiary allegations, the allegations singled out by the majority as “conclusory” are no such thing. Iqbal’s claim is not that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” him to a discriminatory practice that is left undefined; his allegation is that “they knew of, condoned, and willfully and maliciously agreed to subject” him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller “‘fair notice of what the ... claim is and the grounds upon which it rests.’” *Twombly*, 550 U.S., at 555, 127 S. Ct. 1955 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957) (omission in original)).

[57] That aside, the majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that “[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” Complaint ¶ 69, App. to Pet. for Cert. 168a; see *ante*, at 1951. This statement makes two points: (1) after September 11, the FBI held certain detainees in highly restrictive conditions, and (2) Ashcroft and Mueller discussed and approved these conditions. If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when Iqbal alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of “‘high interest’” “because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees’ involvement in supporting terrorist activity,” Complaint ¶¶ 48–50, App. to Pet. for Cert. 164a, and (2) Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed” to that discrimination, *id.*, ¶ 96, at 172a. By my lights, there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.

I respectfully dissent.

Justice BREYER, dissenting.

[58] I agree with Justice SOUTER and join his dissent. I write separately to point out that, like the Court, I believe it important to prevent unwarranted litigation from interfering with “the proper execution of the

work of the Government.” *Ante*, at 1953. But I cannot find in that need adequate justification for the Court’s interpretation of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed.2d 929 (2007), and Federal Rules of Civil Procedure 8. The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and “mindful of the need to vindicate the purpose of the qualified immunity defense,” can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. See *Iqbal v. Hasty*, 490 F.3d 143, 158 (2007). A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials. See *ibid*. Neither the briefs nor the Court’s opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us. For this reason, as well as for the independently sufficient reasons set forth in Justice SOUTER’s opinion, I would affirm the Second Circuit.



[Ashcroft v. Iqbal – Audio and Transcript of Oral Argument](#)

Footnotes

4. *Iqbal* makes no claim against Ashcroft and Mueller based simply on his right, as a pretrial detainee, to be free from punishment prior to an adjudication of guilt on the fraud charges. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). [↗](#)
5. If I am mistaken, and the majority’s rejection of the concession is somehow outcome determinative, then its approach is even more unfair to *Iqbal* than previously explained, see *supra*, at 692, for *Iqbal* had no reason to argue the (apparently dispositive) supervisory liability standard in light of the concession. [↗](#)

Notes on *Ashcroft v. Iqbal*

1. Most constitutional rights are not absolute. Rather, to assess whether the government deprived plaintiff of constitutional liberties, the court must weigh the government’s justification for the invasion of plaintiff’s autonomy. For example, the Fourth Amendment allows an official to invade the citizen’s reasonable expectation of privacy where the government has probable cause and a warrant to conduct a search (or an exception to the probable cause or warrant requirement). The *Iqbal* Court’s holding that plaintiff must allege sufficient facts to state a “plausible” claim for relief, then, poses a significant obstacle where the plaintiff does not possess the facts on which the government relies to sustain its actions. These barriers are heightened by the Court’s apparent holding that the plaintiff not only must plead sufficient facts to make it plausible that defendant violated the Constitution, but also must allege facts that establish that is plausible the defendant is not sheltered by qualified immunity. Therefore, we will defer consideration of the impact of *Iqbal*’s pleading standard on plaintiff’s ability to plead a viable Section 1983 claim until examination of the qualified immunity defense. See Part III(B), *infra*.
2. Was the Supreme Court’s holding that a supervisory official may be held liable only where the supervisor himself violated the Constitution logically necessary to avoid imposing vicarious liability?
 - a. Is the Court’s requirement that plaintiff prove that the supervisor violated the Constitution compatible

with the language of Section 1983? The legislative history of the statute? The policy underpinnings of Section 1983? Compare Kit Kinports, [Iqbal and Supervisory Immunity](#), 114 PENN. ST. L. REV. 1291, 1297-1300 (2010) with Sheldon Nahmod, [Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal](#), 14 LEWIS & CLARK L. REV. 279 (2010).

- b. Attorney General Ashcroft and FBI Director Mueller never argued that plaintiff must prove that they individually violated the Constitution in order to hold them responsible for constitutional violations physically inflicted by subordinate officials. In their Petition for a Writ of Certiorari, Ashcroft and Mueller presented the following question: “Whether a cabinet-level officer or high ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.” [Petition for Certiorari at 1, Ashcroft v. Iqbal](#), 129 S. Ct. 1937 (2009) (No. 07-1015). Ashcroft and Mueller conceded high-level officials could be sued not only for their direct involvement in deprivations of constitutional rights, but also for their “deliberate indifference in the face of information that rights of others are being violated.” Initial Brief of Appellants at 14, 44, *Ashcroft*, 129 S. Ct. 1937 (2009) (No. 07-1015). Defendants argued that constructive notice of wrongdoing was insufficient to meet that test; rather, “[t]he proper standard ... would preclude liability unless petitioners had actual knowledge of the assertedly discriminatory nature of the classification of suspects of being of ‘high interest’ and they were deliberately indifferent to that discrimination.” *Id.* at 50 (emphasis supplied). Why did the Court adopt a standard of supervisory liability that was neither raised in the lower courts nor argued by the parties?

3. Courts have varied in how stringently they apply the discriminatory purpose standard of culpability in Section 1983 actions against supervisors for violation of the Equal Protection Clause.

- a. In *Powell v. City of New York*, 2016 U.S. Dist. LEXIS 94186 (S.D.N.Y. July 14, 2016), an inmate sued prison officials for not calling him to prayer services despite the fact that he registered as Muslim with the prison. The court determined that there was no underlying constitutional violation, and therefore no supervisory liability. However, “out of an abundance of caution” the court went on in dicta to discard old standards of supervisory liability. *Id.* Prior to *Iqbal*, the Court of Appeals for the Second Circuit evaluated five factors to establish supervisory liability (the *Colon* factors): “(1) Defendant participated directly in the alleged violation (2) Defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong (3) Defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) Defendant was grossly negligent in supervising subordinates who committed the wrongful acts, (5) Defendant exhibited deliberate indifference to the rights of plaintiffs by failing to act on information indicating that unconstitutional acts were occurring.” [Colon v. Coughlin](#), 58 F.3d 865, 873 (2d Cir. 1995). The District Court decided after *Iqbal*, “at a minimum, therefore, the second, fourth, and fifth *Colon* factors—which do not require any showing of discriminatory ‘purpose’ by the supervisor—can no longer be relied on to hold a senior official personally liable for conduct by her juniors in violation of the Equal Protection clause of the 14th Amendment.” *Powell v. City of New York*, 2016 U.S. Dist. LEXIS 94186 at *28, *29. See also [Butler v. Suffolk County](#), 289 F.R.D. 80, 94 n. (E.D.N.Y. 2013) (“[T]he weight of authority among the district courts in the Eastern District of New York suggests that only two of the *Colon* factors—direct participation and the creation of a policy or custom—survive *Iqbal*.”). But see [Raspardo v. Carlone](#), 770 F.3d 97, 117 (2d Cir. 2014) (“We have not yet determined the contours of the supervisory liability test, including the gross negligence prong, after *Iqbal*. We need not decide this question here.”).

- b. In [Locke v. Haessig](#), 788 F.3d 662 (7th Cir. 2015), plaintiff alleged he had been sexually harassed by his

parole officer and complained about the harassment to the parole officer's supervisor. Plaintiff then sued the supervisor for violating the Equal Protection Clause, alleging the supervisor refused to act on the harassment complaint because the plaintiff was male. The court of appeals rejected defendant's contention that only action—and not inaction—could establish the specific intent to discriminate required by *Iqbal*. Rather, the court ruled, "Short perhaps only of a confession of intentional discrimination, selective inaction can be strong evidence of discriminatory intent." *Locke*, 788 F. 3d at 671.

- c. In [Burke v. New Mexico](#), 696 Fed. Appx. 325 (10th Cir. 2017), Heather Burke, an IT Generalist working at the New Mexico General Services Department, alleged she had been harassed based upon her gender and that the Department compensated men more than women employed in the same position. Burke sued Department Secretary Edwynn Burckle, alleging that Burckle had failed to properly train and discipline his staff. The court determined that plaintiff's Complaint was insufficient because she had not alleged any specific deficiency in Burckle's training that actually caused unequal treatment. However, the court acknowledged, "deliberate indifference to known sexual harassment can, under certain circumstances, serve as a basis for supervisory liability under an Equal Protection theory." *Burke*, 696 Fed. Appx. at 330.

4. Does *Iqbal* require that plaintiff plead and prove in every Section 1983 case that the supervisor acted with the purpose of violating the Constitution?

- a. In [OSU Student Alliance v. Ray](#), 699 F.3d 1053 (9th Cir. 2012), the Oregon State University (OSU) Student Alliance group asserted a § 1983 supervisory liability claim against the President and Vice-President of the University. Plaintiff alleged the defendants knowingly acquiesced in the Director of Facilities' removal of bins that housed the Alliance's student-run conservative newspaper, in violation of their First Amendment right to freedom of speech. In deciding which culpability standard to apply, the court stated:

The question is whether allegations of supervisory knowledge and acquiescence suffice to state claims for speech-based first amendment and equal protection violations. *Iqbal* does not answer this question. [*Iqbal*'s] holding was based on the elements of invidious discrimination in particular, not on some blanket requirement that applies equally to all constitutional tort claims.... [There] are only three instances where the Supreme Court has required specific intent for Constitutional torts: (1) Due Process Claims for injury in a high speed chase ... (2) Eighth Amendment claims for injuries suffered during a response to a prison disturbance ... (3) Invidious Discrimination claims under the Equal Protection Clause and the First Amendment Free Exercise Clause.... While a specific intent requirement inheres in claims for invidious discrimination, the same requirement does not inhere in claims for free speech.

Id. at 1071-75. See also [Sash v. United States](#), 674 F. Supp 2d 531, 544 (S.D.N.Y 2009) (pre-*Iqbal* personal involvement standards may apply "[w]here the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments.").

5. As noted earlier, the lower federal courts had recognized several theories under which the supervisor's failure to act would satisfy the "affirmative link" requirement set forth in [Rizzo v. Goode](#). See [Colon v. Coughlin](#), 58 F.3d 865, 873 (2d Cir. 1995) (supervisor may be held liable if he knew of and acquiesced in constitutional deprivation; failed to act to remedy a known violation of Constitution; or failed to adequately train or supervise subordinates). In the wake of *Iqbal*, the lower federal courts have divided over whether

and when a supervisor's failure to act may give rise to liability.

- a. Several courts have concluded that the *Iqbal* Court's statement that a government official "is only liable for his or her misconduct" entirely eliminated Section 1983 claims based upon the inaction of supervisors. See [Joseph v. Fischer](#), 2009 U.S. Dist. LEXIS 96952 at *43 (S.D.N.Y. Oct. 8, 2009) (Suit against prison supervisor who took no action in response to inmate's letters complaining about series of unconstitutional actions of subordinates was "precisely the type of claim *Iqbal* eliminated"); [Bellamy v. Mount Vernon Hosp.](#), 2009 U.S. Dist. LEXIS 54141 at *28 (S.D.N.Y. June 26, 2009) (Granting summary judgment to defendant on claim that supervisor was deliberately indifferent to plaintiff's medical needs in violation of Eighth Amendment; after *Iqbal*, liability could no longer be imposed on ground that supervisor "knew of and acquiesced to a constitutional violation committed by a subordinate"); [Newton v. City of New York](#), 640 F. Supp. 2d 426, 448 (S.D.N.Y. 2009) (Supervisor cannot be held liable for failing to adequately train detectives because *Iqbal* requires that supervisor had to take a "direct action" towards the plaintiff in order to be liable); [Jacobs v. Strickland](#), 2009 U.S. Dist. LEXIS 55133 at *10 (S.D. Ohio June 30, 2009) (Supervisor's actual knowledge of the constitutional violation not sufficient to give rise to liability unless supervisor "actually participate[d] in or encourage[d]" constitutional violation).
- b. In [Peatross v. City of Memphis](#), 818 F.3d 233, 242-42 (6th Cir. 2016), the court of appeals set forth the elements necessary to hold a supervisor liable under Section 1983:

[T]here are clear situations in which supervisory liability does not attach. It is well-settled that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under the theory of *respondeat superior*." In other words, a supervisor cannot be held liable simply because he or she was charged with overseeing a subordinate who violated the constitutional rights of another. Consequently, a mere failure to act will not suffice to establish supervisory liability. We have long held that supervisory liability requires some "active unconstitutional behavior" on the part of the supervisor.

However, "active" behavior does not mean "active" in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation

"[A] supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it." We have interpreted this standard to mean that "at a minimum," the plaintiff must show that the defendant "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." (citations omitted).

See [Garza v. Lansing Sch. Dist.](#), 2020 U.S. App. LEXIS 27523, No. 19-1645 (6th Cir. August 28, 2020) at *20 ("A defendant may 'knowingly acquiesce[] in the unconstitutional conduct of his subordinates through the execution of his job functions,' including by failing to take precautions against likely violations.").

- c. Other courts have ruled that *Iqbal* did not universally repudiate liability for a supervisor's failure to act. Rather, whether inaction could both satisfy *Iqbal* and suffice to show an affirmative link between the supervisory defendant and the violation depends upon the culpability plaintiff is required to prove to establish an infringement of the particular constitutional right in issue.
 - i. The lower courts have agreed that because plaintiff must prove purposeful discrimination to establish a violation of the Equal Protection Clause, officials are not liable merely for failing to act in the face of discriminatory acts by persons who they supervise. [T.E. v. Grindle](#), 599 F.3d 583 (7th Cir.

2010); [Cole v. FBI](#), 791 F. Supp.2d 1229 (D. Mont. 2010).

ii. In [Starr v. Baca](#), 652 F.3d 1202 (9th Cir. 2011), the complaint alleged a deputy sheriff of the Los Angeles County jail opened the door of plaintiff Dion Starr's jail cell, allowing a group of inmates who had been threatening to harm Starr to enter the cell. The inmates stabbed Starr twenty-three times. After the inmates left Starr's cell, one deputy repeated yelled "shut up n—" while kicking Starr. Other deputies stood by and watched. Starr sued not only the deputies involved in the attack, but also sued Sheriff Baca. The complaint alleged that based upon a series of previous incidents, the sheriff knew or should have known about the dangers in the county jail, but failed to act to prevent them. The district court dismissed the claim against Sheriff Baca. The court reasoned that the complaint did not allege that the sheriff participated in the incident giving rise to Starr's injuries; was involved in any review or investigation of that incident; or implemented a specific policy that caused the violation. The court of appeals reversed the dismissal of the claim against the sheriff. The court held that "unlike a claim of unconstitutional discrimination," plaintiff's claim that conditions of confinement violated the Eighth Amendment "may be based on a theory of deliberate indifference." *Id.* at 1206. Accordingly, "[a] showing that the supervisor ... failed to act ... is sufficient to demonstrate the involvement—and the liability—of that supervisor." *Id.* at 1206-07.

iii. In [Sash v. United States](#), 674 F. Supp.2d 531 (S.D.N.Y. 2009), plaintiff alleged that the supervisor was liable for failing to properly train and supervise the police officers who used excessive force while arresting the plaintiff. The court noted that the *Iqbal* Court "specifically held that '[t]he factors necessary to establish' supervisory liability 'will vary with the constitutional provision at issue.'" *Id.* at 544. The court then reasoned that the inaction of the supervisor may give rise to liability '[w]here the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standard of the Fourth and Eighth Amendments. *Id.* See also, [D'Olimpio v. Crisafi](#), 718 F. Supp.2d 340 (S.D.N.Y. 2010) (Because proof of Fourth Amendment violation does not require showing of discriminatory purpose, supervisor may be held liable for failing to take action in response to notice of wrongdoing by subordinate officers in making arrests).

6. If plaintiff satisfies both the *Iqbal* mandate that the supervisor violated the Constitution and the *Rizzo* requirement of an "affirmative link" between the supervisor's conduct and the constitutional deprivation, must the plaintiff further prove that the supervisor's unconstitutional action was a cause in fact of the invasion of plaintiff's rights?

a. Courts generally have insisted plaintiff prove that the supervisor's conduct was a cause-in-fact of the violation. [Chamberlain v. City of White Plains](#), 960 F.3d 100, 114 (2d Cir. 2020) ("To succeed on a supervisory liability claim, a plaintiff must 'show an affirmative causal link between the supervisor's inaction and [the plaintiff's] injury.'"); [Keith v. Dekalb County](#), 749 F.3d 1034, 1052 (11th Cir. 2014) (to hold supervisor liable for failure to properly train subordinates, plaintiff must prove that "the failure has actually caused the injury of which plaintiff complains."). However, they have adopted a range of standards of causation.

b. The most stringent articulation of the causation element requires the plaintiff to show that the "supervisor's conduct led inexorably to the constitutional violation." [Maldonado v. Fontanes](#), 568 F.3d 263, 275 (1st Cir. 2009). See also [Walker v. Upshaw \(In re Estate of Walker\)](#), 515 Fed. Appx. 334, 340 (5th Cir 2013) ("when plaintiffs allege that a supervisory official failed to train or supervise they must prove

that ... the inadequacy of the training [was] obviously likely to result a constitutional violation.”).

- c. Some courts have concluded that to hold a supervisor liable, plaintiff has to show that the supervisor’s conduct was “closely related” to the constitutional violation that occurred. [*Burke v. New Mexico*](#), 696 Fed. Appx. 325 (10th Cir. 2017) (affirming judgment for supervisory official where plaintiff “alleged no specific deficiency in [the defendant’s training] that was closely related to her ultimate injury and ‘actually caused’ unequal treatment.”); [*Parrish v. Ball*](#), 594 F.3d 993, 1000 (9th Cir. 2010). See also [*Doe v. Durham Pub. Sch. Bd. of Educ.*](#), 2019 U.S. Dist. LEXIS 12249 at *45 (No. 1:17cv773 (M.D. N.C. January 25, 2019) (“After showing deliberate indifference, plaintiffs must show a ‘sufficiently close causal link’ between the training deficiency and the alleged violation—that the violation was ‘almost bound to happen’”)).
 - d. Other courts have ruled that the requisite causal connection exists where the supervisor’s actions “could be reasonably expected to give rise to just the sort of injuries that occurred.” [*Peatross v. City of Memphis*](#), 818 F. 3d 233, 245 (6th Cir. 2016); [*Vazquez v. Cty. of Kern*](#), 949 F.3d 1153, 1166 (9th Cir. 2020) (“The requisite causal connection may be established when an official sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional harms”); [*Dodds v. Richardson*](#), 614 F.3d 1185, 1211 (10th Cir. 2010) (supervisor liable if he “set in motion a series of events that the [supervisor] knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.”); [*Starr v. Baca*](#), 652 F.3d 1202, 1207-08 (9th Cir. 2011).
 - e. Yet other courts simply have required the plaintiff to show “some” causal connection between the supervisor’s actions and the constitutional violation. [*Sanchez v. Pereira v. Castillo*](#), 590 F.3d 31, 49 (1st Cir. 2009); [*Gallagher v. Shelton*](#), 587 F.3d 1063, 1069 (10th Cir. 2009).
7. If plaintiff must prove the supervisor’s conduct was a cause in fact of the constitutional deprivation, did *Iqbal* supplant the “affirmative link” requirement set forth in *Rizzo v. Goode*? See [*Santiago v. Warminster Township*](#), 629 F.3d 121, 130 (3d Cir. 2010) (“Particularly after *Iqbal*, the connection between the supervisor’s directions and the constitutional deprivation must be sufficient to ‘demonstrate a ‘plausible nexus’ or ‘affirmative link’ between the [directions] and the specific deprivation of constitutional rights at issue.’”) (emphasis supplied); [*Clark v. Sheffield*](#), 807 Fed. Appx. 910, 917 (11th Cir. 2020) (“Supervisory liability occurs only when the supervisor personally participates in the alleged violation or when there is a causal connection between the supervisory official’s actions and the alleged deprivation.”) (emphasis supplied).

MARTINEZ v. CALIFORNIA, 444 U.S. 277 (1980)



Tecolote Canyon, San Diego

Mr. Justice Stevens delivered the opinion of the Court.

[1] The two federal questions that appellants ask us to decide are (1) whether the Fourteenth Amendment invalidates a California statute granting absolute immunity to public employees who make parole-release determinations, and (2) whether such officials are absolutely immune from liability in an action brought under the federal Civil Rights Act of 1871, 42 U.S.C. § 1983. We agree with the California Court of Appeal that the state statute is valid when applied to claims arising under state law, and we conclude that appellants have not alleged a claim for relief under federal law.

[2] The case arises out of the murder of a 15-year-old girl by a parolee. Her survivors brought this action in a California court claiming that the state officials responsible for the parole-release decision are liable in damages for the harm caused by the parolee.

[3] The complaint alleged that the parolee, one Thomas, was convicted of attempted rape in December 1969. He was first committed to a state mental hospital as a “Mentally Disordered Sex Offender not amenable to treatment” and thereafter sentenced to a term of imprisonment of 1 to 20 years, with a recommendation that he not be paroled. Nevertheless, five years later, appellees decided to parole Thomas to the care of his mother. They were fully informed about his history, his propensities, and the likelihood that he would commit another violent crime. Moreover, in making their release determination they failed to observe certain “requisite formalities.” Five months after his release Thomas tortured and killed appellants’ decedent. We assume, as the complaint alleges, that appellees knew, or should have known, that the release of Thomas created a clear and present danger that such an incident would occur. Their action is characterized not only as negligent, but also as reckless, willful, wanton and malicious. Appellants prayed for actual and punitive damages of \$2 million.

[4] The trial judge sustained a demurrer to the complaint and his order was upheld on appeal. 85 Cal. App.3d 430, 149 Cal. Rptr. 519 (1978). After the California Supreme Court denied appellants’ petition for a hearing, we noted probable jurisdiction. 441 U.S. 960.

[5] We turn then to appellants' § 1983 claim that appellees, by their action in releasing Thomas, subjected appellants' decedent to a deprivation of her life without due process of law.^[6]

It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts.^[7] We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in *Baker v. McCollan*, 443 U.S. 137, "[the] first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States. The answer to that inquiry disposes of this case.

[6] Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "State ... of life ... without due process of law." Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, see *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977); *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

[7] Her life was taken by the parolee five months after his release.^[8]

He was in no sense an agent of the parole board. Cf. *Scheuer v. Rhodes*, 416 U.S. 232. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

The judgment is affirmed. So ordered.



[Martinez v. California – Audio and Transcript of Oral Argument](#)

Footnotes

6. We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court." *Testa v. Katt*, 330 U.S. 386, 391, quoting *Clafin v. Houseman*, 93 U.S. 130, 137. See also *Aldinger v. Howard*, 427 U.S. 1, 36, n.17 (Brennan, J., dissenting); *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 476. We have never considered, however, the question whether a State must entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally

not free to refuse enforcement of the federal claim. *Testa v. Katt*, *supra*, at 394. But see *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). [↓](#)

7. "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law." *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973), *cert. denied*, 415 U.S. 917. [↓](#)
8. Compare the facts in *Screws v. United States*, 325 U.S. 91, where local law enforcement officials themselves beat a citizen to death [↓](#)

Notes on *Martinez v. California*: Causation and Duty

1. Did the Court decide *Martinez* on the issue of causation? Was the parole board's decision to release Thomas a cause in fact of the murder? Would the outcome have been different if the murder had occurred five hours after Thomas was released from custody? Would the parole officials be liable if they knew the Martinez's daughter was Thomas' intended victim?
2. In [Taggart v. State of Washington](#), 822 P.2d 243 (Wash. 1992), Victoria Taggart brought state tort claims against the State of Washington and its agents for negligently supervising parolee Louis Brock, who assaulted Taggart seven months after his release. Taggart and Brock had not met before the assault. The Washington Supreme Court, reversing the trial court's grant of defendant's motion for summary judgment, rejected the State's argument that the parole officials' actions were not a legal cause of assault.

The State argues that Brock's assault on Taggart occurred "without any warning to responsible correctional officials." ... The State contends that since the state correctional system does not have the resources to monitor parolees constantly in order to prevent them from committing unpredictable crimes, neither the State nor its agents should be deemed the legal cause of Taggart's injuries.

We disagree. Brock had a long history of violent attacks against women and a consistently unfavorable prognosis for recovery from his psychiatric problems... In light of such facts, the assertion that Brock's assault upon yet another woman occurred without warning is not that credible. At most, the facts the state cites support the contentions that Brock's parole officer was entitled to relax her vigilance, her actions to protect against Brock's dangerous propensities were reasonable under the circumstances, so that she did not breach any duty. We are unwilling to declare as a matter of law that no actions of the State or its agents were the legal cause of Taggart's injuries.

Taggart, 822 P.2d at 258-59.

3. The *Martinez* Court noted that the parole board did not violate the Fourteenth Amendment "[r]egardless

of whether, as a matter of state tort law, the parole board could be said to either have had a 'duty' to avoid harm to his victim or to have proximately caused her death." *Martinez* at 285. Under what circumstances would an official's actions be a proximate cause of the victim's injury under state tort law yet not be a cause of the injury for purposes of an action under Section 1983?

- a. "Just as basis of liability concepts of tort law do not determine §1983 basis of liability requirements, proximate cause standards from tort law should not be dispositive of the §1983 extent of liability question. This is not to say, of course, that proximate cause standards from tort law are not useful. It turns out, in fact, that most circuits use a reasonable foreseeability standard adapted from tort law. The point, though, is that tort law purposes and interests are often different from §1983 purposes and interests, and thus tort law concepts should not be blindly applied." See Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation* (4th ed. 2000) § 3.104
- b. In [Barnes v. Anderson](#), 202 F.3d 150 (2d Cir. 1999), Michelle Barnes alleged that courtroom security officers caused her to miscarry by using excessive force in the course of an unconstitutional arrest. Because no expert witness had testified that defendants' actions had inflicted sufficient trauma to cause Mrs. Barnes to miscarry, the district court instructed the jury that it was not to consider the miscarriage on the issue of damages. The court of appeals affirmed:

Although proximate causation in the §1983 context is a question of federal law, in determining the meaning of the concept we look to those state tort analogs, because the "Supreme Court has made it crystal clear that principles of causation borrowed from tort law are relevant to civil rights actions brought under §1983." [citations omitted]

In this instance, the district court concluded that proof of proximate cause of a miscarriage required expert medical evidence specifically attributing that injury to the acts of which the plaintiff complained. We find this to be entirely consistent with analogous tort law doctrine.

Barnes, 202 F.3d at 158-59. See also [Jackson v. Sauls](#), 206 F.3d 1156, 1168 (11th Cir. 2000) ("Although §1983 addresses only constitutional torts, §1983 defendants are, as in common law tort suits, responsible for the natural and foreseeable consequences of their actions.... For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries were the reasonable foreseeable consequences of the tortious acts or omissions in Issue").

- c. The lower federal courts have looked to state law in determining whether a supervisory official was personally involved in a constitutional violation under the "affirmative link" requirement of [Rizzo v. Goode](#). See [Meade v. Grubbs](#), 841 F.2d 1512, 1528 (10th Cir. 1988) ("Unless a supervisor has established or utilized an unconstitutional policy or custom, a plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the violation"); [Slakan v. Porter](#), 737 F.2d 368, 373 (4th Cir. 1984), ("The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked. The final determination 'generally is one of fact, not law' ... but state statutes fixing the administrator's legal duties provide a useful guide in determining who had the responsibility and capability to end the offensive practices."). The propriety of using state law to assign responsibility for constitutional invasions also arises in the Supreme Court's attempt to define municipal liability. See Chapter IV, *infra*.

4. Francois Daniel Lesage, an African immigrant of Caucasian descent, brought a Section 1983 action for

race discrimination following rejection of his application for admission to the Ph.D. program in counseling psychology at the University of Texas. It was undisputed that the University considered the race of the applicant in its review process. Finding that the undisputed facts established that Lesage would have been rejected even if the admissions process had been entirely color blind, the District Court entered summary judgment for the University. The Court of Appeals for the Fifth Circuit reversed, finding the determination of whether Lesage would have been admitted irrelevant to whether the University had violated his constitutional rights.

The United States Supreme Court reversed the Court of Appeals:

[E]ven if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration [citations omitted]. Our previous decisions on this point have typically involved retaliation for protected First Amendment activity more than racial discrimination, but that distinction is immaterial. The underlying principle is the same ... Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.

[*Texas v. Lesage*](#), 528 U.S. 18, 20-21 (1999).

5. In [*County of Los Angeles v. Mendez*](#), 581 U.S. 420 (2017) Los Angeles County Sheriff's Department Deputies were executing an arrest warrant for Ronnie O'Dell. The deputies entered a one-room shack where Angel Mendez and Jennifer Garcia were living. The deputies did not have a search warrant and did not knock and announce their presence. The deputies opened the door to the shack and pulled back the blanket on the futon where Mendez and Garcia were napping. Mendez thought it was the owner of the home in whose backyard they were living who had entered. Mendez picked up the BB gun he used to kill rats so that he could stand up and place the gun on the floor. The deputies, believing the gun was a small caliber rifle, fired 15 rounds, shooting both Garcia and Mendez multiple times. As a result of the shooting, Mendez's leg had to be amputated below the knee.

Mendez and Garcia brought a Section 1983 claim alleging three separate constitutional violations: First, that the deputies violated the Fourth Amendment by entering the shack without a warrant; second, that the deputies violated the Fourth Amendment by failing to knock and announce their presence; and third, that the deputies engaged in an unreasonable seizure by using excessive force.

Following a bench trial, the District Court found in favor of plaintiffs on the warrantless entry and knock and announce claims. However, the court awarded only nominal damage on these counts, reasoning that Mendez's picking up the BB gun was a superseding cause as to damages that flowed from the shooting. As to the excessive force claim, the court first found that the deputies' use of force was reasonable in light of their belief that Mendez posed a threat to their lives by holding what they believed to be a rifle. The court then applied the Ninth Circuit's "provocation rule," under which an otherwise reasonable use of force is unreasonable as a matter of law where the officer intentionally or recklessly provoked the violent response and that provocation is an independent violation of the constitution. The court found the deputies liable under the provocation rule and awarded Mendez and Garcia approximately four million dollars in damages.

While not disagreeing with the district court that the shooting was reasonable, the court of appeals affirmed the judgment for plaintiffs on the excessive force claim because the deputies had intentionally and recklessly caused the shooting by entering the shack without a warrant. As an alternative ground for affirmance, the court of appeals reasoned that as a matter of proximate cause, it was reasonably foreseeable that the officers would encounter an armed homeowner by entering the shack unannounced.

The United States Supreme Court reversed, reasoning that the provocation rule impermissibly imposes liability for constitutionally reasonable force by linking the use of force to an earlier-in-time, different violation of the Constitution:

[T]he [provocation] rule includes a vague causal standard. It applies when a prior constitutional violation 'created a situation which led to' the use of force. The rule does not incorporate the familiar proximate cause standard. Indeed, it is not clear what causal standard is being applied.

Mendez, 137 S. Ct. at 1548.

The Court further held that the court of appeals erred in its alternative ruling that the warrantless entry was a proximate cause of the shooting:

Proper analysis of this proximate cause question required consideration of the "foreseeability or scope of the risk created by the predicate conduct," and required the court to conclude that that there was "some direct relation between the injury asserted and the injurious conduct alleged." ...

[T]he Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondent's injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset.

Mendez, 137 S. Ct. at 1548-49.

6. In [Garza v. Lansing School Dist.](#), 972F.3d853, 868 (6th Cir. 2020), the court of appeals summarized the causation element in Section 1983 actions:

Thus, we must consider whether Defendants' conduct is a cause in fact and a proximate cause of C.G.'s injury. "Cause in fact is typically assessed using the 'but for' test, which requires us to imagine whether the harm would have occurred if the defendant had behaved other than [she] did." "[C]ourts have framed the [§ 1983](#) proximate-cause question as a matter of foreseeability, asking whether it was reasonably foreseeable that the complained of harm would befall the [§ 1983](#) plaintiff as a result of the defendant's conduct. Foreseeability overlaps with the concept of "directness," which proximate cause also requires, since "[i]n most cases the more directly related an outcome is to an underlying action, the more likely that the outcome will have been foreseeable, and vice versa.

7. One court has differentiated the causal connection required to prevail among Section 1983 actions based upon the type of relief requested:

In analyzing this relationship between deliberate indifference and the constitutional deprivation, we believe it is important to distinguish the causal connection required when a plaintiff seeks injunctive or declaratory relief as opposed to damages. When a prisoner seeks injunctive or declaratory relief against a myriad of prison personnel responsible for operating a prison, we focus on whether the combined acts or omissions of the state officials responsible for operating the state's penal system created living conditions that violate the eight amendment. See *Williams*, 689 F.2d at 1383. The approach undeniably focuses on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have caused the constitutional deprivation. *Id.* at 1381; see

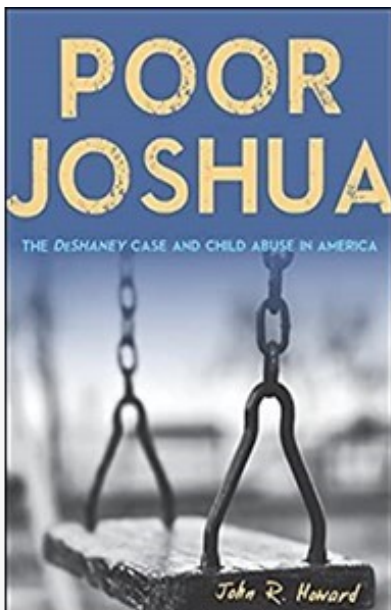
Rizzo, 423 U.S. at 370-71, 375-77, 96 S. Ct. at 603-04, 606-07. However, the causal link between the deliberate indifference and the eighth amendment deprivation is broader and more generalized than when that same prisoner seeks damages for the harmful effects of such conditions. See *Williams*, 689 F.2d at 1383-84 (contrasting the “broad and generalized” approach to causation in a suit seeking injunctive relief with the “individualized” inquiry applicable to suits seeking damages from individual prison officials).

When plaintiffs, such as inmates, seek to hold an individual defendant personally liable for damages, the causation inquiry between the deliberate indifference and the eighth amendment deprivation must be more refined. We must focus on whether the individual defendant was in a position to take steps to avert the stabbing incident, but failed to do so intentionally or with deliberate indifference. In order to resolve this causation issue, we must take a very individualized approach which accounts for the duties, discretion, and means of each defendant. See *Williams*, 689 F.2d at 1384. Especially when, as in this case, a prisoner seeks to hold a prison employee individually liable because another prisoner attacked him, the prisoner must establish individual fault.

[*Leer v. Murphy*](#), 844 F.2d 628, 633-34 (9th Cir. 1988).

8. Did the Martinez family sue the parole board because of the board's action or inaction?
 - a. Does the Constitution impose any requirement that the government act affirmatively, as opposed to prohibiting governmental conduct? See [*Monroe v. Pape*](#), *supra* at 180. (“It is abundantly clear that one reason the legislation [Section 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced....”) and Currie, [*Positive and Negative Constitutional Rights*](#), 53 U. CHI. L. REV. 864 (1986). If the Constitution does impose a duty on the government to affirmatively act, are state and local officials liable under Section 1983 whenever they fail to prevent a crime? Do police officers have an obligation to arrest a suspect as soon as they have probable cause? Must parole officers refuse to grant parole whenever there is a foreseeable risk that the prisoner will commit a crime if released from custody?
 - b. If the Constitution does *not* impose any duty of affirmative governmental action, may a police officer refuse to intervene while a fellow officer beats an arrested person in his presence? See [*Byrd v. Brishke*](#), 466 F.2d 6 (7th Cir. 1972). May prison authorities decline to protect inmates from assaults by other inmates? Compare [*Davidson v. Cannon*](#), 474 U.S. 344 (1986) with [*Withers v. Levine*](#), 615 F.2d 158 (4th Cir. 1980). Are prison officials constitutionally obliged to provide medical care to prisoners? See [*Estelle v. Gamble*](#), 429 U.S. 97 (1976). May an FBI informant choose not to prevent a police officer from executing a murder contract? See [*Beard v. O’Neal*](#), 728 F.2d 894 (7th Cir.1984).

***DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*, 489 U.S. 189 (1989)**



Book cover: *Poor Joshua: The DeShaney Case and Child Abuse in America*. [Indigo](#)



Joshua DeShaney. [Lindsey Gardella](#). [DeShaney v Winnebago County Social Services](#)

Chief Justice Rehnquist delivered the opinion of the Court.

[1] Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

I

[2] The facts of this case are undeniably tragic. Petitioner Joshua DeShaney was born in 1979. In 1980, a Wyoming court granted his parents a divorce and awarded custody of Joshua to his father, Randy DeShaney. The father shortly thereafter moved to Neenah, a city located in Winnebago County, Wisconsin, taking the infant Joshua with him. There he entered into a second marriage, which also ended in divorce.

[3] The Winnebago County authorities first learned that Joshua DeShaney might be a victim of child abuse in January 1982, when his father's second wife complained to the police, at the time of their divorce, that he had previously "hit the boy causing marks and [was] a prime case for child abuse." App. 152-153. The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the accusations, and DSS did not pursue them further. In January 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions. The examining physician suspected child abuse and notified DSS,

which immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. Three days later, the county convened an ad hoc “Child Protection Team”—consisting of a pediatrician, a psychologist, a police detective, the county’s lawyer, several DSS caseworkers, and various hospital personnel—to consider Joshua’s situation. At this meeting, the Team decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court. The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counselling services, and encouraging his father’s girlfriend to move out of the home. Randy DeShaney entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals.

[4] Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father. A month later, emergency room personnel called the DSS caseworker handling Joshua’s case to report that he had once again been treated for suspicious injuries. The caseworker concluded that there was no basis for action. For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua’s head; she also noticed that he had not been enrolled in school, and that the girlfriend had not moved out. The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that they believed to be caused by child abuse. On the caseworker’s next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still DSS took no action.

[5] In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse.

[6] Joshua and his mother brought this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Wisconsin against respondents Winnebago County, DSS, and various individual employees of DSS. The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known. The District Court granted summary judgment for respondents.

[7] The Court of Appeals for the Seventh Circuit affirmed, 812 F.2d 298 (1987), holding that petitioners had not made out an actionable § 1983 claim for two alternative reasons. First, the court held that the Due Process Clause of the Fourteenth Amendment does not require a state or local governmental entity to protect its citizens from “private violence, or other mishaps not attributable to the conduct of its employees.” *Id.*, at 301. In so holding, the court specifically rejected the position ... that once the State learns that a particular child is in danger of abuse from third parties and actually undertakes to protect him from that danger, a “special relationship” arises between it and the child which imposes an affirmative constitutional duty to provide adequate protection. 812 F.2d, at 303-304. Second, the court held, in reliance on our decision in *Martinez v. California*, 444 U.S. 277, 285 (1980), that the causal connection between respondents’ conduct and Joshua’s injuries was too attenuated to establish a deprivation of constitutional rights actionable under § 1983. 812 F.2d, at 301-303. The court therefore found it unnecessary to reach the question whether respondents’ conduct evinced the “state of mind” necessary to make out a due process claim after *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986). 812 F.2d, at 301.

[8] Because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual’s due process rights, see *Archie v. Racine*, 847 F.2d 1211, 1220-1223, and n.10 (CA7 1988) (en banc) (collecting cases), cert. pending, No. 88-576, and the importance of

the issue to the administration of state and local governments, we granted certiorari. 485 U.S. 958 (1988). We now affirm.

II

[9] The Due Process Clause of the Fourteenth Amendment provides that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.” Petitioners contend that the State deprived Joshua of his liberty interest in “free[dom] from ... unjustified intrusions on personal security,” see *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), by failing to provide him with adequate protection against his father’s violence. The claim is one invoking the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied Joshua protection without according him appropriate procedural safeguards, see *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but that it was categorically obligated to protect him in these circumstances, see *Youngberg v. Romeo*, 457 U.S. 307, 309 (1982).^[9]

[10] But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government “from abusing [its] power, or employing it as an instrument of oppression,” *Davidson v. Cannon*, *supra*, at 348; see also *Daniels v. Williams*, *supra*, at 331 (“to secure the individual from the arbitrary exercise of the powers of government,” and “to prevent governmental power from being ‘used for purposes of oppression’”) (internal citations omitted); *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring in result) (to prevent the “affirmative abuse of power”). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

[11] Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. See, e. g., *Harris v. McRae*, 448 U.S. 297, 317-318 (1980) (no obligation to fund abortions or other medical services) (discussing Due Process Clause of Fifth Amendment); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing) (discussing Due Process Clause of Fourteenth Amendment); see also *Youngberg v. Romeo*, *supra*, at 317 (“As a general matter, a State is under no constitutional duty to provide substantive services for those within its border”). As we said in *Harris v. McRae*:

“Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference ..., it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.”

448 U.S., at 317-318 (emphasis added). If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.^[10] As a general matter, then, we conclude that a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

[12] Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of

certain “special relationships” created or assumed by the State with respect to particular individuals. Brief for Petitioners 13-18. Petitioners argue that such a “special relationship” existed here because the State knew that Joshua faced a special danger of abuse at his father’s hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. *Id.*, at 18-20. Having actually undertaken to protect Joshua from this danger—which petitioners concede the State played no part in creating—the State acquired an affirmative “duty,” enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so “shocks the conscience,” *Rochin v. California*, 342 U.S. 165, 172 (1952), as to constitute a substantive due process violation. Brief for Petitioners 20.^[11]

[13] We reject this argument. It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. In *Estelle v. Gamble*, 429 U.S. 97 (1976), we recognized that the Eighth Amendment’s prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment’s Due Process Clause, *Robinson v. California*, 370 U.S. 660 (1962), requires the State to provide adequate medical care to incarcerated prisoners. 429 U.S., at 103-104.^[12] We reasoned that because the prisoner is unable “‘by reason of the deprivation of his liberty [to] care for himself,’” it is only “‘just’” that the State be required to care for him. *Ibid.*, quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

[14] In *Youngberg v. Romeo*, 457 U.S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting,^[13] holding that the substantive component of the Fourteenth Amendment’s Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their “reasonable safety” from themselves and others. *Id.*, at 314-325; see *id.*, at 315, 324 (dicta indicating that the State is also obligated to provide such individuals with “adequate food, shelter, clothing, and medical care”). As we explained: “If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.” *Id.*, at 315-316; see also *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police).

[15] But these cases afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg v. Romeo*, *supra*, at 317 (“When a person is institutionalized—and wholly dependent on the State[,] ... a duty to provide certain services and care does exist”). The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See *Estelle v. Gamble*, *supra*, at 103-104; *Youngberg v. Romeo*, *supra*, at 315-316. The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See *Estelle v. Gamble*, *supra*, at 103 (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met”). In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.^[14]

[16] The *Estelle-Youngberg* analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered occurred not while he was in the State’s custody, but while he was in the custody of his natural father, who was in no sense a state actor.^[15] While the State may have been aware of the

dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

[17] It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. See Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984) (discussing "special relationships" which may give rise to affirmative duties to act under the common law of tort). But the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation. See *Daniels v. Williams*, 474 U.S., at 335-336; *Parratt v. Taylor*, 451 U.S., at 544; *Martinez v. California*, 444 U.S. 277, 285 (1980); *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693, 701 (1976). A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not "all common-law duties owed by government actors were ... constitutionalized by the Fourteenth Amendment." *Daniels v. Williams*, *supra*, at 335. Because, as explained above, the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause.^[16]

[18] Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

[19] The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

Affirmed.

Justice Brennan, with whom Justice Marshall and Justice Blackmun join, dissenting.

[20] "The most that can be said of the state functionaries in this case," the Court today concludes, "is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Ante* this page. Because I believe that this description of respondents' conduct tells only part of the story and that, accordingly, the Constitution itself "dictated a more active role" for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney.

[21] It may well be, as the Court decides, *ante*, at 194-197, that the Due Process Clause as construed by

our prior cases creates no general right to basic governmental services. That, however, is not the question presented here; indeed, that question was not raised in the complaint, urged on appeal, presented in the petition for certiorari, or addressed in the briefs on the merits. No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties.

[22] This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications. In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us. This initial discussion establishes the baseline from which the Court assesses the DeShaneys' claim that, when a State has—"by word and by deed," *ante*, at 197—announced an intention to protect a certain class of citizens and has before it facts that would trigger that protection under the applicable state law, the Constitution imposes upon the State an affirmative duty of protection.

[23] The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys' claim is first and foremost about inaction (the failure, here, of respondents to take steps to protect Joshua), and only tangentially about action (the establishment of a state program specifically designed to help children like Joshua). And from this perspective, holding these Wisconsin officials liable—where the only difference between this case and one involving a general claim to protective services is Wisconsin's establishment and operation of a program to protect children—would seem to punish an effort that we should seek to promote.

[24] I would begin from the opposite direction. I would focus first on the action that Wisconsin has taken with respect to Joshua and children like him, rather than on the actions that the State failed to take. Such a method is not new to this Court. Both *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Youngberg v. Romeo*, 457 U.S. 307 (1982), began by emphasizing that the States had confined J.W. Gamble to prison and Nicholas Romeo to a psychiatric hospital. This initial action rendered these people helpless to help themselves or to seek help from persons unconnected to the government. See *Estelle, supra*, at 104 ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself"); *Youngberg, supra*, at 317 ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist"). Cases from the lower courts also recognize that a State's actions can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant. See, e.g., *White v. Rochford*, 592 F.2d 381 (CA7 1979) (police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night).

[25] Because of the Court's initial fixation on the general principle that the Constitution does not establish positive rights, it is unable to appreciate our recognition in *Estelle* and *Youngberg* that this principle does not hold true in all circumstances. Thus, in the Court's view, *Youngberg* can be explained (and dismissed) in the following way: "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Ante*, at 200. This restatement of *Youngberg's* holding should come as a surprise when one recalls our explicit observation in that case that Romeo did not challenge his commitment to the hospital, but instead "argue[d] that he ha[d] a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights *by failing to provide* constitutionally required conditions of confinement." 457 U.S., at 315 (emphasis added). I do not mean to suggest that "the State's affirmative act of restraining the individual's freedom to act on his own

behalf,” *ante*, at 200, was irrelevant in *Youngberg*; rather, I emphasize that this conduct would have led to no injury, and consequently no cause of action under § 1983, unless the State then had failed to take steps to protect Romeo from himself and from others. In addition, the Court’s exclusive attention to state-imposed restraints of “the individual’s freedom to act on his own behalf,” *ante*, at 200, suggests that it was the State that rendered Romeo unable to care for himself, whereas in fact—with an I.Q. of between 8 and 10, and the mental capacity of an 18-month-old child, 457 U.S., at 309—he had been quite incapable of taking care of himself long before the State stepped into his life. Thus, the fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the State was obligated to replace. Unlike the Court, therefore, I am unable to see in *Youngberg* a neat and decisive divide between action and inaction.

[26] Moreover, to the Court, the only fact that seems to count as an “affirmative act of restraining the individual’s freedom to act on his own behalf” is direct physical control. *Ante*, at 200 (listing only “incarceration, institutionalization, [and] other similar restraint of personal liberty” in describing relevant “affirmative acts”). I would not, however, give *Youngberg* and *Estelle* such a stingy scope. I would recognize, as the Court apparently cannot, that “the State’s knowledge of [an] individual’s predicament [and] its expressions of intent to help him” can amount to a “limitation ... on his freedom to act on his own behalf” or to obtain help from others. *Ante*, at 200. Thus, I would read *Youngberg* and *Estelle* to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.

[27] *Youngberg* and *Estelle* are not alone in sounding this theme. In striking down a filing fee as applied to divorce cases brought by indigents, see *Boddie v. Connecticut*, 401 U.S. 371 (1971), and in deciding that a local government could not entirely foreclose the opportunity to speak in a public forum, see, e.g., *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *United States v. Grace*, 461 U.S. 171 (1983), we have acknowledged that a State’s actions—such as the monopolization of a particular path of relief—may impose upon the State certain positive duties. Similarly, *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), suggest that a State may be found complicit in an injury even if it did not create the situation that caused the harm.

[28] Arising as they do from constitutional contexts different from the one involved here, cases like *Boddie* and *Burton* are instructive rather than decisive in the case before us. But they set a tone equally well established in precedent as, and contradictory to, the one the Court sets by situating the DeShaneys’ complaint within the class of cases epitomized by the Court’s decision in *Harris v. McRae*, 448 U.S. 297 (1980). The cases that I have cited tell us that *Goldberg v. Kelly*, 397 U.S. 254 (1970) (recognizing entitlement to welfare under state law), can stand side by side with *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (implicitly rejecting idea that welfare is a fundamental right), and that *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (entitlement to public education under state law), is perfectly consistent with *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973) (no fundamental right to education). To put the point more directly, these cases signal that a State’s prior actions may be decisive in analyzing the constitutional significance of its inaction. I thus would locate the DeShaneys’ claims within the framework of cases like *Youngberg* and *Estelle*, and more generally, *Boddie* and *Schneider*, by considering the actions that Wisconsin took with respect to Joshua.

[29] Wisconsin has established a child-welfare system specifically designed to help children like Joshua. Wisconsin law places upon the local departments of social services such as respondent (DSS or Department) a duty to investigate reported instances of child abuse. See Wis. Stat. § 48.981(3) (1987-1988). While other governmental bodies and private persons are largely responsible for the reporting of possible cases of child abuse, see § 48.981(2), Wisconsin law channels all such reports to the local departments of social services for evaluation and, if necessary, further action. § 48.981(3). Even when it is the sheriff’s office or police department that receives a report of suspected child abuse, that report is referred to local social services departments for action, see § 48.981(3)(a); the only exception to this occurs when the reporter fears for the

child's immediate safety. § 48.981(3)(b). In this way, Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.

[30] The specific facts before us bear out this view of Wisconsin's system of protecting children. Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action. When Randy DeShaney's second wife told the police that he had "hit the boy causing marks and [was] a prime case for child abuse," the police referred her complaint to DSS. *Ante*, at 192. When, on three separate occasions, emergency room personnel noticed suspicious injuries on Joshua's body, they went to DSS with this information. *Ante*, at 192-193. When neighbors informed the police that they had seen or heard Joshua's father or his father's lover beating or otherwise abusing Joshua, the police brought these reports to the attention of DSS. App. 144-145. And when respondent Kemmeter, through these reports and through her own observations in the course of nearly 20 visits to the DeShaney home, *id.*, at 104, compiled growing evidence that Joshua was being abused, that information stayed within the Department—chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it. (As to the extent of the social worker's involvement in, and knowledge of, Joshua's predicament, her reaction to the news of Joshua's last and most devastating injuries is illuminating: "I just knew the phone would ring some day and Joshua would be dead." 812 F.2d 298, 300 (CA7 1987).)

[31] Even more telling than these examples is the Department's control over the decision whether to take steps to protect a particular child from suspected abuse. While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision (subject to the approval of the local government's corporation counsel) whether to disturb the family's current arrangements. App. 41, 58. When Joshua first appeared at a local hospital with injuries signaling physical abuse, for example, it was DSS that made the decision to take him into temporary custody for the purpose of studying his situation—and it was DSS, acting in conjunction with the corporation counsel, that returned him to his father. *Ante*, at 192. Unfortunately for Joshua DeShaney, the buck effectively stopped with the Department.

[32] In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.

[33] It simply belies reality, therefore, to contend that the State "stood by and did nothing" with respect to Joshua. *Ante*, at 203. Through its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger. These circumstances, in my view, plant this case solidly within the tradition of cases like *Youngberg* and *Estelle*.

[34] It will be meager comfort to Joshua and his mother to know that, if the State had "selectively den[ie]d its protective services" to them because they were "disfavored minorities," *ante*, at 197, n.3, their § 1983 suit might have stood on sturdier ground. Because of the posture of this case, we do not know why respondents did not take steps to protect Joshua; the Court, however, tells us that their reason is irrelevant so long as their inaction was not the product of invidious discrimination. Presumably, then, if respondents decided not to help Joshua because his name began with a "J," or because he was born in the spring, or because they did not care enough about him even to formulate an intent to discriminate against him based

on an arbitrary reason, respondents would not be liable to the DeShaneys because they were not the ones who dealt the blows that destroyed Joshua's life.

[35] I do not suggest that such irrationality was at work in this case; I emphasize only that we do not know whether or not it was. I would allow Joshua and his mother the opportunity to show that respondents' failure to help him arose, not out of the sound exercise of professional judgment that we recognized in *Youngberg* as sufficient to preclude liability, see 457 U.S., at 322-323, but from the kind of arbitrariness that we have in the past condemned. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (purpose of Due Process Clause was "to secure the individual from the arbitrary exercise of the powers of government" (citations omitted)); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (to sustain state action, the Court need only decide that it is not "arbitrary or capricious"); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (state action invalid where it "passes the bounds of reason and assumes the character of a merely arbitrary fiat," quoting *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912)).

[36] Youngberg's deference to a decisionmaker's professional judgment ensures that once a caseworker has decided, on the basis of her professional training and experience, that one course of protection is preferable for a given child, or even that no special protection is required, she will not be found liable for the harm that follows. (In this way, *Youngberg's* vision of substantive due process serves a purpose similar to that served by adherence to procedural norms, namely, requiring that a state actor stop and think before she acts in a way that may lead to a loss of liberty.) Moreover, that the Due Process Clause is not violated by merely negligent conduct, see *Daniels, supra*, and *Davidson v. Cannon*, 474 U.S. 344 (1986), means that a social worker who simply makes a mistake of judgment under what are admittedly complex and difficult conditions will not find herself liable in damages under § 1983.

[37] As the Court today reminds us, "the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Ante*, at 196, quoting *Davidson, supra*, U.S., at 348. My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent.

Justice Blackmun, dissenting.

[38] Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." *Ante*, at 202. But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. As Justice Brennan demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney—intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed.

[39] The Court fails to recognize this duty because it attempts to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence, which the late Professor Robert Cover analyzed so effectively in his significant work entitled *Justice Accused* (1975).

[40] Like the antebellum judges who denied relief to fugitive slaves, see *id.*, at 119-121, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would

adopt a “sympathetic” reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. *Cf.* A. STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984) (“We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort”).

[41] Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, *ante*, at 193, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all”—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.



[DeShaney v. Winnebago County – Audio and Transcript of Oral Argument](#)

Footnotes

9. Petitioners also argue that the Wisconsin child protection statutes gave Joshua an “entitlement” to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Brief for Petitioners 24-29. But this argument is made for the first time in petitioners’ brief to this Court: it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here. [↗](#)
10. The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But no such argument has been made here. [↗](#)
11. The genesis of this notion appears to lie in a statement in our opinion in *Martinez v. California*, 444 U.S. 277 (1980). In that case, we were asked to decide, *inter alia*, whether state officials could be held liable under the Due Process Clause of the Fourteenth Amendment for the death of a private citizen at the hands of a parolee. Rather than squarely confronting the question presented here—whether the Due Process Clause imposed upon the State an affirmative duty to protect—we affirmed the dismissal of the claim on the narrower ground that the causal connection between the state officials’ decision to release the parolee from prison and the murder was too attenuated to establish a “deprivation” of constitutional rights within the meaning of § 1983. *Id.*, at 284-285. But we went on to say: “[T]he parole board was not aware that appellants’ decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to ‘deprive’ someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants’ decedent’s death is too remote a consequence of the parole officers’ action to hold them responsible under the federal civil rights law.” *Id.*, at 285 (footnote omitted). Several of the Courts of Appeals have read this language as implying that once the State learns

that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a “special relationship” arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection. See *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-511 (CA3 1985); *Jensen v. Conrad*, 747 F.2d 185, 190-194, and n.11 (CA4 1984) (dicta), cert. denied, 470 U.S. 1052 (1985); *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421, 1425-1426 (CA9 1988). But see, in addition to the opinion of the Seventh Circuit below, *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-723 (CA1), cert. denied, 479 U.S. 882 (1986); *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, 926-927 (CA8 1987); *Wideman v. Shallowford Community Hospital Inc.*, 826 F.2d 1030, 1034-1037 (CA11 1987). [↵](#)

12. To make out an Eighth Amendment claim based on the failure to provide adequate medical care, a prisoner must show that the state defendants exhibited “deliberate indifference” to his “serious” medical needs; the mere negligent or inadvertent failure to provide adequate care is not enough. *Estelle v. Gamble*, 429 U.S., at 105-106. In *Whitley v. Albers*, 475 U.S. 312 (1986), we suggested that a similar state of mind is required to make out a substantive due process claim in the prison setting. *Id.*, at 326-327. [↵](#)
13. The Eighth Amendment applies “only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.... [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.” *Ingraham v. Wright*, 430 U.S. 651, 671-672, n.40 (1977); see also *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Bell v. Wolfish*, 441 U.S. 520, 535, n.16 (1979). [↵](#)
14. Of course, the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement. See, e.g., *Whitley v. Albers*, *supra*, at 326-327 (shooting inmate); *Youngberg v. Romeo*, *supra*, at 316 (shackling involuntarily committed mental patient); *Hughes v. Rowe*, 449 U.S. 5, 11 (1980) (removing inmate from general prison population and confining him to administrative segregation); *Vitek v. Jones*, 445 U.S. 480, 491-494 (1980) (transferring inmate to mental health facility). [↵](#)
15. Complaint para. 16, App. 6 (“At relevant times to and until March 8, 1984, [the date of the final beating,] Joshua DeShaney was in the custody and control of Defendant Randy DeShaney”). Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. See *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141-142 (CA2 1981), after remand, 709 F.2d 782, cert. denied sub nom. *Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794-797 (CA11 1987) (en banc), cert. pending *Ledbetter v. Taylor*, No. 87-521. We express no view on the validity of this analogy, however, as it is not before us in the present case. [↵](#)
16. Because we conclude that the Due Process Clause did not require the State to protect Joshua from his father, we need not address respondents’ alternative argument that the individual state actors lacked the

requisite “state of mind” to make out a due process violation. See *Daniels v. Williams*, 474 U.S., at 334, n.3. Similarly, we have no occasion to consider whether the individual respondents might be entitled to a qualified immunity defense, see *Anderson v. Creighton*, 483 U.S. 635 (1987), or whether the allegations in the complaint are sufficient to support a § 1983 claim against the county and DSS under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny. [↓](#)

Notes on *DeShaney v. Winnebago County Department of Social Services*: Constitutional Duty

1. Was anyone paid to protect Joshua DeShaney? Who should or can protect a child from an abusive parent? What relief is available to Joshua?
2. “[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” [DeShaney](#), 489 U.S. at 195. The above language is indicative of what many courts have termed the negative liberty concept inherent in the Federal Constitution. As Judge Posner observed in [Jackson v. Joliet](#), 715 F.2d 1200, 1203 (7th Cir. 1983):

[T]he Constitution is a charter of negative liberties rather than positive liberties. [Citations omitted] The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

Is this a question of semantics? Does the provision of the Fifth Amendment “nor shall private property be taken for public use, without just compensation” impose an affirmative duty to pay just compensation, or does it impose a limitation on the government’s power? Is the Sixth Amendment guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have Assistance of Counsel for his defense” an affirmative right or a negative liberty? Can every constitutional duty be phrased in the positive or negative?

3. Is state law a potential source of an affirmative constitutional duty after *DeShaney*?
 - a. In [Collins v. City of Harker Heights](#), 503 U.S. 115 (1992), the widow of a city employee who was asphyxiated when he entered a manhole to unplug a sewer line alleged that the city had violated the substantive aspect of the Due Process Clause by failing to provide a reasonably safe working environment. The Supreme Court rejected the general proposition that the Due Process Clause triggered any affirmative obligation to provide for the safety of government employees. However, the Court was willing to assume that the Texas Hazard Communication Act, which required every employer to take specified precautions to protect workers from hazardous chemicals, created an entitlement that constituted a liberty interest within the meaning of the Fourteenth Amendment. *Id.* at 129. The Court then found that plaintiff had failed to prove the requisite arbitrariness to establish a breach of the constitutional duty. See also [Board of Regents v. Roth](#), 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source of state law....”).

- b. [*Town of Castle Rock, Colorado v. Gonzales*](#), 545 U.S. 748 (2005) arose out of the murder of Jessica Gonzales' three daughters at the hands of their estranged father. In violation of a permanent restraining order, Gonzales' husband picked up the daughters when they were playing outside their home. At 7:30 p.m., Ms. Gonzales called the police to notify them that her children were missing. When the officers arrived at the scene, Ms. Gonzales showed them the restraining order. She asked that the officers enforce the order and return the children to her immediately. The officers advised Ms. Gonzales that there was nothing they could do about the restraining order. They suggested Ms. Gonzales call the Police Department if her children had not returned home by 10:00 p.m. At around 8:30 p.m., Ms. Gonzales spoke to her husband by cell phone. He stated he had the three children at an amusement park in Denver. Gonzales again called the police department. The police refused to put out an all-points bulletin and told Ms. Gonzales to wait until 10:00 p.m. to see if her husband returned the girls. At around 10:10, Gonzales called the police and apprised them that her husband had not returned the children; she was told to wait until midnight. Ms. Gonzales called again at midnight and told the dispatcher that her children were still missing. Ms. Gonzales then went to her husband's apartment. Finding no one there, Gonzales called the police, and was told to wait for an officer to arrive. When no police officer showed up, Ms. Gonzales went to the police station and submitted an incident report. The officer who took the report made no effort to enforce the restraining order or locate the children. Instead, he went to dinner. Less than three hours later, Ms. Gonzales' husband arrived at the police station and was killed in a shootout after opening fire on the officers. Inside his truck were the bodies of all three daughters, whom he already had murdered. Ms. Gonzales filed a Section 1983 action alleging that pursuant to official policy or custom, the town's police officers failed to respond to her repeated reports that her husband was violating the terms of the restraining order. The court of appeals ruled that the mother had alleged an actionable procedural due process claim because she had a protected property interest in the enforcement of the restraining order. The Supreme Court reversed. While acknowledging that interests in property protected by the Due Process Clause are created by state law, the Court ruled that a benefit conferred by state law does not rise to an enforceable property interest if government officials have discretion whether to grant or deny the benefit. Colorado statutes required police to "use every reasonable means to enforce a restraining order" and to "arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person" when the police officer has probable cause. The Court reasoned that neither statutory provision overrode the traditional discretion afforded police, especially where the parent violating the restraining order was never in the presence of the officers. Furthermore, any non-discretionary statutory imperative that the police seek a warrant would be at most an entitlement to procedure, which would not confer standing, much less create a cognizable property interest. Finally, even had the Colorado legislature intended to make enforcement of restraining orders mandatory, the Court ruled, such an entitlement did not have any "ascertainable monetary value" as required to rise to a constitutionally protected property interest. *Town of Castle Rock*, 545 U.S. at 767. The Court concluded:

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This reflects continuing reluctance to treat the Fourteenth Amendment as a "font of tort law," ... but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 ... did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.

Town of Castle Rock, 545 U.S. at 768-69.

- c. In [*Stoneking v. Bradford Area School District*](#), 882 F.2d 720 (3rd Cir. 1989), the court considered whether Section 1983 liability could be premised upon the failure to protect a student from a sexually abusive teacher. The plaintiff had argued that Pennsylvania's mandatory attendance law effectively created a custodial relationship between the state and the student. The *Stoneking* court reasoned that in light of *DeShaney* "we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as a basis of a duty to protect students from harm occurring as a result of a third person." *Id.* at 723.
 - d. Even if state law does not give rise to a federal constitutional duty to act, a positive right on occasion may be found in the state constitution. See [*Tucker v. Toia*](#), 43 N.Y. 2d 1, 371 N.E.2d 449 (1977) (New York statute denying public benefits to needy persons under the age of 21 violates guarantees of Article XVII, Section 1 of New York Constitution providing, "The aid, care and support of the needy are public concerns and shall be provided by the state."); North Carolina Constitution, Article XI, Section 4 ("Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore, the General Assembly shall provide for and define the duties of a board of public welfare.").
4. What is the scope of the "special relationship" doctrine after *DeShaney*? May a "special relationship" giving rise to an affirmative duty to act be found absent state custody? Does it matter if the state played a role in creating the danger?
- a. In [*K.H. v. Morgan*](#), 914 F.2d 846 (7th Cir. 1990), plaintiff sued the Illinois Department of Children and Family Services as well as officials of the department for damages suffered from a series of allegedly improper foster care placements. In affirming the district court's rejection of qualified immunity, the court distinguished *DeShaney* as follows:

This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights.... In either case the state would be a doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to the lions....

The Roman analogy is sound even if one concedes, as one must in the light of *DeShaney*, that the State of Illinois has no constitutional obligation to protect children from physical or sexual abuse by their parents. The state could have left K.H. to the tender mercies of her parents without thereby violating her rights under the Constitution. But having removed her from their custody the state assumed at least a limited responsibility for her safety.

Id. at 848-49. See also [*Kneipp v. Tedder*](#), 95 F. 3d 1199, 1208 (3d Cir. 1996) (state actor liable if "(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."); [*Ross v. United States*](#), 910 F.2d 1422, 1431 (7th Cir. 1990) (county liable for cutting off private sources of rescue without providing a meaningful alternative); [*Wood v.*](#)

[*Ostrander*](#), 879 F.2d 583, 590 (9th Cir. 1989) (“the fact that Ostrander arrested Bell, impounded his car, and apparently stranded Wood in a high crime area at 2:30 a.m. triggers a duty of the police to afford her some peace and safety”).

- b. In [*Butera v. District of Columbia*](#), 235 F.3d 637, 653-54 (D.C. Cir. 2001), the court of appeals recounted the varying circuit views of the elements necessary to give rise to a duty to intervene under the “state created danger” theory:

While courts of appeals had adopted the State endangerment concept without prompting Supreme Court review, there was little consistency in courts’ explanations of the types of actions that would amount to constitutional liability. The Eighth Circuit, for example, acknowledged that “[i]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect.” The court later stated that, to establish constitutional liability, the plaintiff must demonstrate that he “would not have been in harm’s way but for the government’s affirmative actions.” The Seventh Circuit, in turn, provided a slightly different standard, finding State endangerment where the State “*greatly* increased the danger to [the plaintiff] while constricting access to self-help.” Other circuits, however, adopted more elaborate tests to determine whether the actions of State officials amounted to state endangerment and therefore triggered constitutional liability....

While all these tests share the key element of State endangerment by affirmative conduct by State actors, they are inconsistent in their elaborations of the concept. For example, the circuits have adopted different nexus requirements, and employed different degrees of specificity in defining actionable conduct.

- c. In [*Johnson v. City of Philadelphia*](#), No. 19-2938 (3rd Cir. September 22, 2020), the court critiqued the state-created danger theory of liability:

The state-created danger doctrine traces to a few words in the Supreme Court’s opinion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).... From those simple words—“played no part in their creation” and “render him any more vulnerable”—sprang a considerable expansion of the law. While seemingly not part of *DeShaney*’s holding, lower courts seized on those words to create a new remedy that would, it was thought, aid the next “[p]oor Joshua.” Thus was born the “state-created danger theory of liability, which we adopted in *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996).... Charting a new course, we elevated the commentary in *DeShaney* and discovered that the Court had “left open the possibility that a constitutional violation might ... occur[]” when a state “play[s a] part in ... creat[ing]” a danger or when it “render[s a person] more vulnerable to” that danger. *Id.* at 1205 (*quoting DeShaney*, 489 U.S. at 201).

Several other Circuit Courts have also recognized the state-created danger theory of liability. But the Supreme Court has not. And the doctrine has not escaped criticism, since it does not stem from the text of the Constitution or any other positive law, and consequently vests open-ended lawmaking power in the judiciary. Moreover, the “state-created danger” doctrine offers little help to public employees seeking to better discharge their duties, and does not tell them “what to do, or avoid, in any situation.”

Id. at 6-11.

While the *Johnson* court proceeded to apply the doctrine, two of the three judges called for the full court of appeals to re-examine the viability of the state created danger theory of liability:

First, “it is troubling how far we have expanded substantive due process” in this area. *Kedra v. Schroeter*, 876 F.3d 424, 462 (3d Cir. 2017) (Fisher, J., concurring). As Judge Fisher noted in his concurrence in *Kedra*, we have gone much further than the Supreme Court by “fashioning” our own state-created danger doctrine and further still by “stating that there could be liability in non-custodial situations for gross negligence.” *Id.* (citations omitted). As the majority opinion observes, the state-created danger doctrine “has not escaped criticism, since it does not stem from the text of the Constitution or any other positive law.” Maj. Op. at 11. I agree that, “[g]iven that our substantive due process doctrine has gradually lowered the bar for bringing a [state-created danger] claim, it may be time for this full Court to reexamine the doctrine.” *Kedra*, 876 F.3d at 462 (Fisher, J., concurring).

[*Johnson v. City of Philadelphia*](#), No. 19-2938 (3rd Cir. September 22, 2020) at 22 (Porter, J. concurring).

5. If the Constitution imposes no affirmative duty to protect a private individual from the actions of a third party, is there any constitutional duty to protect an individual from other governmental officials?

In [*Stoneking v. Bradford Area School District*](#), 882 F.2d 720 (3rd Cir. 1989), the court held that the school district and its officials could be held liable for failure to protect a student from sexual abuse by a teacher.

The principal distinction between DeShaney’s situation and that of Stoneking is that DeShaney’s injuries resulted at the hands of a private actor, whereas Stoneking’s resulted from the actions of a state employee. The significance of the status of the perpetrator as a private actor rather than as a state official is referred to on numerous occasions in the *DeShaney* opinion. Not only is the Court’s statement of the holding in terms of the identity of the actor ... but the analytic steps taken by the Court to reach that holding continuously take note of the status of the person responsible for the injuries....

Unlike DeShaney’s father, who was referred to throughout the *DeShaney* opinion as a private third party, Wright was a school district employee subject to defendant’s immediate control. In fact, many of Wright’s interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

Id. at 724.

The same court, however, refused to apply this distinction to the state’s refusal to continue funding levels for services to mentally retarded persons living at home.

The class attempts to distinguish *DeShaney* by arguing that in this case it is the Commonwealth, rather than private actors, that is causing the harm. They assert that it is the state’s failure to maintain services to the mentally retarded living at home that results in their harm. This cessation of action by the state, however, in no way differs from the *DeShaney* situation. Just as in *DeShaney*, the retraction of state intervention permits the harm, but the harm in each case is actively caused by a source other than the state.

[*Philadelphia Police and Fire Assn. v. City of Philadelphia*](#), 874 F.2d 156, 167 (3rd Cir. 1989).

6. Does the government owe any duty to protect its employees from private individuals in government

custody? In [Benavides v. Herrera](#), 883 F.2d 385 (5th Cir. 1989), local jailers brought a Section 1983 action against the sheriff and county for injuries suffered at the hands of inmates in the course of an escape attempt. Plaintiff alleged that the sheriff had been warned that a jailbreak was imminent but did nothing in response. The court of appeals, relying on *DeShaney*, affirmed dismissal of the complaint for failure to state a claim. The court observed the anomaly that the Constitution affords greater protection to prisoners than prison guards. The court reasoned, however, that unlike the prisoners, the guards were free to quit the relationship. In [Cornelius v. Town of Highland Lake](#), 880 F.2d 348, 356 (11th Cir. 1989), the court acknowledged a duty to protect a town clerk who was abducted by inmates participating in a work program outside the prison:

These inmates never assumed the status of parolee, releasee, furloughed inmate or unknown assailant as in *Martinez*.... In such cases the remoteness of the defendant's conduct from the actual harm committed by an individual wholly outside the custody and control of the state is too great to impose liability. However here, although the inmates eventually escaped from the custody of the defendants, at the time of the kidnaping they were still within the defendants' custody and were in the community only by virtue of the defendants' action in bringing them there.... [T]his custodial relationship supports a finding that the defendants had the power and authority to direct the inmates' actions in a way that was absent in *Martinez*.... Such power and authority impose a responsibility upon the state for its own actions.

7. Would *DeShaney* have had an actionable Section 1983 claim if the Department of Social Services had declined to intervene because he was African American? In [McKee v. City of Rockwell](#), 877 F.2d 409 (5th Cir. 1989), plaintiff alleged that she was denied equal protection as the result of the refusal of officers to arrest her husband after a domestic assault. The court, in granting defendant's motion for summary judgment, opined as follows:

Because McKee's complaint sounds in Equal Protection rather than Due Process, it is not directly barred by the holding in *DeShaney*. *DeShaney* is nonetheless relevant to our analysis of this case.... Footnote three does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process Claim into an Equal Protection claim via an allegation that state officers exercised their discretion to act in one incident but not in another.

McKee cannot, however, prevail merely by showing that the officers knew facts that would have justified an arrest of Streetman. This is the lesson of *DeShaney*: that law enforcement officers have authority to act does not imply that they have any constitutional duty to act. McKee can sustain her claim only by showing that the non-arrest was the result of discrimination against a protected class. McKee purports to find such discrimination in an alleged policy of the Rockwell Police Department discouraging arrests in domestic violence cases. McKee contends that this policy discriminates against women.

[H]er argument reduces to an attempt to generalize a single incident—the police department's inaction in her own case—into a general policy or practice. We have indicated in other contexts that a single incident, when unaccompanied by supporting history, will frequently be an inadequate basis for inferring a policy.... To permit such an argument in this case would eviscerate the discretion reserved to police officers by *DeShaney*. Absent any evidence of a discriminatory policy, the only reasonable construction of the officers' action in this case is that they decided that McKee's complaint did not warrant any further response than what they gave. As *DeShaney* makes clear, this judgment is not actionable.

Id. at 413-16. *But see* [Village of Willowbrook v. Olech](#), 528 U.S. 562 (2000) (“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”).

Judge Goldberg dissented from the court’s application of *DeShaney* to Equal Protection claims:

DeShaney should play no role in McKee’s case. *DeShaney* seeks to define a bright line limit to the substantive component of the Due Process Clause. *DeShaney* specifically does not address claims based upon illegitimate distribution of public services in contravention of the Equal Protection Clause...

Equal protection values are not tied to the scope or limits of governmental discretion, but are tied, instead, to the government’s obligation not to make illegitimate distinctions among those to whom the government provides services...

The “democratic political processes” upon which the majority rests its hope that all people receive equal protection of the law is not adequate for the task of protecting people when distinctions are made upon suspect and quasi-suspect classifications... . We hold dear equal protection values, in large part, because the legislative process may fall short of the Constitution’s commands. There can be no “discretion” to discriminate invidiously.

Id. at 417-18. *See also* [Soto v. Flores](#), 103 F.2d 1056, 1066 (1st Cir. 1997) (to prevail on Equal Protection claim that police discriminate on the basis of sex of complaining witness in domestic disputes, plaintiff “must show that there is a policy or custom of providing less protection to victims of domestic violence than to victims of other crimes, that gender discrimination is a motivating factor, and that Soto was injured by the practice.”)

8. Assuming an affirmative duty of government to act is found, what is the standard of culpability governing its duty?

- a. As noted earlier, in [Collins v. City of Harker](#), 503 U.S. 115 (1992), the Supreme Court assumed that city sanitation workers had a Fourteenth Amendment liberty interest, founded in state statutes, obliging the city to provide warnings, safety training and protective equipment. The Court held, however, that this constitutional duty was not breached because the city’s failure to provide these protections was not “arbitrary.”

Our refusal to characterize the city’s alleged omission as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on rational decisionmaking process that takes account of competing social, political and economic forces. [citation omitted] Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause “is not a guarantee against incorrect or ill-advised personnel decisions.” *Bishop v. Wood*, 426 U.S. at 350. Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

Id. at 128-129.

- b. In [Yvonne L. v. New Mexico Department of Human Services](#), 959 F.2d 883 (10th Cir. 1992), the court of appeals held that children who were sexually assaulted after having been placed by the state in a private foster care facility were entitled to recover for violation of their Fourteenth Amendment

rights if the department “failed to exercise professional judgment.” The court rejected the position of other circuits that “deliberate indifference” was the appropriate standard of culpability, reasoning that “foster children, like involuntarily committed patients, are ‘entitled to more considerate treatment and conditions’ than criminals.” *Id.* at 894. In [Shaw by Strain v. Strackhouse](#), 920 F.2d 1135 (3rd Cir. 1990), an involuntarily institutionalized resident of a state mental institution alleged that the state failed to protect him against abuse and sexual assaults. The court of appeals held that while the deliberate indifference standard applied to non-professional employees, a professional judgment standard governed professional decisionmakers, those persons “‘competent, whether by education, training or experience, to make the particular decision at issue.’” *Id.* at 1147. The court repudiated the professional defendants’ contention that the professional judgment standard was the functional equivalent of the negligence standard which the Supreme Court, in [Daniels v. Williams](#), 474 U.S. 327 (1986), had held insufficient to constitute a deprivation within the meaning of the Fourteenth Amendment:

[D]efendants’ attempt to equate professional judgment and negligence falls short of the mark. Professional judgment is a relatively deferential standard. It requires only that a state actor exercise professional judgment in choosing the appropriate course of action. Negligence, however, imposes on a state official the burden of choosing, from among alternatives, a course of action consistent with the exercise of “due care.” That means, as we see it, rejecting negligent alternatives that might nonetheless satisfy the demands of professional judgment.

Admittedly, the two standards are premised on different criteria. Thus, any attempt to place the two on a single continuum risks becoming, in the vernacular, a comparison of “apples and oranges.” This dissimilarity notwithstanding, professional judgment appears to us to be a substantially less onerous standard than negligence from the viewpoint of the public actor. Indeed, in our view, professional judgment more closely approximates—although ... remains somewhat less deferential than—a recklessness standard. Professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct.

Id. at 1146.

[T]he danger creation theory must ultimately rest on the specifics of a substantive due process claim—i.e., a claim predicated on reckless or intentionally injury-causing state action which “shocks the conscience.”

In order to discern whether the facts of the instant case “shock the conscience” so as to rise to the level of a substantive due process violation, we must bear in mind three basic principles highlighted by the Supreme Court in evaluating substantive due process claims: (1) the need for restraint in defining their scope; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting upon public safety.

[T]o satisfy the “shocks the conscience” standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.

Uhlig v. Harder, 64 F.3d 567, 572-74 (10th Cir. 1995). *But see Butera v. District of Columbia*, 235 F.3d 637, 651-52 (D.C. Cir. 2001) (where state has taken individual into custody, shocks the conscience standard may be satisfied by deliberate indifference).

- c. In [*Johnson v. City of Philadelphia*](#), 975 F.3d 394 (3rd Cir. 2020), the court of appeals defined the “shocks the conscience” test that it held governed Section 1983 claims founded on the state created danger theory:

Start with the standard, recognizing that it offers little light. See, e.g., *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (noting the shock-the-conscience test “is not one that can be applied by a computer, [but] it at least points the way”), *quoted in Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). We have explained that “[t]he exact level of culpability required to shock the conscience ... depends on the circumstances of each case, and the threshold for liability varies with the state actor’s opportunity to deliberate before taking action.” In “hyperpressurized environments requiring a snap judgment, an official must actually intend to cause harm in order to be liable.” “In situations in which the state actor is required to act ‘in a matter of hours or minutes,’ ... the state actor [must] ‘disregard a great risk of serious harm.’” “And where the actor has time to make an ‘unhurried judgment[],’ a plaintiff need only allege facts supporting an inference that the official acted with a mental state of ‘deliberate indifference.’” *Id.* at 401.

In his concurring opinion, Judge Porter called for a revising the shocks the conscience test:

Our precedent asks district courts to differentiate among the three tiers of culpability and apply them to a set of facts. That is no simple task. But it is further complicated by the mystifying differences we have drawn between the second and third tiers of culpability. In my view, there is no practical difference between a “disregard of a *great* risk of serious harm” (the second tier) and a “conscious disregard of a *substantial* risk of serious harm” (the third tier). [Compare Great, The Concise Oxford Dictionary](#) (last visited September 1, 2020) (“Of considerable importance, significance, or distinction; important, weighty; distinguished, prominent; famous, renowned; impressive.”), [with Substantial, The Concise Oxford Dictionary](#) (last visited September 1, 2020) (“[O]f real significance, weighty; reliable; important, worthwhile.”). But a “great” or “substantial” risk is obviously weightier than a merely “foreseeable” risk—regardless of whether that “foreseeable” risk is willfully ignored. Our explication of the second and third tiers is inconsistent and nearly incoherent. That is not surprising, however, because “guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Assuming we continue to recognize the state-created danger doctrine at all, I suggest combining the second and third tiers into one and making the inquiry more straightforward: For a state actor to be liable in a “hyperpressurized environment requiring a snap judgment,” he must actually intend to cause harm. But in any other context, the state actor must act with deliberate indifference that shocks the conscience. This articulation of the standard hews more closely to Supreme Court precedent, is more consistent with the tests established by our sister circuits that have adopted the state-created danger doctrine, and does not ask state actors like the operator and dispatcher in this case to ponder the gradations among a “substantial risk,” a “great risk,” and a “foreseeable danger” before reacting to an urgent 911 call.

Id. at 405-06 (Porter, J. concurring).

III. LIABILITY OF STATE AND LOCAL GOVERNMENT OFFICIALS: IMMUNITIES

A. Absolute Immunity

PIERSON v. RAY, 386 U.S. 547 (1967)



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Mr. Chief Justice Warren delivered the opinion of the Court.

[1] These cases present issues involving the liability of local police officers and judges under § 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U.S.C. § 1983. Petitioners in No. 79 were members of a group of 15 white and Negro Episcopal clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961. They were arrested by respondents Ray, Griffith, and Nichols, policemen of the City of Jackson, and charged with violating § 2087.5 of the Mississippi Code, which makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer. Petitioners waived a jury trial and were convicted of the offense by respondent Spencer, a municipal police justice. They were each given the maximum sentence of four months in jail and a fine of \$200. On appeal petitioner Jones was accorded a trial de novo in the County Court, and after the city produced its evidence the court granted his motion for a directed verdict. The cases against the other petitioners were then dropped.

[2] Having been vindicated in the County Court, petitioners brought this action for damages in the United States District Court for the Southern District of Mississippi, Jackson Division, alleging that respondents had violated § 1983, *supra*, and that respondents were liable at common law for false arrest and imprisonment. A jury returned verdicts for respondents on both counts. On appeal, the Court of Appeals for the Fifth Circuit held that respondent Spencer was immune from liability under both § 1983 and the common law of Mississippi for acts committed within his judicial jurisdiction. 352 F.2d 213. As to the police officers, the court noted that § 2087.5 of the Mississippi Code was held unconstitutional as applied to similar facts in *Thomas v. Mississippi*, 380 U.S. 524 (1965).^[1] Although *Thomas* was decided years after the arrest involved in this trial, the court held that the policemen would be liable in a suit under § 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid. The court believed that this stern result was required by *Monroe v. Pape*, 365 U.S. 167 (1961). Under the count based on the common law of Mississippi, however, it held that the policemen would not be liable if they had probable cause to believe that the statute had been violated, because Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not.

Apparently dismissing the common-law claim,^[2] the Court of Appeals reversed and remanded for a new trial on the § 1983 claim against the police officers because defense counsel had been allowed to cross-examine the ministers on various irrelevant and prejudicial matters, particularly including an alleged convergence of their views on racial justice with those of the Communist Party. At the new trial, however, the court held that the ministers could not recover if it were proved that they went to Mississippi anticipating that they would be illegally arrested because such action would constitute consent to the arrest under the principle of *volenti non fit injuria*, he who consents to a wrong cannot be injured.

[3] We granted certiorari in No. 79 to consider whether a local judge is liable for damages under § 1983 for an unconstitutional conviction and whether the ministers should be denied recovery against the police officers if they acted with the anticipation that they would be illegally arrested. We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of good faith and probable cause to an action under § 1983 for unconstitutional arrest. ^[3]

* * * * *

[4] We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court. Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 80 U.S. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, *supra*, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

[5] We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

[6] The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. RESTATEMENT, (SECOND), TORTS § 121 (1965); 1 HARPER & JAMES, THE LAW OF TORTS § 3.18, at 277-278 (1956); *Ward v. Fidelity & Deposit Co. of Maryland*, 179 F.2d 327 (C.A. 8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.

[7] The Court of Appeals held that the officers had such a limited privilege under the common law of Mississippi, and indicated that it would have recognized a similar privilege under § 1983 except that it felt

compelled to hold otherwise by our decision in *Monroe v. Pape*, 365 U.S. 167 (1961). *Monroe v. Pape* presented no question of immunity, however, and none was decided.

* * * * *

[8] We also held that the complaint should not be dismissed for failure to state that the officers had “a specific intent to deprive a person of a federal right,” but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” 365 U.S., at 187. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.

[9] We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983. This holding does not, however, mean that the count based thereon should be dismissed. The Court of Appeals ordered dismissal of the common-law count on the theory that the police officers were not required to predict our decision in *Thomas v. Mississippi*, 380 U.S. 524. We agree that a police officer is not charged with predicting the future course of constitutional law. But the petitioners in this case did not simply argue that they were arrested under a statute later held unconstitutional. They claimed and attempted to prove that the police officers arrested them solely for attempting to use the “White Only” waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a disturbance. The officers did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. Rather, they claimed and attempted to prove that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional. The jury did resolve the factual issues in favor of the officers but, for reasons previously stated, its verdict was influenced by irrelevant and prejudicial evidence. Accordingly, the case must be remanded to the trial court for a new trial.

* * * * *

Mr. Justice Douglas, dissenting.

[10] I do not think that all judges, under all circumstances, no matter how outrageous their conduct are immune from suit under 17 Stat. 13, 42 U.S.C. § 1983. The Court’s ruling is not justified by the admitted need for a vigorous and independent judiciary, is not commanded by the common-law doctrine of judicial immunity, and does not follow inexorably from our prior decisions.

[11] The statute, which came on the books as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, provides that “every person” who under color of state law or custom “subjects, or causes to be subjected, any citizen ... 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.” To most, “every person” would mean *every person*, not every person *except* judges. Despite the plain import of those words, the Court decided in *Tenney v. Brandhove*, 341 U.S. 367, that state legislators are immune from suit as long as the deprivation of civil rights which they caused a person occurred while the legislators “were acting in a field where legislators traditionally have power to act.” *Id.*, at 379. I dissented from the creation of that judicial exception as I do from the creation of the present one.

[12] The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy

for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that “immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.” Cong. Globe, 42d Cong., 1st Sess., 374.

[13] It is said that, at the time of the statute’s enactment, the doctrine of judicial immunity was well settled and that Congress cannot be presumed to have intended to abrogate the doctrine since it did not clearly evince such a purpose. This view is beset by many difficulties. It assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.

“Underlying [this] view is an atomistic conception of intention, coupled with what may be called a pointer theory of meaning. This view conceives the mind to be directed toward individual things, rather than toward general ideas, toward distinct situations of fact rather than toward some significance in human affairs that these situations may share. If this view were taken seriously, then we would have to regard the intention of the draftsman of a statute directed against ‘dangerous weapons’ as being directed toward an endless series of individual objects: revolvers, automatic pistols, daggers, Bowie knives, etc. If a court applies the statute to a weapon its draftsman had not thought of, then it would be ‘legislating,’ not ‘interpreting,’ as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed.” FULLER, *THE MORALITY OF LAW* 84 (1964).

[14] Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the “common law before the making of the Act.” *Heydon’s Case*, 3 Co. Rep. 7 a, 76 Eng. Rep. 637 (Ex. 1584). But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law. It cannot be presumed that the common law is the perfection of reason, is superior to statutory law (SEDGWICK, *CONSTRUCTION OF STATUTES* 270 (1st ed. 1857)); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 404-406 (1908)), and that the legislature always changes law for the worse. Nor should the canon of construction “statutes in derogation of the common law are to be strictly construed” be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the pre-existing law.

[15] The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable. Many members of Congress objected to the statute because it imposed liability on members of the judiciary.

[16] Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to “any person.” ^[4]

There was no exception for members of the judiciary. In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result.

[17] The section’s purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied. The parade of cases coming to this Court shows that a similar condition now obtains in some of the States. Some state courts have been instruments of suppression of civil rights. The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists.

[18] The immunity which the Court today grants the judiciary is not necessary to preserve an independent judiciary. If the threat of civil action lies in the background of litigation, so the argument goes, judges will be reluctant to exercise the discretion and judgment inherent in their position and vital to the

effective operation of the judiciary. We should, of course, not protect a member of the judiciary “who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good.” *Gregoire v. Biddle*, 177 F.2d 579, 581. To deny recovery to a person injured by the ruling of a judge acting for personal gain or out of personal motives would be “monstrous.” *Ibid*. But, it is argued that absolute immunity is necessary to prevent the chilling effects of a judicial inquiry, or the threat of such inquiry, into whether, in fact, a judge has been unfaithful to his oath of office. Thus, it is necessary to protect the guilty as well as the innocent. ^[5]

* * * * *

[19] The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work, is but a more sophisticated manner of saying “The King can do no wrong.”

[20] This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistaken, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions. Thus, a judge who sustains a conviction on what he forthrightly considers adequate evidence should not be subjected to liability when an appellate court decides that the evidence was not adequate. Nor should a judge who allows a conviction under what is later held an unconstitutional statute.

[21] But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person’s civil rights. What about the judge who conspires with local law enforcement officers to “railroad” a dissenter? What about the judge who knowingly turns a trial into a “kangaroo” court? Or one who intentionally flouts the Constitution in order to obtain a conviction? Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights. ^[6]

[22] The plight of the oppressed is indeed serious. Under *City of Greenwood v. Peacock*, 384 U.S. 808, the defendant cannot remove to a federal court to prevent a state court from depriving him of his civil rights. And under the rule announced today, the person cannot recover damages for the deprivation.



[Pierson v. Ray – Audio and Transcript of Oral Argument](#)

Footnotes

1. In *Thomas* various “Freedom Riders” were arrested and convicted under circumstances substantially similar to the facts of these cases. The police testified that they ordered the “Freedom Riders” to leave because they feared that onlookers might breach the peace. We reversed without argument or opinion, citing *Boynton v. Virginia*, 364 U.S. 454 (1960). *Boynton* held that racial discrimination in a bus terminal restaurant utilized as an integral part of the transportation of interstate passengers violates § 216(d) of the Interstate Commerce Act. State enforcement of such discrimination is barred by the Supremacy Clause. ^[7]
2. Respondents read the court’s opinion as remanding for a new trial on this claim. The court stated, however, that the officers “are immune from liability for false imprisonment at common law but not from liability for

violations of the Federal statutes on civil rights. It therefore follows that there should be a new trial of the civil rights claim against the appellee police officers so that there may be a determination of the fact issue as to whether the appellants invited or consented to the arrest and imprisonment." 352 F.2d, at 221. [↓](#)

3. Respondents did not challenge in their petition in No. 94 the holding of the Court of Appeals that a new trial is necessary because of the prejudicial cross-examination. Belatedly, they devoted a section of their brief to the contention that the cross-examination was proper. This argument is no more meritorious than it is timely. The views of the Communist Party on racial equality were not an issue in these cases. [↓](#)
4. As altered by the reviser who prepared the Revised Statutes of 1878, and as printed in 42 U.S.C. § 1983, the statute refers to "every person" rather than to "any person." [↓](#)
5. Other justifications for the doctrine of absolute immunity have been advanced: (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers. See *generally* Jennings, *Tort Liability of Administrative Officers*, 21 MINN L. REV. 263, 271-272 (1937). [↓](#)
6. A judge is liable for injury caused by a ministerial act; to have immunity the judge must be performing a judicial function. See, e.g., *Ex parte Virginia*, 100 U.S. 339; 2 HARPER & JAMES, THE LAW OF TORTS 1642-1643 (1956). The presence of malice and the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices. [↓](#)

Notes on *Pierson v. Ray*: Absolute Immunity under Section 1983

1. What are the policies that justify judicial immunity? Must the immunity be absolute to serve these purposes? Who bears the risk of loss of the constitutional deprivation where the individual state official who violated the Constitution is absolutely immune?

2. In [Scheuer v. Rhodes](#), 416 U.S. 232, 248-9 (1974), the Supreme Court rejected a claim of absolute immunity for state executive officers under [42 U.S.C. § 1983](#):

Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." [Sterling v. Constantin](#), 287 U.S. 378 at 397, 77 L.Ed. 375, 53 S. Ct. 190. In *Sterling*, Mr. Chief Justice Hughes put it in these terms:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of

the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." *Id.* at 397-398, 77 L.Ed. 375.

See also [Yousuf v. Samantar](#), 699 F.3d 763 (4th Cir. 2012) (holding common law immunity defense unavailable under Torture Victims Protection Act, which authorizes civil action against "[a]n individual who, under actual or apparent authority, or color of law, of any nation ... subjects an individual to torture' or 'extrajudicial killing'; customary international law, which abrogates official immunity for individuals who violate international human rights, is incorporated into domestic law of the United States.); [Clea v. Mayor and City Council of Baltimore](#), 541 A.2d 1303, 1314 (Md. 1988) ("[W]ith regard to clothing a public official with a degree of governmental immunity, there are sound reasons to distinguish actions to remedy constitutional violations from ordinary tort suits. The purpose of an ... ordinary tort action is not to specifically to protect individuals against government officials or to restrain government officials.... On the other hand, constitutional provisions like ... the Maryland Declaration of Rights ... are specifically designed to protect citizens against certain types of unlawful acts by government officials. To accord immunity to the responsible government officials and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of constitutional provisions.").

Is absolute judicial immunity distinguishable?

3. What is the source of the exemption of the judiciary from liability for violating the guarantees of the Constitution? See [Seminole Tribe v. Florida](#), 517 U.S. 44, 71 n.15 (1996) ("Justice Stevens, in his dissenting opinion ... contends that no distinction may be drawn between state sovereign immunity and the immunity enjoyed by state and local officials. But even assuming the latter has no constitutional foundation, the distinction is clear. The Constitution specifically recognizes the States as sovereign entities, while government officials enjoy no such constitutional recognition."). From where would such an exemption properly derive? See U.S. CONST. art. 1, § 6. Is the conferral of immunity under Section 1983 unconstitutional?

a. In [Briscoe v. LaHue](#), 460 U.S. 325 (1983), the Supreme Court held that police officers are absolutely immune from Section 1983 liability founded on their allegedly perjured testimony in judicial proceedings. Justice Marshall dissented from the Court's reliance on the common law immunity of witnesses in conferring immunity under Section 1983:

The majority opinion correctly states that this case presents a question of statutory construction. *Ante*, at 1. Yet it departs from generally accepted principles for interpreting laws. In all other matters of statutory construction, this Court begins by focusing on the language of the statute itself.

"Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." [Consumer Product Safety Comm'n v. GTE Sylvania, Inc.](#), 447 U.S. 102, 108 (1980). The language of § 1983 provides unambiguous guidance in this case. A witness is most assuredly a "person," the word Congress employed to describe those whose conduct § 1983 encompasses. The majority turns the conventional approach to statutory interpretation on its head. It assumes that common-law tort immunities provide

an exemption from the plain language of the statute unless petitioners demonstrate that Congress meant to override the immunity. See *ante*, at 11. Thus, in the absence of a clearly expressed legislative intent to the contrary, the Court simply presumes that Congress did not mean what it said.

Absolute immunity for witnesses conflicts not only with the language of § 1983 but also with its purpose. In enacting § 1983, Congress sought to create a damage action for victims of violations of federal rights; absolute immunity nullifies “*pro tanto* the very remedy it appears Congress sought to create.” *Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring in the judgment). The words of a statute should always be interpreted to carry out its purpose. Moreover, members of the 42nd Congress explicitly stated that § 1983 should be read so as to further its broad remedial goals.

It might be appropriate to import common-law defenses and immunities into the statute if, in enacting § 1983, Congress had merely sought to federalize state tort law. But Congress “intended to give a broad remedy for violations of *federally* protected civil rights.” *Monell v. Department of Social Services*, 436 U.S. 658, 685 (1978) (emphasis added). Different considerations surely apply when a suit is based on a federally guaranteed right—in this case, the constitutional right to due process of law—rather than the common law. The Congress that enacted § 1983 had concluded that “a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.” *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). Therefore, immunities that arose in the context of tort actions against private parties provide little guidance for actions against state officials for constitutional violations. “It 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.” *Id.* at 196 n.5.

460 U.S. 325, 347-50. See also, Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court’s Historical Analysis*, 40 ARK. L. REV. 741 (1987).

b. [42 U.S.C. § 1988](#) provides, in pertinent part:

The jurisdiction in civil ... matters conferred on the district courts ... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil ... cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....

In *Manuel v. City of Joliet*, 580 U.S. ___, 139 S. Ct. 2777 (2017), the Court remanded the case to the lower court to consider whether the statute of limitations in a Section 1983 action challenging the legality of pretrial confinement accrues on the date that legal process began or on the date that charges were dismissed. The Court offered the following guidance:

In defining the contours and prerogatives of a § 1983 claim, including its rule of accrual,

courts are to look first to the common law of torts. Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply to a suit involving the most analogous tort. But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims. Serving “more as a source of inspired examples than of prefabricated components.... See [Rehberg v. Paulk](#), 566 U.S. 356, 366 (2012) (noting that “§ 1983 is [not] simply a federalized amalgamation of pre-existing common law claims.”). In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue.

Id. at ____.

c. Must absolute immunity under Section 1983 be denied to all officials who did not possess a well-established immunity at common law in 1871?

i. In [Antoine v. Byers](#), 508 U.S. 429 (1993), the Court refused absolute immunity for a court reporter whose failure to produce a transcript delayed the hearing of an appeal from a federal criminal trial until four years following the conviction. The Court reasoned that “[i]n determining which officials perform functions that might justify a full exemption from liability we have ‘undertaken a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.’” *Id.* at 432. Because official court reporters were first employed in the late nineteenth century, the Court found they were not among the persons protected when the common law doctrine of judicial immunity emerged.

ii. In [Imbler v. Pachtman](#), 424 U.S. 409 (1976), the Court relied in part upon common law precedents to hold public prosecutors absolutely immune for initiating a criminal action. As the Court subsequently conceded in [Kalina v. Fletcher](#), 522 U.S. 118, 124 n.11 (1997):

The cases that the [*Imbler*] Court cited were decided after 1871 and granted a broader immunity to public prosecutors than had been available in malicious prosecution actions against private persons who brought prosecutions at early common law.... However, these early cases were decided before the office of public prosecutor in its modern form was common. Thus, the Court in *Imbler* drew guidance both from the first American cases addressing the availability of malicious prosecution cases against public prosecutors, and perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors.

Was the *Imbler* Court’s use of cases decided after 1871 consistent with the intent of Congress as portrayed in *Pierson*? Does the Court have the power to interpret Section 1983 to afford more expansive immunity than existed under the common law as of 1871 based upon policy considerations?

iii. Plaintiff Charles Rehberg, a certified public accountant, sent a series of anonymous criticizing the management of a hospital in Georgia. The district attorney’s office, and its chief investigator James Paulk, initiated a criminal investigation of Rehberg, allegedly as a favor to the leadership of the hospital. Paulk testified before a grand jury on three separate occasions; in each instance, the grand jury issued an indictment that subsequently was dismissed. Rehberg filed a Section 1983 action against Paulk, alleging that Paulk conspired to present and presented false

testimony to the grand jury.

Rehberg contended that because complaining witnesses were not entitled to absolute immunity at common law, Paulk was not absolutely immune from liability under Section 1983. The Court rejected the argument:

While the Court has looked to the common law in determining the scope of the absolute immunity available under § 1983, the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common law claims. The new federal claim created by § 1983 differs in important ways from those pre-existing torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort. But it is narrower in that it applies only to tortfeasors who act under color of state law. Thus, both the scope of the new tort and the scope of the absolute immunity available in § 1983 actions differ in some respects from the common law.

[*Rehberg v. Paulk*](#), 566 U.S. 356, 366 (2012). The court reasoned that when Congress enacted Section 1983, a “complaining witness” was the person who procured an arrest and initiated a prosecution, without necessarily testifying against the accused. After 1871, those functions were performed by the prosecutor. Thus it would be “anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute.” *Id.* at 372

4. In [*Stump v. Sparkman*](#), 435 U.S. 349 (1978), a state trial court judge granted a petition to perform a tubal ligation on Linda Sparkman. The petition, which was presented by Linda’s mother, was not assigned a docket number nor placed on file with the court’s office. No notice was given to Linda, nor were her interests represented by a guardian *ad litem*. At the time that Judge Stump approved the petition, Indiana statutory law authorized sterilization only for institutionalized persons, and even then only after notice and an evidentiary hearing. Similarly, the Indiana courts had held that the general authority of a parent to consent to medical treatment for a minor child did not encompass the power to authorize sterilization.

Approximately two years after the tubal ligation was performed, Linda learned she had been sterilized and filed a Section 1983 action against, among others, Judge Stump. The Supreme Court held that Judge Stump was absolutely immune because the approval of the petition was a judicial act and, as an Indiana Circuit Court Judge, Judge Stump had “original exclusive jurisdiction in all cases at law and equity.” “Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions.” *Id.* at 359-60.

a. In [*Zarcone v. Perry*](#), 572 F.2d 52, 53-54 (2nd Cir. 1978), a jury found Suffolk County Judge William Perry liable under Section 1983 for compensatory and punitive damages for the following conduct:

The incident that gave rise to the lawsuit occurred on April 30, 1975. On that night, then Judge Perry was in his chambers during a break in an evening session of traffic court in Suffolk County, Long Island. Zarcone was operating a mobile food vending truck outside the courthouse. Perry asked Deputy Sheriff Windsor to get some coffee, which he did. Both Perry and Windsor thought the coffee tasted “putrid,” and Perry told Windsor to get the coffee vendor and bring him “in front of me in

cuffs.” Perry directed two plainclothes officers, who happened to be nearby, to accompany Windsor. Wearing his sheriff’s uniform equipped with badge, gun and handcuffs, Windsor went to Zarcone and told him that the judge said the coffee was terrible and that Zarcone had to go inside to see the judge. Windsor handcuffed Zarcone, despite the vendor’s protestations that it was not necessary. When Zarcone said he was too embarrassed to go into the courthouse that way, one of the officers suggested that Zarcone walk between them with Zarcone’s jacket over his hands.

The group then marched through the hallway of the courthouse, in full view of dozens of people. Zarcone heard someone yell that they were locking up the frankfurter man. When they arrived at Perry’s chambers, the judge asked if the Sheriff had “the coffee vending man there in handcuffs.” Upon entering the chambers, Perry ordered Zarcone to be left “in handcuffs until I get finished with him.” A pseudo-official inquisition then began. Zarcone stood in front of the judge’s desk, behind which the judge sat. A court reporter was present, along with Windsor and the two police officers. Perry told Zarcone that “I have the two cups of coffee here for evidence.” According to Zarcone, whom the jury must have believed, Perry then started screaming at him, threatening him and his “livelihood” for about 20 minutes, and thoroughly scaring him. Just before Zarcone was allowed to leave, Perry commanded Windsor to note Zarcone’s vehicle and vending license numbers and told Zarcone, “Mister, you are going to be sorrier before I get through with you.”

After Zarcone left, he resumed his mobile truck route and came back to the night traffic courthouse about 45 minutes later. Shortly thereafter, Windsor returned and told Zarcone they were to go back to the judge. Zarcone asked if he had to be handcuffed again, but Windsor said no. When they reappeared before Perry, he told Zarcone that he was going to have the two cups of coffee analyzed. Perry also said that if Zarcone would admit he did something wrong, then Perry would drop the charges. Zarcone consistently denied that anything was amiss with the coffee, and no charges were filed.

Should Judge Perry have been held absolutely immune from liability for his actions?

b. In [Mireles v. Waco](#), 502 U.S. 9 (1991), Los Angeles County public defender Howard Waco filed a damages action under Section 1983 against Judge Mireles. The Complaint alleged that after Waco failed to appear for the morning calendar call, Judge Mireles ordered police officers to use unreasonable force to seize Waco and bring him into Mireles’ courtroom. Waco averred that with Judge Mireles’ approval, the officers violently removed Waco backwards from another courtroom where he was waiting to appear, and slammed him through the doors and swinging gates of Judge Mireles’ court. In a per curiam opinion, the Supreme Court affirmed the granting of Judge Mireles’ motion to dismiss on the ground of absolute immunity. The Court ruled that the judge did not act in the absence of jurisdiction but, to the contrary, ordered Waco to be brought to the courtroom in aid of the judge’s jurisdiction over a matter before him. Furthermore, Judge Mireles’ actions were taken in his judicial capacity. While judges do not commonly order officers to use excessive force:

If judicial immunity means anything it means that a judge “Will not be deprived of immunity because the action he took was in error ... or was in excess of his authority.” ... [T]he relevant inquiry is the “nature” and “function” of the act, not the “act itself.” In other words, we look to the particular act’s relation to a general function ordinarily performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court.

Id. at 12-13. See also [Martin v. Hendren](#), 172 F.3d 720 (8th Cir. 1997) (police officer who used excessive force in carrying out judge’s order to handcuff plaintiff and to remove her from courtroom during traffic court is shielded by absolute quasi-judicial immunity); *contra*, [Richman v. Sheahan](#), 270 F.3d

430 (7th Cir. 2001) (deputy sheriffs who killed plaintiff while enforcing judge's order to restrain plaintiff during his mother's appearance before traffic judge not entitled to absolute immunity).

5. Although judges are absolutely immune from all "judicial acts" within their jurisdiction, absolute immunity may be denied when a judge acts in a non-judicial capacity. See [Forrester v. White](#), 484 U.S. 219 (1988) (Judge is not absolutely immune for discriminatory dismissal of a probation officer, as action was taken in an administrative capacity); [Supreme Court of Virginia v. Consumers Union of the United States](#), 446 U.S. 719 (1980) (Virginia Supreme Court is not absolutely immune from suit for declaratory and injunctive relief for initiating disciplinary proceedings against attorneys pursuant to State Bar Code because initiation of proceeding was exercise of judges' "enforcement capacities.")

6. In [Pulliam v. Allen](#), 466 U.S. 522 (1984), the Court held that judges are not immune under Section 1983 from declaratory or injunctive relief. The Court looked first to English common law and discovered that the Kings Bench prerogative writs of prohibition and mandamus were issued against judges. Likewise, American common law rejected immunity of judges where prospective relief was sought. *Id.* at 529-37.

Equitable relief, the Court reasoned, does not present the same policy concerns that animated absolute judicial immunity from damages. The limits on the issuance of equitable relief—the requirement that the remedy at law be inadequate and the risk of irreparable harm were equitable relief not to issue—diminish the risk of harassment and interference with judicial independence presented by suits for damages. *Id.* at 537-38.

Finally, the Court discerned no evidence of congressional intent to confer absolute immunity on judges against Section 1983 actions seeking equitable relief. To the contrary, Congress enacted Section 1983 because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* at 540, quoting [Mitchum v. Foster](#), 407 U.S. 225, 240 (1972).

In 1996, Congress amended Section 1983, providing that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." [Pub. L. 104-317, Title III, § 309\(c\)](#), Oct. 19, 1996, 110 Stat. 3853.

7. In [Olivia v. Heller](#), 839 F.2d 37, 40 (2nd Cir. 1988), the court considered whether a judge's law clerk is protected by any immunity:

[A] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function. As described by the district court:

the work of judges' law clerks is entirely [judicial in nature]. Law clerks are closely connected with the court's decision-making process. Law clerks are "sounding boards for tentative opinions and legal researchers who seek authorities that affect decisions. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be." *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983). Moreover, the work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.

We believe the district court accurately described the role of the law clerk in the judicial

process, and we therefore must agree that “for purposes of absolute judicial immunity, judges and their law clerks are as one.” *Id.*

[*Olivia v. Heller*](#), 670 F. Supp. 523, 526 (S.D.N.Y. 1987)

8. Prosecutors possess absolute immunity for initiating prosecutions and presenting the government's case, [*Imbler v. Pachtman*](#), 424 U.S. 409 (1976). Absolute prosecutorial immunity, however, is plainly limited to damage suits and will not bar a Section 1983 action seeking declaratory or injunctive relief. [*Supreme Court of Virginia v. Consumers Union of the United States*](#), 446 U.S. 719, 736-37 (1980).

a. In [*Burns v. Reed*](#), 500 U.S. 478 (1991), the Court held that absolute immunity extends to the prosecutor's “role as an advocate” in presenting evidence at a hearing to determine the existence of probable cause for the issuance of a search warrant. However, the Court renounced absolute immunity for the prosecutor's advice to police officers that it was permissible to interview the defendant under hypnosis and to use the incriminating statement elicited to establish probable cause to search her house and car. The Court reasoned that there is no historic tradition of absolute prosecutorial immunity for legal advice analogous to the common law immunity from malicious prosecution that animated its bestowal of absolute immunity in *Imbler*. The Court further concluded that the risk of vexatious litigation does not mandate absolute immunity because such immunity is aimed only at guarding the judicial process from the burdens of litigation. Accordingly, absolute prosecutorial immunity is not available for all investigative activities related to the ultimate decision to prosecute, but is restricted to the prosecutor's role in judicial proceedings. See also [*Van de Kamp v. Goldstein*](#), 555 U.S. 335 (2009) (supervising prosecutor has absolute immunity against claim that (a) failure to properly train and supervise subordinate prosecutors, and (b) failure to establish information system containing potential impeachment materials about informant caused prosecution to fail to turn over evidence that its witness previously had been rewarded for giving testimony favorable to prosecution. Although challenged actions were “administrative,” they require legal knowledge and are directly connected to the prosecutors' trial advocacy duties).

b. In [*Buckley v. Fitzsimmons*](#), 509 U.S. 259 (1993), the Court ruled that a prosecutor was not absolutely immune for (a) fabricating evidence that was later presented to the grand jury, and (b) making false statements at a press conference to announce the indictment of the plaintiff. The Court dismissed the plaintiff's contention that the immunity was confined to the actual initiation of the prosecution and the presentation of the state's case. However, the Court accepted the distinction “between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.” 509 U.S. 273. Because the plaintiff alleged that the prosecutor fabricated evidence before probable cause existed to make an arrest or initiate judicial proceedings, the actions in issue were investigative and not shielded by absolute immunity. The Court likewise held that the prosecutor was not absolutely immune for untrue statements to the press. Such statements do not involve the commencement of prosecution, presentation of the State's case in court, or actions in preparation for those functions. Hence for immunity purposes, the prosecutor does not issue comments to the press in the role as an advocate and the statements have no functional tie to the judicial process.

c. In [*Kalina v. Fletcher*](#), 522 U.S. 118 (1997), the Court denied absolute immunity to a deputy prosecuting attorney for falsely certifying, under penalty of perjury, the factual allegations underlying an application for an arrest warrant. While the prosecutor's filing of the application for

an arrest warrant was part of the advocate's function and therefore protected by absolute immunity, the Court concluded, in verifying the truth of the factual underpinnings the attorney was performing the function of a witness. The Court had previously held in [Malley v. Briggs](#), 475 U.S. 335 (1986) that a police officer possesses only qualified immunity for signing an application for a search warrant. Hence it ruled that the district attorney similarly was shielded only by qualified immunity to the extent that plaintiff's Section 1983 action arose out of the prosecutor's false verification of the factual allegations. Justice Scalia pointed out that the Court's "functional approach" to immunity under Section 1983 yielded an outcome diametrically opposed to the common law rules as of 1871. At that time, prosecutions were initiated by private individuals, who were shielded only by a form of qualified immunity from malicious prosecution actions. On the other hand, the common law granted absolute immunity to statements made in the course of judicial proceedings. Justice Scalia nonetheless concurred with the majority:

[T]he "functional categories" approach to immunity questions ... make faithful adherence to the common law embodied in § 1983 very difficult. But ... the "functional" approach [is] so deeply imbedded in our § 1983 jurisprudence that, for reasons of *stare decisis*, I would not abandon them now.

522 U.S. at 135 (Scalia, J., concurring). If the Court had abandoned the common law as the source of immunity under Section 1983, on what basis can Congress be said to have intended to embrace immunity when it enacted Section 1983?

9. State, regional and local legislators also have been found absolutely immune from Section 1983 liability in suits arising out of their legislative acts, whether the relief sought is legal or equitable. [Bogan v. Scott-Harris](#), 523 U.S. 44 (1998); [Supreme Court of Virginia v. Consumers Union of the United States](#), 446 U.S. 719, 731-32 (1980); [Lake Country Estates, Inc. v. Tahoe Regional Planning Agency](#), 440 U.S. 391, 402-06 (1979). In *Bogan*, the Court held that a mayor, albeit an executive official, is shielded by absolute legislative immunity for the acts of introducing a budget and signing an ordinance into law "because they were integral steps in the legislative process." *Bogan*, 523 U.S. at 55. But see, [Kamplain v. Curry County Board of Commissioners](#), 159 F.3d 1248, 1252 (10th Cir. 1998) (County commissioners' vote to prohibit plaintiff from speaking at commission meetings is not protected by absolute immunity because they were not "voting on, speaking on, or investigating a legislative issue.").

10. The Supreme Court has held that police officers are absolutely immune from Section 1983 suits arising out of allegations that the officers gave perjured testimony in a criminal trial. [Briscoe v. LaHue](#), 460 U.S. 325 (1983), or in a grand jury proceeding. [Rehberg v. Paulk](#), 566 U.S. 356 (2012). However, the Court held that members of a prison disciplinary committee are entitled to only a qualified, rather than absolute, immunity. [Cleavinger v. Saxner](#), 474 U.S. 193 (1985). Similarly, the Court refused to extend absolute immunity to a police officer alleged to have caused an unconstitutional arrest by presenting a judge with a complaint and supporting affidavit that failed to establish probable cause, even though the judge issues arrest warrants. [Malley v. Briggs](#), 475 U.S. 335 (1986).

11. While the "under color of law" requirement of Section 1983 generally is satisfied where private actors conspire with a state official, [Adickes v. S.H. Kress & Co.](#), 398 U.S. 144 (1970), may private individuals be sued under Section 1983 for constitutional deprivations inflicted pursuant to a conspiracy with a state official who is absolutely immune? See [Dennis v. Sparks](#), 449 U.S. 24 (1980).

B. Qualified Immunity

1. On what basis did the [Pierson](#) Court find that the legislature conferred qualified immunity when it enacted Section 1983? Does the text of the Constitution prescribe qualified immunity? May state common law afford immunity to an official who violates the Constitution? Is the legislature empowered to exempt government officials from adherence to constitutional mandates? If the answer to the three preceding questions is “no,” is the 1871 Congress’ supposed attempt to supply qualified immunity unconstitutional?
2. What is the test for qualified immunity set forth in *Pierson*?
 - a. The *Pierson* Court observed that plaintiffs “did not simply argue that they were arrested under a statute later held unconstitutional” but “attempted to prove that the police officers arrested them solely for using the “White Only” waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a disturbance.” If on remand plaintiffs succeed in proving the arresting officers lacked probable cause on the latter theory of the case, is there any set of facts under which the officers could meet the qualified immunity test?

WOOD v. STRICKLAND, 420 U.S. 308 (1975)

Mr. Justice White delivered the opinion of the Court.

[1] Respondents Peggy Strickland and Virginia Crain brought this lawsuit against petitioners, who were members of the school board at the time in question, two school administrators, and the Special School District of Mena, Ark., purporting to assert a cause of action under 42 U.S.C. § 1983, and claiming that their federal constitutional rights to due process were infringed under color of state law by their expulsion from the Mena Public High School on the grounds of their violation of a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. The complaint as amended prayed for compensatory and punitive damages against all petitioners, injunctive relief allowing respondents to resume attendance, preventing petitioners from imposing any sanctions as a result of the expulsion, and restraining enforcement of the challenged regulation, declaratory relief as to the constitutional invalidity of the regulation, and expunction of any record of their expulsion. After the declaration of a mistrial arising from the jury’s failure to reach a verdict, the District Court directed verdicts in favor of petitioners on the ground that petitioners were immune from damages suits absent proof of malice in the sense of ill will toward respondents. 348 F. Supp. 244 (WD Ark. 1972). The Court of Appeals, finding that the facts showed a violation of respondents’ rights to “substantive due process,” reversed and remanded for appropriate injunctive relief and a new trial on the question of damages. 485 F.2d 186 (CA8 1973). A petition for rehearing en banc was denied, with three judges dissenting. See *id.*, at 191. Certiorari was granted to consider whether this application of due process by the Court of Appeals was warranted and whether that court’s expression of a standard governing immunity for school board members from liability for compensatory damages under 42 U.S.C. § 1983 was the correct one. 416 U.S. 935 (1974).

[2] The District Court instructed the jury that a decision for respondents had to be premised upon a finding that petitioners acted with malice in expelling them and defined “malice” as meaning “ill will against a person—a wrongful act done intentionally without just cause or excuse.” 348 F. Supp., at 248. In ruling for petitioners after the jury had been unable to agree, the District Court found “as a matter of law” that there was no evidence from which malice could be inferred. *Id.*, at 253.

[3] The Court of Appeals, however, viewed both the instruction and the decision of the District Court as being erroneous. Specific intent to harm wrongfully, it held, was not a requirement for the recovery of damages. Instead, “[it] need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one.” 485 F.2d, at 191 (footnote omitted).

[4] Petitioners as members of the school board assert here, as they did below, an absolute immunity from liability under § 1983 and at the very least seek to reinstate the judgment of the District Court. If they are correct and the District Court’s dismissal should be sustained, we need go no further in this case. Moreover, the immunity question involves the construction of a federal statute, and our practice is to deal with possibly dispositive statutory issues before reaching questions turning on the construction of the Constitution. *Cf. Hagans v. Lavine*, 415 U.S. 528, 549 (1974). ^[1] We essentially sustain the position of the Court of Appeals with respect to the immunity issue.

[5] The nature of the immunity from awards of damages under § 1983 available to school administrators and school board members is not a question which the lower federal courts have answered with a single voice. There is general agreement on the existence of a “good faith” immunity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good-faith standard.

[6] This Court has decided three cases dealing with the scope of the immunity protecting various types of governmental officials from liability for damages under § 1983. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the question was found to be one essentially of statutory construction ^[2]. Noting that the language of § 1983 is silent with respect to immunities, the Court concluded that there was no basis for believing that Congress intended to eliminate the traditional immunity of legislators from civil liability for acts done within their sphere of legislative action. That immunity, “so well grounded in history and reason ...,” 341 U.S. at 376, was absolute and consequently did not depend upon the motivations of the legislators. In *Pierson v. Ray*, 386 U.S. 547, 554 (1967), finding that “[the] legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities” in enacting § 1983, we concluded that the common-law doctrine of absolute judicial immunity survived. Similarly, § 1983 did not preclude application of the traditional rule that a policeman, making an arrest in good faith and with probable cause, is not liable for damages, although the person arrested proves innocent. Consequently the Court said: “Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.” 386 U.S. at 555 (footnote omitted). Finally, last Term we held that the chief executive officer of a State, the senior and subordinate officers of the State’s National Guard, and the president of a state-controlled university were not absolutely immune from liability under § 1983, but instead were entitled to immunity, under prior precedent and in light of the obvious need to avoid discouraging effective official action by public officers

charged with a considerable range of responsibility and discretion, only if they acted in good faith as defined by the Court:

“[In] varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.” *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974).

[7] Common-law tradition, recognized in our prior decisions, and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability for damages under that section. Although there have been differing emphases and formulations of the common-law immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such officers should be protected from tort liability under state law for all good faith, nonmalicious action taken to fulfill their official duties.

[8] As the facts of this case reveal, school board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. Each of these functions necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy. “Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act.” *Scheuer v. Rhodes*, *supra*, at 246 (footnote omitted). As with executive officers faced with instances of civil disorder, school officials, confronted with student behavior causing or threatening disruption, also have an “obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others.” *Ibid*.

[9] Liability for damages for every action which is found subsequently to have been violative of a student’s constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances “would contribute not to principled and fearless decision-making but to intimidation.” *Pierson v. Ray*, *supra*, at 554. The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.^[3]

[10] These considerations have undoubtedly played a prime role in the development by state courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions.^[4]

But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.

[11] *Tenney v. Brandhove*, *Pierson v. Ray*, and *Scheuer v. Rhodes* drew upon a very similar background and were animated by a very similar judgment in construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983. We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that

action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.

“Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.” *Scheuer v. Rhodes*, 416 U.S., at 241-242 (footnote omitted).

[12] The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an “objective” versus a “subjective” test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student’s constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students’ daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student’s constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are “charged with predicting the future course of constitutional law.” *Pierson v. Ray*, 386 U.S., at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student’s clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

III

[13] The Court of Appeals, based upon its review of the facts but without the benefit of the transcript of the testimony given at the four-day trial to the jury in the District Court, found that the board had made its decision to expel the girls on the basis of *no* evidence that the school regulation had been violated:

“To justify the suspension, it was necessary for the Board to establish that the students possessed or used an ‘intoxicating’ beverage at a school-sponsored activity. No evidence was presented at either meeting to establish the alcoholic content of the liquid brought to campus. Moreover, the Board made no finding that the liquid was intoxicating. The only evidence as to the nature of the drink was that supplied by the girls, and it is clear that they did not know whether the beverage was intoxicating or not.” 485 F.2d at 190.

[14] The Court of Appeals interpreted the school regulation prohibiting the use or possession of intoxicating beverages as being linked to the definition of “intoxicating liquor” under Arkansas statutes

which restrict the term to beverages with an alcoholic content exceeding 5% weight. Testimony at the trial, however, established convincingly that the term “intoxicating beverage” in the school regulation was not intended at the time of its adoption in 1967 to be linked to the definition in the state statutes or to any other technical definition of “intoxicating.” The adoption of the regulation was at a time when the school board was concerned with a previous beer-drinking episode. It was applied prior to respondents’ case to another student charged with possession of beer. In its statement of facts issued prior to the onset of this litigation, the school board expressed its construction of the regulation by finding that the girls had brought an “alcoholic beverage” onto school premises. The girls themselves admitted knowing at the time of the incident that they were doing something wrong which might be punished. In light of this evidence, the Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement.

* * * * *

[15] When the regulation is construed to prohibit the use and possession of beverages containing alcohol, there was no absence of evidence before the school board to prove the charge against respondents. The girls had admitted that they intended to “spike” the punch and that they had mixed malt liquor into the punch that was served. The third girl estimated at the time of their admissions to Waller that the malt liquor had an alcohol content of 20%. After the expulsion decision had been made and this litigation had begun, it was conclusively determined that the malt liquor in fact has an alcohol content not exceeding 3.2% by weight. [5] Testimony at trial put the alcohol content of the punch served at 0.9%. [6]

[16] Given the fact that there was evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Goss v. Lopez*, 419 U.S. 565 (1975). But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Tinker, supra*, at 507.

IV

[17] Respondents’ complaint alleged that their procedural due process rights were violated by the action taken by petitioners. App. 9. The District Court did not discuss this claim in its final opinion, but the Court of Appeals viewed it as presenting a substantial question. It concluded that the girls were denied procedural due process at the first school board meeting, but also intimated that the second meeting may have cured the initial procedural deficiencies. Having found a substantive due process violation, however, the court did not reach a conclusion on this procedural issue. 485 F.2d, at 190.

[18] Respondents have argued here that there was a procedural due process violation which also supports the result reached by the Court of Appeals. Brief for Respondents 27-28, 36. But because the District Court did not discuss it, and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance.

[19] The judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with this opinion.

So ordered.

Mr. Justice Powell, with whom the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist join, concurring in part and dissenting in part.

[20] I join in Parts I, III, and IV of the Court's opinion, and agree that the judgment of the Court of Appeals should be vacated and the case remanded. I dissent from Part II which appears to impose a higher standard of care upon public school officials, sued under § 1983, than that heretofore required of any other official.

[21] The holding of the Court on the immunity issue is set forth in the margin. It would impose personal liability on a school official who acted sincerely and in the utmost good faith, but who was found—after the fact—to have acted in “ignorance ... of settled, indisputable law.” *Ante*, at 321. Or, as the Court also puts it, the school official must be held to a standard of conduct based not only on good faith “but also on knowledge of the basic, unquestioned constitutional rights of his charges.” *Ante*, at 322. Moreover, ignorance of the law is explicitly equated with “actual malice.” *Ante*, at 321. This harsh standard, requiring knowledge of what is characterized as “settled, indisputable law,” leaves little substance to the doctrine of qualified immunity. The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.^[7]

[22] The Court states the standard of required knowledge in two cryptic phrases: “settled, indisputable law” and “unquestioned constitutional rights.” Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are “unquestioned constitutional rights.” Consider, for example, the recent five-to-four decision in *Goss v. Lopez*, 419 U.S. 565 (1975), holding that a junior high school pupil routinely suspended for as much as a single day is entitled to due process. I suggest that most lawyers and judges would have thought, prior to that decision, that the law to the contrary was settled, indisputable, and unquestioned.

[23] Less than a year ago, in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and in an opinion joined by all participating members of the Court, a considerably less demanding standard of liability was approved with respect to two of the highest officers of the State, the Governor and Adjutant General. In that case, the estates of students killed at Kent State University sued these officials under § 1983. After weighing the competing claims, the Court concluded:

“These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. *It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.*” 416 U.S., at 247-248. (Emphasis added.)

[24] The italicized sentence from *Scheuer* states, as I view it, the correct standard for qualified immunity of a government official: whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith. This was the standard applied to the Governor of a State charged with maliciously calling out National Guardsmen who killed and wounded Kent State students.^[8] Today's opinion offers no reason for imposing a more severe standard on school board members charged only with wrongfully expelling three teenage pupils.

[25] In view of today's decision significantly enhancing the possibility of personal liability, one must wonder whether qualified persons will continue in the desired numbers to volunteer for service in public education.



[Wood v. Strickland – Audio and Transcript of Oral Argument](#)

Footnotes

1. In their original complaint, respondents sought only injunctive and declaratory relief. App. 11-12. In their amended complaint, they added a prayer for compensatory and punitive damages. *Id.* at 92. Trial was to a jury; and the District Court in ruling on motions after declaring a mistrial appears to have treated the case as having developed into one for damages only since it entered judgment for petitioners and dismissed the complaint on the basis of their good-faith defense. In a joint motion for a new trial, respondents specifically argued that the District Court had erred in treating the case as one for the recovery of damages only and in failing to give them a trial and ruling on their claims for injunctive and declaratory relief. *Id.* at 131. The District Court denied the motion. *Id.* at 133. Upon appeal, respondents renewed these contentions, and the Court of Appeals, after finding a substantive due process violation, directed the District Court to give respondents an injunction requiring expunction of the expulsion records and restraining any further continuing punishment. 485 F.2d at 190. Petitioners urge that we reverse the Court of Appeals and order the complaint dismissed. Brief for Petitioners 48. Respondents, however, again stress that the relief they sought included equitable relief. Brief for Respondents 47-48, 50.

In light of the record in this case, we are uncertain as to the basis for the District Court's judgment, for immunity from damages does not ordinarily bar equitable relief as well. The opinion of the Court of Appeals does not entirely dispel this uncertainty. With the case in this posture, it is the better course to proceed directly to the question of the immunity of school board members under § 1983. [↩](#)

2. "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 ... were not spelled out in debate. We cannot believe that Congress—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." 341 U.S., at 376. [↩](#)
3. The overwhelming majority of school board members are elected to office. See WHITE, LOCAL SCHOOL BOARDS: ORGANIZATION AND PRACTICES 8 (U.S. Office of Education, OE-23023, Bulletin No. 8, 1962); NATIONAL SCHOOL BOARDS ASSOCIATION, SURVEY OF PUBLIC EDUCATION IN THE MEMBER CITIES OF THE COUNCIL OF BIG CITY BOARDS OF EDUCATION 3 (Nov. 1968); Campbell, Cunningham, & McPhee, *supra*, n.10, at 164-170. Most of the school board members across the country receive little or no monetary compensation for their service. WHITE, *supra*, at 67-79; NATIONAL SCHOOL BOARDS ASSOCIATION, *supra*, at 3, 15-21; Campbell, Cunningham, & McPhee, *supra*, at 172. [↩](#)
4. "[School directors] are authorized, and it is their duty to adopt reasonable rules for the government and management of the school, and it would deter responsible and suitable men from accepting the position, if held liable for damages to a pupil expelled under a rule adopted by them, under the impression that the

welfare of the school demanded it, if the courts should deem it improper." *Dritt v. Snodgrass*, 66 Mo., at 293.

[↩](#)

5. This percentage content was established through the deposition of an officer of the company that produced "Right Time" malt liquor. App. 93-94. [↩](#)
6. Tr. 205 (testimony of Dr. W. F. Turner). [↩](#)
7. The opinion indicates that actual malice is presumed where one acts in ignorance of the law; thus it would appear that even good-faith reliance on the advice of counsel is of no avail. [↩](#)
8. The decision of the Court in *Scheuer* with respect to qualified immunity is consistent with Mr. Chief Justice Warren's opinion for the Court in *Pierson v. Ray*, 386 U.S. 547 (1967), where it was said: "If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional." *Id.*, at 557. As in *Scheuer*, the standard prescribed is one of acting in good faith in accordance with reasonable belief that the action was lawful and justified. Not even police officers were held liable for ignorance of "settled, indisputable law." [↩](#)

Notes on *Wood v. Strickland*: Qualified Immunity Under Section 1983

1. What are the policies that underlie qualified immunity?
 - a. Do these policies in fact justify the immunity? What is the effect of conferring qualified immunity on the allocation of the risk of loss from constitutional violations? In order to ensure that the victim does not bear the loss, should qualified immunity be denied if the entity that employs the official who violated the Constitution is not liable for damages?
 - b. May the qualified immunity defense be asserted where the Complaint seeks equitable relief rather than damages? See [Wood v. Strickland](#) at n.6.
2. What is the standard that the government actor must satisfy to be shielded from liability by the qualified immunity?
 - a. What is the test for the qualified immunity prescribed in [Scheuer v. Rhodes](#), 416 U.S. 232 (1976)?
 - b. What is the test for the qualified immunity promulgated in [Wood v. Strickland](#)?
 - i. Under the subjective prong, is immunity available to an official who intends to cause injury to the plaintiff but does not specifically intend to violate the plaintiff's constitutional rights?
 - ii. Is there any limit on the relevant factors to be examined in determining whether the official satisfies

the objective tier of the qualified immunity?

3. Under [Wood v. Strickland](#), what is the significance of whether the right violated was “clearly established” at the time of the deprivation? Is the immunity *per se* unavailable where the right was “clearly established?” Conversely, is either element of the immunity satisfied as a matter of law where the right was not “clearly established?”
4. What test for the qualified immunity is proposed by the dissenters in *Wood*? Why do they disagree with the standard of the majority opinion?
5. Neither the district court nor the court of appeals addressed whether the test for qualified immunity should be adjusted to render the state of the law a signature element. Because the district court believed immunity is governed by a purely subjective good-faith test, it had no cause to assess whether to single out the state of the law under the objective prong. [Strickland & Crain v. Inlow](#), 348 F. Supp. 244, 250-54 (W.D. Ark. 1972). While holding immunity is to be gauged by a purely objective standard, the court of appeals applied the test the Supreme Court set forth in [Scheuer v. Rhodes](#)—the school board members would be immune only if “in light of all the circumstances, [they] act[ed] in good faith.” [Strickland v. Inlow](#), 485 F.2d 186, 191 (8th Cir. 1973). The court of appeals then remanded the case to the district court for a new trial against the school board members under the *Scheuer* test. Neither party asked the Supreme Court to alter the immunity test to condition immunity on the clarity of the law. During oral argument, the board members’ counsel conceded that *Scheuer v. Rhodes* supplied the applicable immunity standard. Transcript of Oral Argument, at 11, [Wood v. Strickland](#), 420 U.S. 308 (1975) (No. 73-1285). At no juncture did defendants’ counsel suggest there was any ambiguity in the law regarding due process that should affect the immunity analysis. Rather, counsel argued that the board members should be immune under *Scheuer* because the district court had found “School Board members had reasonable grounds to believe that their regulation had been violated.” *Id.* Likewise, plaintiffs never contended that the state of the law should inform or be determinative of immunity. Instead, plaintiffs relied upon the factual deficiencies in the procedures that gave rise to the Board’s suspension of the students to demonstrate the school board members did not act objectively in good faith. Brief for Respondents at 46, *Wood*, 420 U.S. 308 (No. 73-1285). Having held that the school board members did not violate the substantive due process rights of the students, the Court had no occasion to address qualified immunity on that claim. The Court remanded the case for consideration of whether the officials violated the students’ procedural due process rights, an issue not addressed by the district court or court of appeals. The Court did not suggest the law governing procedural due process was unsettled. To the contrary, the Court noted, “Over the past 13 years the Courts of Appeals have without exception held that procedural due process requirements must be satisfied if a student is to be expelled.” *Wood*, 420 U.S. at 324 n.15. Why, then, did the Court interject the clarity of the state of the law into the immunity analysis?

***PROCUNIER v. NAVARETTE*, 434 U.S. 555 (1978)**

Mr. Justice White delivered the opinion of the Court.

[1] Respondent Navarette, an inmate of Soledad Prison in California when the events revealed here occurred, filed his second amended complaint on January 19, 1974, charging six prison officials with various types of conduct allegedly violative of his constitutional rights and of 42 U.S.C. §§ 1983 and 1985. Three of the

defendants were subordinate officials at Soledad; three were supervisory officials: the director of the State Department of Corrections and the warden and assistant warden of Soledad. The first three of nine claims for relief alleged wrongful interference with Navarette's outgoing mail.

* * * * *

[2] In support of their motion for summary judgment, petitioners argued that on the record before the court they were immune from liability for damages under § 1983 and hence were entitled to judgment as a matter of law. The claim was not that they shared the absolute immunity accorded judges and prosecutors but that they were entitled to the qualified immunity accorded those officials involved in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Wood v. Strickland*, 420 U.S. 308 (1975). The Court of Appeals appeared to agree that petitioners were entitled to the claimed degree of immunity but held that they were nevertheless not entitled to summary judgment because in the court's view there were issues of fact to be resolved and because when the facts were viewed most favorably to respondent, it could not be held that petitioners were entitled to judgment as a matter of law. Without disagreeing that petitioners enjoyed a qualified immunity from damages liability under § 1983, respondent defends the judgment of the Court of Appeals as a proper application of § 1983 and of the Court's cases construing it.

[3] Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials. Legislators, judges, and prosecutors have been held absolutely immune from liability for damages under § 1983. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Pierson v. Ray*, 386 U.S. 547 (1967); *Imbler v. Pachtman*, 424 U.S. 409 (1976). Only a qualified immunity from damages is available to a state Governor, a president of a state university, and officers and members of a state National Guard. *Scheuer v. Rhodes*, *supra*. The same is true of local school board members, *Wood v. Strickland*, *supra*; of the superintendent of a state hospital, *O'Connor v. Donaldson*, 422 U.S. 563 (1975); and of policemen, *Pierson v. Ray*, *supra*; see *Imbler v. Pachtman*, *supra*, at 418-419.

[4] We agree with petitioners that as prison officials and officers, they were not absolutely immune from liability in this § 1983 damages suit and could rely only on the qualified immunity described in *Scheuer v. Rhodes*, *supra*, and *Wood v. Strickland*, *supra*.

[5] Under the first part of the *Wood v. Strickland* rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm. Petitioners claim that in 1971 and 1972 when the conduct involved in this case took place there was no established First Amendment right protecting the mailing privileges of state prisoners and that hence there was no such federal right about which they should have known. We are in essential agreement with petitioners in this respect and also agree that they were entitled to judgment as a matter of law.

* * * * *

[6] Whether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court, there was no "clearly established" First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972.^[9] As a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct "cannot reasonably be characterized as being in good faith." *Wood v. Strickland*, 420 U.S. at 322. ^[10]

[7] Neither should petitioners' immunity defense be overruled under the second branch of the *Wood v. Strickland* standard, which would authorize liability where the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." This part of the rule speaks of "intentional injury," contemplating that the actor intends the consequences of his conduct. See RESTATEMENT

(SECOND) OF TORTS § 8A (1965). The third claim for relief with which we are concerned here, however, charges negligent conduct, which normally implies that although the actor has subjected the plaintiff to unreasonable risk, he did not intend the harm or injury that in fact resulted. See *id.*, at § 282 and Comment d. Claims 1 and 2 of the complaint alleged intentional and bad-faith conduct in disregard of Navarette’s constitutional rights; but claim 3, as the court below understood it and as the parties have treated it, was limited to negligence. The prison officers were charged with negligent and inadvertent interference with the mail and the supervisory personnel with negligent failure to provide proper training. To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us.^[11]

[8] We accordingly conclude that the District Court was correct in entering summary judgment for petitioners on the third claim of relief and that the Court of Appeals erred in holding otherwise. The judgment of the Court of Appeals is

Reversed.

Mr. Chief Justice Burger, dissenting.

* * * * *

Mr. Justice Stevens, dissenting.

[9] Today’s decision, coupled with *O’Connor v. Donaldson*, 422 U.S. 563, strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability. As the immunity doctrine developed, the Court was careful to limit its holdings to specific officials,^[12] and to insist that a considered inquiry into the common law was an essential precondition to the recognition of the proper immunity for any official.^[13] These limits have now been abandoned. In *Donaldson*, without explanation and without reference to the common law, the Court held that the standard for judging the immunity of the superintendent of a mental hospital is the same as the standard for school officials; today the Court purports to apply the same standard to the superintendent of a prison system and to various correction officers.^[14]

* * * * *



[Procunier v. Navarette – Audio and Transcript of Oral Argument](#)

Footnotes

9. Although some of the items of correspondence with which respondent claims interference concerned legal matters or were addressed to lawyers, respondent is foreclosed from asserting any claim with respect to mail interference based on infringement of his right of access to the courts because such a claim was dismissed with prejudice in an earlier phase of this case. Order of Feb. 9, 1973, No. C-72-1954 SW (ND Cal.). In his Points and Authorities Against Motion to Dismiss filed in connection with the present complaint on April 17, 1974, respondent stated that “[t]he claim against mail interference does not purport to allege denial of access to the courts,” and explained that “[i]n ruling on defendants’ previous Motion to Dismiss, in February, 1973, this Court dismissed plaintiff’s claim against mail interference insofar as it alleged denial of access to the courts.” Record 171. [↗](#)

10. There is thus no occasion to address this case on the assumption that Navarette's mailing privileges were protected by a constitutional rule of which petitioners could reasonably have been expected to be aware in 1971 and 1972 and to inquire whether petitioners knew or should have known that their conduct was in violation of that constitutional proscription. [↵](#)
11. Because of the disposition of this case on immunity grounds, we do not address petitioners' other submissions: that § 1983 does not afford a remedy for negligent deprivation of constitutional rights and that state prisoners have no First and Fourteenth Amendment rights in their outgoing mail. [↵](#)
12. Thus, in *Wood v. Strickland*, 420 U.S. 308, 322, the Court stated: "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." (Emphasis added.) [↵](#)
13. In *Imbler v. Pachtman*, 424 U.S. 409, 421, the Court stated: "As noted above, our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." [↵](#)
14. Perhaps with good reason, see *Whirl v. Kern*, 407 F. 2d 781, 791-792 (CA5 1969), the Court does not consult the common law to gauge the scope of a jailer's immunity. Cf. *Imbler v. Pachtman*, *supra*, at 421; *Wood v. Strickland*, *supra*, at 318. Instead, the Court seems to rely on an unarticulated notion that prison administrators deserve as much immunity as Governors, school administrators, hospital administrators, and policemen. *Ante*, at 561, and n.7. The Court also elides any distinction between discretionary and ministerial tasks. Cf. *Scheuer v. Rhodes*, 416 U.S. 232, 247. One defendant in this case was joined simply because he "was in charge of handling incoming and outgoing prisoner mail." Although the scope of this defendant's duties is not clear, he may well have been performing wholly ministerial chores, such as bagging and delivering prison mail. By allowing summary judgment in his favor, the Court strongly suggests that the nature of his job is irrelevant to whether he should have a good-faith immunity. [↵](#)

Notes on *Procunier v. Navarette*

A. Which Officials are Entitled to Assert Qualified Immunity?

1. The district court in [Procunier](#) granted summary judgment to the prison officials without issuing an opinion. The court of appeals reversed. The court held that qualified immunity is not to be extended automatically to all public officials who are denied absolute immunity. Instead, the court of appeals reasoned, prison officials could assert qualified immunity only if there existed a common law tradition of immunity for prison officials and such immunity was supported by public policy. The court of appeals instructed the district court to determine on remand whether, under this standard, prison officials were entitled to invoke the immunity defense. [Navarette v. Enomoto](#), 536 F.2d 277, 280 (9th Cir. 1976). On what

basis does the *Procunier* Court find prison officials may avail themselves of the qualified immunity?

2. In [*Tower v. Glover*](#), 467 U.S. 914 (1984), Billy Irl Glover filed a Section 1983 action against the public defenders who unsuccessfully represented him on a robbery charge. Glover alleged that the defense attorneys had conspired with the trial and appellate court judges, as well as the Attorney General of Oregon, to secure his conviction. The Supreme Court had held in [*Polk County v. Dodson*](#), 454 U.S. 312 (1981) that appointed counsel in a state prosecution does not act under color of state law for purposes of Section 1983. However, the Court in [*Dennis v. Sparks*](#), 449 U.S. 24 (1980) held that private persons who are alleged to have engaged in a conspiracy with state officials to deprive a person of federal constitutional rights do act under color of state law and are therefore suable under Section 1983. The Court in *Tower* granted certiorari to determine whether the public defenders were protected by any immunity, and reasoned as follows:

Section 1983 immunities are “predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.” [Citation omitted]. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983’s history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. [Citations omitted].

Using this framework we conclude that public defenders have no immunity from § 1983 liability for intentional misconduct of the type alleged here.

No immunity for public defenders, as such, existed at common law in 1871 because there was, of course, no such office or position in existence at that time. The first public defender program in the United States was reportedly established in 1914.... Our inquiry, however, cannot stop there. Immunities in this country have regularly been borrowed from the English precedents, and the public defender has a reasonably close “cousin” in the English barrister. Like public defenders, barristers are not free to pick and choose their clients. They are thought to have no formal contractual relationship with their clients, and they are incapable of suing their clients for a fee... It is therefore noteworthy that English barristers enjoyed in the 19th century, as they still do today, a broad immunity from liability for negligent misconduct. *Rondel v. Worsley*, *supra*, a recent decision from the House of Lords, traces this immunity from its origins in 1435 until the present. Nevertheless, it appears that even barristers have never enjoyed immunity from liability for intentional misconduct, *id.* at 287 (opinion of Lord Pearson), and it is only intentional misconduct that concerns us here.

In this country the public defender’s only 19th-century counterpart was a privately retained lawyer, and petitioners do not suggest that such a lawyer would have enjoyed immunity from tort liability for intentional misconduct.

Finally, petitioners contend that public defenders have responsibilities similar to those of a judge or prosecutor, and therefore should enjoy similar immunities. The threat of § 1983 actions based on alleged conspiracies among defense counsel and other state officials may deter counsel from engaging in activities that require some degree of cooperation with prosecutors—negotiating pleas, expediting trials and appeals, and so on. Ultimately, petitioners argue, the State’s attempt to meet its constitutional obligation to furnish criminal defendants with effective counsel will be impaired. At the same time, the federal courts may be inundated with frivolous lawsuits.

Petitioners’ concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interests of

what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate. We conclude that state public defenders are not immune from liability under § 1983 for intentional misconduct, “under color of” state law, by virtue of alleged conspiratorial action with state officials that deprives their clients of federal rights.

[*Tower v. Glover*](#), 467 U.S. 914, 920-23 (1984). Can the according of qualified immunity to prison officials in *Procunier* be reconciled with *Tower v. Glover*? See [*Richardson v. McKnight*](#), 521 U.S. 399, 415-16 (1997) (Scalia, J. dissenting) (“The truth to tell, *Procunier v. Navarette* ... did not trouble itself with history ... but simply set forth a policy prescription.”)

3. In [*Richardson v. McKnight*](#), 521 U.S. 399 (1997), the Supreme Court, in a 5-4 opinion, held that guards employed by a private prison management firm were not entitled to assert a qualified immunity defense in prisoner Section 1983 actions. The Court first observed that neither the English nor American common law afforded immunity to private jailers. 521 U.S. at 404-07. The Court rejected the entreaty that the defendants were deserving of immunity because they serve the same function as state prison guards. The Court reasoned that its precedents employ a functional approach to decide only which type of immunity—absolute or qualified—applied to governmental officials; it had never held that performance of a governmental function triggers a qualified immunity to shield private actors from Section 1983 liability. “Indeed, a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery.” 521 U.S. at 409. The Court then elaborated why the purposes of qualified immunity do not pertain when the defendant is employed by a private entity:

First, the most important special government immunity-producing concern—unwarranted timidity—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison. Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.

[M]arketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or “non-arduous” employee job performance. And the contract’s provisions—including those that might permit employee indemnification and avoid many civil-service restrictions—grant this private firm freedom to respond to those market pressures through rewards and penalties that operate directly upon its employees. See § 41-24-111. To this extent, the employees before us resemble those of other private firms and differ from government employees.

[G]overnment employees typically act within a *different* system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees. Hence a judicial determination that “effectiveness” concerns warrant special immunity-type protection in respect to this latter

(governmental) system does not prove its need in respect to the former. Consequently, we can find no *special* immunity-related need to encourage vigorous performance.

Second, “privatization” helps to meet the immunity-related need “to ensure that talented candidates” are “not deterred by the threat of damages suits from entering public service.” (citations omitted). It does so in part because of the comprehensive insurance-coverage requirements just mentioned. The insurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face. Because privatization law also frees the private prison-management firm from many civil service law restraints, TENN. CODE ANN. § 41-24-111 (1990), it permits the private firm, unlike a government department, to offset any increased employee liability risk with higher pay or extra benefits. In respect to this second government-immunity-related purpose then, it is difficult to find a *special* need for immunity, for the guards’ employer can operate like other private firms; it need not operate like a typical government department.

Third, lawsuits may well “distrac[t]” these employees “from their ... duties” (citations omitted) but the risk of “distraction” alone cannot be sufficient grounds for an immunity.... Given a continual and conceded need for deterring constitutional violations and our sense that the firm’s tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms, we are not persuaded that the threat of distracting workers from their duties is enough virtually by itself to justify providing an immunity.

521 U.S. at 409-12. See also [Wyatt v. Cole](#), 504 U.S. 158 (1992) (finding rationale for qualified immunity does not pertain to private parties sued for filing state replevin action found to have violated due process).

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, vigorously dissented from the Court’s refusal to determine entitlement to qualified immunity through an examination of whether the defendant performs governmental functions. The dissent also decried the majority’s conclusion that market pressures obviate the need to afford immunity:

[I]t is fanciful to speak of the consequences of “market” pressures in a regime where public officials are the only purchaser, and other people’s money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some *political* official not to renew the contract. See TENN. CODE ANN. §§ 41-24-103 to 105 (Supp. 1996). This is a government decision, not a market choice.... Secondly and more importantly, however, if one assumes a political regime that *is* bent on emulating the market in its purchase of prison services, it is almost certainly the case that, short of mismanagement so severe as to provoke a prison riot, *price* (not discipline) will be the predominating factor in such a regime’s selection of a contractor. A contractor’s price must depend upon its costs; lawsuits increase costs; and “fearless” maintenance of discipline increases lawsuits. The incentive to down-play discipline will exist, moreover, even in those states where the politicians’ zeal for market-emulation and budget-cutting has waned, and where prison-management contract renewal is virtually automatic: the more cautious the prison guards, the fewer the lawsuits, the higher the profits. In sum, it seems that “market-competitive” private person managers have even greater need than civil-service prison managers for immunity as an incentive to discipline.

521 U.S. at 418-20.

Finally, the dissent attacked the majority’s assertion that immunity was unnecessary in the private sector to ensure that the fear of damages liability does not deter talented individuals from seeking employment.

The Court's second distinction between state and private prisons is that privatization "helps to meet the immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service" as prison guards. *Ante*, at 2107 (internal quotation marks omitted). This is so because privatization brings with it (or at least has brought with it in the case before us) (1) a statutory requirement for insurance coverage against civil-rights claims, which assertedly "increases the likelihood of employee indemnification," and (2) a liberation "from many civil service law restraints" which prevent increased employee risk from being "offset ... with higher pay or extra benefits," *ibid* ... [O]f course civil-rights liability insurance is no less *available* to public entities than to private employers. But the second factor—liberation from civil-service limitations—is the more interesting one. First of all, simply as a philosophical matter it is fascinating to learn that one of the prime justifications for § 1983 immunity should be a phenomenon (civil-service laws) that did not even exist when § 1983 was enacted and the immunity created. Also as a philosophical matter, it is poetic justice (or poetic revenge) that the Court should use one of the principal economic benefits of "prison out-sourcing"—namely, the avoidance of civil service salary and tenure encrustations—as the justification for a legal rule rendering out-sourcing more expensive. Of course the savings attributable to out-sourcing will not be wholly lost as a result of today's holding; they will be transferred in part from the public to prisoner-plaintiffs and to lawyers. It is a result that only the American Bar Association and the American Federation of Government Employees could love.

521 U.S. at 420-21.

4. In [Filarsky v. Delia](#), 566 U.S. 377 (2012), the court of appeals held a private lawyer, who had been hired by the City of Rialto to investigate whether a city firefighter was misusing his medical leave to perform construction on his home, could not assert qualified immunity. The Supreme Court reversed, finding that in the mid 1800s, private individuals performed many governmental functions on a part-time or episodic basis. The common law extended the same immunity to individuals working part-time for the government as was available to full-time employees executing the same responsibilities. Therefore, the Court reasoned, "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Id.* at 389. The Court distinguished [Richardson v. McKnight](#), 521 U.S. 399 (1997) as follows:

Richardson was a self-consciously "narrow decision." ... [T]he Court emphasized that the particular circumstances of that case—"a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work.

Id. at 393.

5. Given the policy underpinnings of the doctrine, should qualified immunity be available to a governmental official who is indemnified by the entity? If so, what are the policy reasons that support immunity for an indemnified public official? See [Greer v. Shoop](#), 141 F.3d 824, 828 (8th Cir 1998) ("Greer next argues that the defendants should not be entitled to qualified immunity because they would be indemnified, pursuant to Iowa state law, for any award of damages entered against them. In our view, the policy reasons are much broader than simply protecting state employees from having to pay damages. Therefore, we are not convinced by Greer's argument and find no compelling reason to

further comment on the issue”).

B. The Qualified Immunity Standard

1. California prison regulations permitted prison officials to bar mailings “that pertain to criminal activity; are lewd, obscene or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate.” The same regulation prohibited prison officials from interfering with correspondence between the inmate and his attorney. *Procunier*, 434 U.S. at 558 n.3. Contrary to the regulation, the warden took the position that officials could confiscate any inmate mail, including legal correspondence, “if we don’t feel it is right or necessary.” *Id.* Navarette submitted affidavits contradicting the officials’ conclusory contention that they had acted with the good faith belief that they were abiding by prison mail regulations. The court of appeals found there was a dispute of material fact as to whether prison officials harbored a reasonable and good faith belief that their conduct was lawful and complied with regulations. The court of appeals’ immunity analysis did not assess whether the constitutional right was clearly established or posit the implications for the defense if the right were or were not settled.

In addressing whether Congress intended to extend Section 1983 to claims for negligent deprivations of constitutional rights—the lone question on which the Court granted certiorari—the briefs of the parties drew support for their respective positions by analogizing to the Court’s qualified immunity decisions. See Brief for Petitioners at 12-13. *Procunier*, 434 U.S. 555 (No. 76-446) (arguing that immunity test set forth in *Pierson* and *Wood* demonstrates Section 1983 is limited to intentional conduct); Brief for Respondent 20-27 and Brief for the American Civil Liberties Union as Amicus Curiae Supporting Respondents at 10, 14-15, *Procunier*, 434 U.S. 555 (No. 76-446) (averring that qualified immunity cases support liability for objectively unreasonable deprivations). However, neither party argued a) whether the state of the law should be dispositive of the immunity defense; b) whether public officials should be permitted to offer evidence of the reasonableness of their actions where the right was clearly established, or c) whether plaintiff should be precluded from offering evidence of the unreasonableness of official action when the right was not settled.

- a. Does *Procunier* purport to overrule or modify *Wood v. Strickland*? Does the test for the objective tier of the immunity defined by Justice White in *Procunier* differ from the standard he set forth in *Wood*? Was the issue of amending the immunity standard properly before the Court? Did the Court have the power to change the test for immunity?
- b. After *Procunier*, does the official satisfy the objective tier of the immunity standard as a matter of law whenever the right violated was not “clearly established?” Could the prison officials’ belief in the propriety of their refusal to mail Navarette’s legal correspondence have been unreasonable, even if it was not “clearly established” that the First Amendment protected Navarette’s right to send letters to his attorney? Should an official be freed from Section 1983 liability for conduct that is unreasonable under all the circumstances whenever it was not also “clearly established” that her actions would violate the Constitution?
- c. Is the official automatically deprived of immunity where the constitutional right violated was clearly established? May the official successfully assert immunity, even where the right was clearly established, if his conduct was reasonable under all the circumstances? Did the *Procunier* Court have any reason to address this issue? Can the Court’s test for immunity where the right was clearly

established be reconciled with the Court's treatment of immunity where the right was not clearly established?

***HARLOW v. FITZGERALD*, 457 U.S. 800 (1982)**

Justice Powell delivered the opinion of the Court

[1] The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

[2] In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, ante, p. 731, the facts need not be repeated in detail.

[3] Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* (*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)) claim under the First Amendment and his "inferred" statutory causes of action under 5 U.S.C. § 7211 (1976 ed., Supp. IV) and 18 U.S.C. § 1505.^[15] The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. App. to Pet. for Cert. 1a-3a.

[4] Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. *Id.*, at 11a-12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U.S. 959 (1981).

III

A

[5] Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides.

[6] Having decided in *Butz* that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the

President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

* * * * *

C

[7] Petitioners also assert an entitlement to immunity based on the “special functions” of White House aides. This form of argument accords with the analytical approach of our cases. For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. But a “special functions” rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official’s claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.

* * * * *

[8] Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that “public policy requires [for any of the functions of his office] an exemption of [absolute] scope.” *Butz*, 438 U.S., at 506. Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could we now conclude that the acts charged in this lawsuit—if taken at all—would lie within the protected area. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

[9] Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

[10] The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz v. Economou*, *supra*, at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S., at 410 (“For people in *Bivens*’ shoes, it is damages or nothing”). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the

most irresponsible [public officials], in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949), *cert. denied*, 339 U.S. 949 (1950).

[11] In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, at 507-508, as in *Scheuer*, 416 U.S., at 245-248, we relied on the assumption that this standard would permit “[insubstantial] lawsuits [to] be quickly terminated.” 438 U.S. at 507-508; see *Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part). Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the “good faith” standard established by our decisions.

B

[12] Qualified or “good faith” immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635 (1980). Decisions of this Court have established that the “good faith” defense has both an “objective” and a “subjective” aspect. The objective element involves a presumptive knowledge of and respect for “basic, unquestioned constitutional rights.” *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component refers to “permissible intentions.” *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official “*knew or reasonably should have known*” that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury.” *Ibid.* (emphasis added).

[13] The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official’s subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

[14] In the context of *Butz*’ attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to “subjective” inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying “ministerial” tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

[15] Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials 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. See *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S., at 322.^[16]

[16] Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,^[17] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.^[18] If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

[17] By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).^[19]

* * * * *

Justice Brennan, with whom Justice Marshall and Justice Blackmun join, concurring.

[18] I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 815, 819. This standard would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. *Ante*, at 819, n.33. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Ante*, at 818. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert v. Lando*, 441 U.S. 153 (1979), in which the Court observed that "[to] erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their [good faith]." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 818-819, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold

matter, that a violation of his constitutional rights actually occurred. I see no reason why discovery of defendants' "knowledge" should not be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds such as these. *Cf. Herbert v. Lando, supra*, at 180, n.4 (Powell, J., concurring).

Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun, concurring.

[19] We join the Court's opinion but, having dissented in *Nixon v. Fitzgerald, ante*, p.731, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon v. Fitzgerald* was correctly decided.

Justice Rehnquist, concurring.

[20] At such time as a majority of the Court is willing to reexamine our holding in *Butz v. Economou*, 438 U.S. 478 (1978), I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

Chief Justice Burger, dissenting.

* * * * *



[Harlow v. Fitzgerald – Audio and Transcript of Oral Argument](#)

Footnotes

15. The first of these statutes, 5 U.S.C. § 7211 (1976 ed., Supp. IV), provides generally that "[the] right of employees ... to ... furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U.S.C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's Bivens action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See n.36, *infra*. [↩](#)
16. This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal

officials.” *Butz v. Economou*, 438 U.S., at 504. Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope. [↴](#)

17. This case involves no claim that Congress has expressed its intent to impose “no fault” tort liability on high federal officials for violations of particular statutes or the Constitution. [↴](#)
18. As in *Procunier v. Navarette*, 434 U.S., at 565, we need not define here the circumstances under which “the state of the law” should be “evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.” [↴](#)
19. We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official’s duties and in “objective” good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available. [↴](#)

Notes on *Harlow v. Fitzgerald*: Qualified Immunity Redefined

1. In what respects did the Court alter the elements of the qualified immunity?
 - a. After [Harlow](#), may an official who intended to violate plaintiff’s constitutional rights or intended to injure the plaintiff be held liable if the right invaded was not clearly established?
 - b. Is an official who deprived plaintiff of a constitutional right in violation of explicit agency policy or orders immune if the right was not clearly established? May the injured party offer evidence of the policy or orders? Discover such evidence?
2. In their brief to the Court, defendants did not ask the Court to stay discovery or to abandon the common law requirement that an official must subjectively act in good faith to be immune. Rather, defendants asked the Court to heighten the evidentiary burden plaintiff would have to meet to establish a dispute of material fact as to subjective prong of the immunity defense. Defendants submitted that after discovery, the plaintiff should be required to present sufficient evidence of bad faith to satisfy either a preponderance of the evidence or clear and convincing evidence standard in order to survive a motion for summary judgment. Brief for the Petitioners at 79, [Harlow](#), 457 U.S. 800 (1982) (Nos. 79-1738, 80-945). During oral argument, counsel reiterated that defendants were urging the Court to require plaintiffs to prove malice by a standard that was more demanding than preponderance of the evidence. Transcript of Oral Argument at 14, *Harlow v. Fitzgerald*, 457 U.S. 800 (Nos. 79-1738, 80-945), *available at* 1981 U.S. Trans. LEXIS 17. Counsel argued that the Court could “significantly reduce the number of cases that would have to go to trial and increase the number in which a motion for summary judgment was granted” if the Court were “to enjoin upon the lower courts close scrutiny of allegations of malice, applying *the two standards of Wood* against *Strickland*.” *Id.* at 20 (emphasis supplied).
3. Did the Court’s modification of the standards governing the qualified immunity arise out of a

concern that the existing test did not adequately shield federal officials from liability for constitutional violations? A 1979 study of all reported [Bivens](#) cases revealed that the plaintiffs prevailed in but 5 of the 136 cases in which judgment or dismissal was entered. Note, [“Damages or Nothing”—The Efficacy of the Bivens-Type Remedy](#), 64 CORNELL L. REV. 667, 694 (1979). The remaining 131 cases were disposed of on the following grounds:

- No meritorious claim – 40
- No *Bivens*-type cause of action – 8
- No constitutional violation – 32
- Grounds unrelated to merits – 89
- Proper defendant problems – 18
- Improper personal jurisdiction or service of process – 12
- Insufficient jurisdictional amount – 5
- Statute of limitations bar – 3
- Sovereign immunity bar – 26
- Individual immunity bar – 51
- Other – 32
- Relationship to merits unknown – 21
- General verdict by jury – 3
- Insufficient pleadings – 9
- Other – 9
- Total judgments for defendants – 131

Id. at 695.

4. Why did the Court find it necessary to adjust the qualified immunity? What evidence did the Court cite to demonstrate that the existing immunity test impeded pretrial disposition of civil actions to recover damages for constitutional violations?

a. A review of § 1983 cases filed in 1975 and 1976 in the Central District of California found that of 276 non-prisoner cases filed, depositions were conducted in 56 cases and 17 cases went to trial. Theodore Eisenberg, [Section 1983: Doctrinal Foundations and an Empirical Study](#), 67 CORNELL L. REV. 482, 550-53 (1982). Of the 212 prisoner § 1983 claims filed in the same period, depositions were conducted in 5 cases and 3 cases proceeded to trial. *Id.* at 554.

b. An empirical study of prisoner § 1983 suits in five federal districts in 1975-1977 concluded:

Few prisoners attempted to conduct discovery, and still fewer successfully obtained any discovery. Hardly any of the cases went to trial. Only 18 of the 664 cases studied had either an evidentiary hearing or a trial. A grand total of forty-four court days over a two-and-one-half-year period were spent on the cases studied.

William Bennett Turner, [When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts](#), 92 HARV. L. REV. 610, 624 (1979). The Court subsequently relied on this study in [Cleavinger v. Saxner](#), 474 U.S. 193 (1985), in rejecting the claim of prison disciplinary committee members that absolute immunity is needed to avoid procedural burdens and the expense of litigation.

c. A third empirical study analyzed prisoner § 1983 cases filed in the Northern District of Illinois in 1971 and 1973. William S. Bailey, [The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A](#)

[*Statistical Survey in the Northern District of Illinois*](#), 6 LOY. U. CHI. L.J. 527 (1975). Of the 218 cases filed in 1971, all but 22 were summarily dismissed. Depositions were conducted in only nine cases and hearings were held in only seven. *Id.* at 551. Of the 173 cases filed in 1973, all but 36 were summarily dismissed. Depositions were taken in 7 cases and hearings were held in 22. *Id.* at 552.

- d. Another assessment of § 1983 and *Bivens* litigation focused on cases in the Central District of California in 1980 and 1981. The study concluded that “discovery events occur somewhat more often in nonprisoner constitutional tort cases” and that “[j]udges are somewhat more likely to have a pretrial conference or conduct a trial in a constitutional tort case.” Theodore Eisenberg & Stewart Schwab, [*The Reality of Constitutional Tort Litigation*](#), 72 CORNELL L. REV. 641, 675 (1987). The authors cautioned, however, that their conclusions were limited to a single district and suggested “that decision makers demand evidence to support assertions about constitutional tort cases, and that they not act in the empirical void that has dominated discussion to date.” *Id.* at 695.
- e. The most recent empirical inquiry evaluated claims of constitutional violations filed against federal officials in five district courts between 2001 and 2003. Alex Reinert, [*Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*](#), 62 STAN. L. REV. 809 (2010). The study assumed that plaintiffs won not only in cases resolved by a favorable judgment, but also prevailed in cases disposed of by settlement, voluntary dismissal, and stipulated dismissal. Using this measure, the raw data revealed that plaintiffs succeeded in approximately 16% of the roughly 250 *Bivens* actions with final dispositions. However, for cases where the claims were not dismissed *sua sponte* and defendant filed a motion or answer, plaintiffs’ success rate rose to 30%. *Id.* at 837-41. The study revealed the following as to the qualified immunity defense:

[T]he data provide important information about the role that the qualified immunity defense plays in the outcome of *Bivens* cases.... Although defendants made arguments based on qualified immunity in some of the cases examined, the defense was a basis for a dismissal in only five out of the 244 complaints studied. Dismissal on the merits, for frivolity, and for failure to exhaust administrative remedies were the most common grounds for terminating a case. Dismissals for lack of subject matter jurisdiction were more common than dismissals on qualified immunity grounds.

These data suggest that the qualified immunity defense is of minimal importance in regulating *Bivens*, at least as to filed cases. If the data are replicated elsewhere, it suggests that the doctrine of qualified immunity is of greater symbolic than practical importance.

Id. at 843-44. Prof. Reinert acknowledged that there were other possible explanations for the insignificant statistical role that the immunity defense played:

[I]t is possible that the vast majority of *Bivens* cases involve disputes over well-established law, such that there are limited opportunities for defendants to raise qualified immunity as a defense. It is also possible that immunity is operating in the background in those cases which are dismissed for being frivolous. Relatedly, it may be that judges apply a modified doctrine of constitutional avoidance where there is a way of resolving cases without relying on qualified immunity. Finally, and most troubling,

it may be that the prospect of qualified immunity deters lawyers from accepting the most difficult *Bivens* cases, thus operating as an unseen thumb on the scale in favor of maintaining the legal status quo.

Id. at 844.

5. Was reconfiguration of the immunity standard necessary to meet the Court's concerns?

Harlow was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. [457 U.S. at 815-819](#). However, subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a non-moving party "who fails to make a showing sufficient to establish the existence of an element necessary to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322 (1986). Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.

[Wyatt v. Cole](#), 504 U.S. 158, 171 (1992) (Kennedy, J. concurring). Does *Celotex* supplant the need for abrogation of the subjective tier of the immunity? Does the Court have the power to restore the pre-*Harlow* standard?

6. Does the procedure for adjudicating a claim of qualified immunity established by *Harlow* comport with usual practice under the Federal Rules of Civil Procedure? See 6 Pt. 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 56.15[5] (2d ed. 1976) ("The party opposing summary judgement must be given a reasonable opportunity to gain access to proof, particularly where the facts are largely within the knowledge or control of the moving party.")

7. Does the *Harlow* standard for the qualified immunity apply to actions against state and local officials under Section 1983?

- a. *Harlow* was a civil damages action for violation of constitutional rights against individual federal government officials. Section 1983 does not apply to federal officials, nor is there a statutory counterpart to Section 1983 which generally affords a civil damage remedy for the constitutional wrongs of federal officials. However, in [Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics](#), 403 U.S. 388 (1971), the Supreme Court implied from the Constitution a cause of action for damages against individual federal officials. In [Butz v. Economou](#), 438 U.S. 478 (1978), the Supreme Court was called upon to determine what immunities apply to the *Bivens* cause of action. As noted in footnote 30 of the *Harlow* opinion, the Butz Court held that federal officials sued in *Bivens* action should have the same immunity as their state counterparts sued under Section 1983. Four days after its *Harlow* opinion, the Supreme Court vacated and remanded a decision of the United States Court of Appeals for the Sixth Circuit in which two state parole officers had unsuccessfully asserted a qualified immunity defense. The order of the Supreme Court, in pertinent part, reads as follows:

[T]his cause is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Harlow v. Fitzgerald*, 457 U.S. 800 [102 S. Ct. 2727, 73 L. Ed.2d 396] (1982).

See *Butz v. Economou*, 438 U.S. [478] 504 [98 S. Ct. 2894, 2909, 57 L. Ed.2d 895] (1978) (deeming it “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials”).

Wolfel v. Sanborn, 458 U.S. 1102 (1982). The court of appeals construed the remand order to mean that the *Harlow* qualified immunity standard likewise governs Section 1983 actions. [*Wolfel v. Sanborn*](#), 691 F.2d 270 (6th Cir. 1982).

In [*Davis v. Scherer*](#), 468 U.S. 183, 193 (1984), the plaintiff conceded that the *Harlow* standard applied to his Section 1983 action. While noting that *Harlow* was a suit against federal officials, the Supreme Court reiterated that “our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officials under *Bivens*...” 468 U.S. at 194 n.12. See also [*Anderson v. Creighton*](#), 483 U.S. 635, 642 n.4 (1987); [*Malley v. Briggs*](#), 475 U.S. 335, 340 n.2 (1986).

- b. Does the rationale of [*Butz v. Economou*](#), cited in footnote 16 of *Harlow*, in fact dictate that the immunity as revised in *Harlow* must extend to individual state and local government officials sued under Section 1983?
 - i. On what basis did the Court find that Congress incorporated a qualified immunity defense when it enacted Section 1983? See [*Pierson v. Ray*](#), *supra*. Is *Harlow* consistent with the origin of the qualified immunity defense? In [*Anderson v. Creighton*](#), 483 U.S. 635 (1987), a *Bivens* action arising out of a warrantless residence search, plaintiffs contended that the FBI officials who conducted the search could not assert a qualified immunity defense because officers conducting such searches were strictly liable at English common law. Rejecting this argument as “procrustean,” Justice Scalia reasoned:

[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.

Anderson, 483 U.S. at 645. See also *Crawford-El v. Britton*, 523 U.S. 574, 604 (Rehnquist, J., dissenting) (*Harlow* Court “‘purged’ qualified immunity doctrine of its subjective component and remolded it so that it turned entirely on ‘objective legal reasonableness’”). Justice Scalia subsequently explained his justification for departing from the common law to redefine qualified immunity:

As I have observed earlier, our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume. That is perhaps just as well. The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe v. Pape*, 365 U.S. 167 (1961), which converted an 1871 statute covering constitutional violations committed “under color of any statute, ordinance, regulation, custom or usage of any State,” into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation,

custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law *Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law.

Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.

[*Crawford-El v. Britton*](#), 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

- ii. In [*Malley v. Briggs*](#), 475 U.S. 335, 342 (1986), the Court refused to extend absolute prosecutorial immunity to a state police officer who was sued for allegedly presenting a judge with a complaint and supporting affidavit that failed to establish probable cause:

We reemphasize that our role is to interpret the intent of Congress in enacting §1983, not to make a free-wheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition. In *Imbler, supra*, we concluded that at common law "[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution." *Id.* at 437, 96 S. Ct. at 998. We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue. See n.3, *supra*. While this observation may seem unresponsive to petitioner's policy argument it is, we believe, an important guide to interpreting §1983. Since the statute on its face does not provide for any immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.

Malley at 475 U.S. at 342. See also *Wyatt v. Cole*, 504 U.S. 158, 171-72 (1992) (Kennedy, J. concurring) ("It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by Congress, which 'on its face does not provide for *any* immunities.' We have imported common-law doctrines in the past because of our conclusion that the Congress which enacted §1983 acted in light of existing legal principles. That suggests, however, that we may not transform what existed at common law based upon our notions of policy or efficiency." (citations omitted)).

Does the *Malley* reasoning resolve whether *Harlow* can apply to Section 1983 actions? See Gary S. Gildin, [*Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions*](#), 38 EMORY L.J. 369 (1989).

- iii. In [*Ziglar v. Abassi*](#), 528 U.S. 120, 157-60 (2017), Justice Thomas wrote a concurring opinion "to note my growing concern with our qualified immunity jurisprudence";

Although the Act made no mention of defenses or immunities, "we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." We have done so because "[c]ertain immunities were so well established in 1871 ... that 'we presume that Congress would have specifically so provided had it wished to abolish' them." Immunity is thus available under the

statute if it was “historically accorded the relevant official” in an analogous situation “at common law,” unless the statute provides some reason to think that Congress did not preserve the defense.

In some contexts, we have conducted the common-law inquiry that the statute requires. For example, we have concluded that legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871. We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the “judicial phase of the criminal process,” although not from suits relating to the prosecutor’s advice to police officers.

In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson*, we held that police officers are not absolutely immune from a § 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. Rather, we concluded that police officers could assert “the defense of good faith and probable cause” against the claim for an unconstitutional arrest because that defense was available against the analogous torts of “false arrest and imprisonment” at common law.

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. In the decisions following *Pierson*, we have “completely reformulated qualified immunity along principles not at all embodied in the common law.” Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff’s claim under § 1983, we instead grant immunity to any officer whose conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” We apply this “clearly established” standard “across the board” and without regard to “the precise nature of the various officials’ duties or the precise character of the particular rights alleged to have been violated. We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in “interpret[ing] the intent of Congress in enacting” the Act. Our qualified immunity precedents instead represent precisely the sort of “freewheeling policy choice[s]” that we have previously disclaimed the power to make. We have acknowledged, in fact, that the “clearly established” standard is designed to “protec[t] the balance between vindication of constitutional rights and government officials’ effective performance of their duties. The Constitution assigns this kind of balancing to Congress, not the Courts.

In today’s decision, we continue down the path our precedents have marked. We ask “whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted,” rather than whether officers in petitioners’ positions would have been accorded immunity at common law in 1871 from claims analogous to respondents.’ Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will

continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

- c. On June 4, 2020, 18 members of the House of Representatives introduced H.R. 7085, and on July 1, 2020, Senators Warren, Markey and Sanders introduced S. 4142, the Ending Qualified Immunity Act, both of which provided:

SEC 2. FINDINGS.

The congress finds as follows:

(1) In 1871, Congress passed the Ku Klux Klan Act to combat rampant violations of civil and constitutionally secured rights across the nation, particularly in the post-Civil war South.

(2) Included in the act was a provision, now codified at section 1983 of title 42, United States Code, which provides a cause of action for individuals to file lawsuits against state and local officials who violate their legal and constitutionally secured rights.

(3) Section 1983 has never included a defense or immunity for government officials who act in good faith when violating rights, nor has it ever had a defense or immunity based on whether the right was “clearly established” at the time of the violation.

(4) From the law’s beginning in 1871, through the 1960s, government actors were not afforded qualified immunity for violating rights.

(5) In 1967, the Supreme Court in *Pierson v. Ray*, 386 U.S. 547, suddenly found that government actors had a good faith defense for making arrests under unconstitutional statutes based on a common law defense for the tort of false arrest.

(6) The Court later extended this beyond false arrests, turning it into a general good faith defense for government officials.

(7) Finally, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court found the subjective search for good faith in the government actor unnecessary and replaced it with an “objective reasonableness” standard that requires the right to be “clearly established” at the time of the violation for the defendant to be liable.

(8) This doctrine of qualified immunity has severely limited the ability of many plaintiffs to recover damages under section 1983 when their rights have been violated by State and local officials. As a result, the intent of Congress in passing the law has been frustrated, and Americans’ rights secured by the Constitution have not been appropriately protected.

SEC 3. SENSE OF THE CONGRESS.

It is the sense of the Congress that we must correct the erroneous interpretation of section 1983 which provides for qualified immunity, and reiterate the standard found on the face of the statute, which does not limit liability on the basis of the defendant’s good faith beliefs or on the basis that the right was not “clearly established” at the time of the violation.

SEC. 4. REMOVAL OF QUALIFIED IMMUNITY.

Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding at the end the following: “It shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation by defendant, or that the state of the law was otherwise such that

the defendant could not reasonably have been expected to know whether his or her conduct was lawful.”

8. Does *Harlow* preclude any inquiry into the government official's subjective intent when plaintiff must prove that intent to establish a constitutional violation?

- a. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), an inmate filed a Section 1983 action alleging that prison officials had deliberately misdirected the transfer of his personal belongings and legal materials to punish the prisoner for exercising his First Amendment rights. The court of appeals adopted a special procedural rule for cases where the constitutionality of the defendant's action turns on motive, designed to fulfill *Harlow's* goal of protecting government officials from the burdens of litigation. In order to facilitate pretrial disposition of such cases, defendant would be entitled to judgment unless plaintiff established the unconstitutional motive by clear and convincing evidence, rather than by a preponderance of the evidence. The Supreme Court reversed. The Court first explained that the court of appeals' approach was not justified by either the holding or reasoning in *Harlow*:

Our holding that “bare allegations of malice” cannot overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation.

* * * * *

There are several reasons why we believe that here, unlike *Harlow*, the proper balance [between vindicating constitutional guarantees and shielding officials from the social costs of litigation] does not justify a judicial revision of the law to bar claims that depend on proof of an official's motive. . . . Under *Wood*, the mere allegation of intent to cause any “other injury,” not just a deprivation of constitutional rights, would have permitted an open-ended inquiry into subjective motivation. When intent is an element of a constitutional violation, however, the primary focus is not an any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff, or to deter public comment on a specific issue of public importance. . . . [E]xisting law already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial.

. . . First, there may be doubt as to the illegality of the defendant's particular conduct, for instance whether a plaintiff's speech was a matter of public concern. . . . Second, at least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation. . . . The reasoning in *Harlow*, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved.

Britton, 523 U.S. at 588-93. The Court then reasoned that the heightened burden of proof legislated by the court of appeals exceeded its judicial authority:

Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself. The same might be said of the qualified

immunity defense; but in *Harlow*, as in the series of earlier cases concerning both the absolute and the qualified immunity defenses, we were engaged in a process of adjudication that we had consistently and repeatedly viewed as appropriate for judicial decision—a process “predicated upon a considered inquiry into the immunity historically accorded the relevant officials at common law and the interests behind it.” The unprecedented change made by the Court of Appeals in this case, however, lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983—to provide a remedy for the violation of constitutional rights. . . . [Q]uestions regarding pleading, discovery and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.

Britton, 523 U.S. at 594-95. Are you persuaded by the Court’s explanation of its power to redefine the contours of the qualified immunity?

- b. While the Supreme Court refused to heighten the burden of proof in unconstitutional motive Section 1983 cases, the Court did catalog the procedural mechanisms that could assist trial courts to dispose of baseless claims:

The court may at first permit the plaintiff to take only a focused deposition of the defendant before allowing any additional discovery. Alternatively, the court may postpone all inquiry regarding the official’s subjective motive until discovery has been had on objective factual questions such as whether the plaintiff suffered any injury or whether the plaintiff actually engaged in protected conduct that could be the object of unlawful retaliation [T]he defendant-official may move for partial summary judgment on objective issues that are potentially dispositive and are more amenable to summary disposition than disputes about the official’s intent, which frequently turn on credibility assessments. Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as actions that the official actually took, since that defense should be resolved as early as possible.

Beyond these procedures and others that we have not mentioned, summary judgment serves as the ultimate screen to weed out truly insubstantial suits prior to trial. At that stage the plaintiff may not respond simply with general attacks upon the defendant’s credibility, but rather must identify affirmative evidence from which a jury could find that plaintiff has carried his or her burden of proving the pertinent motive. Finally, federal judges are undoubtedly familiar with two additional tools that are available in extreme cases to protect public officials from undue harassment: Rule 11, which authorizes sanctions for the filing of papers that are frivolous, lacking in factual support, or “presented for any improper purpose, such as to harass”; and 28 U.S.C. § 1915(e)(2) (1994 ed., Supp. II), which authorizes dismissal “at any time” of *in forma pauperis* suits that are “frivolous or malicious.”

Britton, 523 U.S. at 599-600.

C. When is a Right Clearly Established?

DAVIS v. SCHERER, 468 U.S. 183 (1984)



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Escambia County Sheriff Office Car. Cole Johnson.
NorthEscambia.com

Justice Powell delivered the opinion of the Court.

[1] Appellants in this case challenge the holding of the Court of Appeals that a state official loses his qualified immunity from suit for deprivation of federal constitutional rights if he is found to have violated the clear command of a state administrative regulation.

I

[2] Appellee's complaint alleged that appellants in 1977 had violated the Due Process Clause of the Fourteenth Amendment by discharging appellee from his job without a formal pretermination or a prompt post-termination hearing. Appellee requested a declaration that his rights had been violated and an award of money damages.

[3] The District Court granted the requested relief for violation of appellee's Fourteenth Amendment rights. The court found that appellee had a property interest in his job and that the procedures followed by appellants to discharge appellee were constitutionally "inadequate" under the Fourteenth Amendment. *Id.* at 14. Further, the court declared unconstitutional Florida's statutory provisions governing removal of state employees, FLA. STAT. § 110.061 (1977). Finally, the District Court concluded that appellants had forfeited their qualified immunity from suit under § 1983 because appellee's "due process rights were clearly established at the time of his October 24, 1977, dismissal." *Id.*, at 16.

[4] Five days after entry of the District Court's order, the Court of Appeals for the Fifth Circuit decided

Weisbrod v. Donigan, 651 F.2d 334 (1981). The Court of Appeals there held that Florida officials in 1978 had violated no well-established due process rights in discharging a permanent state employee without a pretermination or a prompt post-termination hearing. On motion for reconsideration, the District Court found that *Weisbrod* required it to vacate its prior holding that appellants had forfeited their immunity by violating appellee's clearly established constitutional rights. The court nevertheless reaffirmed its award of monetary damages. It reasoned that proof that an official had violated clearly established constitutional rights was not the "sole way" to overcome the official's claim of qualified immunity.

[5] Applying the "totality of the circumstances" test of *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974), the District Court held that "if an official violates his agency's explicit regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable." 543 F. Supp. at 19. In this respect, the court noted that the personnel regulations of the Florida Highway Patrol clearly required "a complete investigation of the charge and an opportunity [for the employee] to respond in writing." *Id.* at 20.^[1] The District Court concluded that appellants in discharging appellee had "followed procedures contrary to the department's rules and regulations"; therefore, appellants were "not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable." *Ibid.* The court explicitly relied upon the official violation of the personnel regulation, stating that "[if] [the] departmental order had not been adopted ... prior to [appellee's] dismissal, no damages of any kind could be awarded." *Ibid.* The District Court's order amending the judgment did not discuss the issue whether appellants violated appellee's federal constitutional rights. On that issue, the District Court relied upon its previous opinion; the court did not indicate that the personnel regulation was relevant to its analysis of appellee's rights under the Due Process Clause.

[6] The District Court also amended its judgment declaring the Florida civil service statute unconstitutional. The State's motion for reconsideration had informed the court that the statute had been repealed by the Florida Legislature. The District Court therefore declared unconstitutional the provisions of the newly enacted civil service statute, FLA. STAT., ch. 110 (1982 and Supp. 1983), insofar as "they fail to provide a prompt post-termination hearing." *Id.* at 21.

[7] The Court of Appeals affirmed on the basis of the District Court's opinion. *Scherer v. Graham*, 710 F.2d 838 (CA11 1983). We noted probable jurisdiction, 464 U.S. 1017 (1983), to consider whether the Court of Appeals properly had declared the Florida statute unconstitutional and denied appellants' claim of qualified immunity. Appellants do not seek review of the District Court's finding that appellee's constitutional rights were violated. As appellee now concedes that the District Court lacked jurisdiction to adjudicate the constitutionality of the Florida statute enacted in 1981, we consider only the issue of qualified immunity.^[2] We reverse.

II

[8] In the present posture of this case, the District Court's decision that appellants violated appellee's rights under the Fourteenth Amendment is undisputed.^[3] This finding of the District Court—based entirely upon federal constitutional law—resolves the merits of appellee's underlying claim for relief under § 1983. It does not, however, decide the issue of damages. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. The precise standard for determining when an official may assert the qualified immunity defense has been clarified by recent cases, see *Wood v. Strickland*, 420 U.S. 308 (1975); *Butz v. Economou*, 438 U.S. 478 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The present case requires us to consider the application of the standard where the official's conduct violated a state regulation as well as a provision of the Federal Constitution.

[9] The District Court's analysis of appellants' qualified immunity, written before our decision in *Harlow v. Fitzgerald*, *supra*, rests upon the "totality of the circumstances" surrounding appellee's separation from

his job. This Court applied that standard in *Scheuer v. Rhodes*, 416 U.S. at 247-248. As subsequent cases recognized, *Wood v. Strickland*, *supra*, at 322, the “totality of the circumstances” test comprised two separate inquiries: an inquiry into the objective reasonableness of the defendant official’s conduct in light of the governing law, and an inquiry into the official’s subjective state of mind. *Harlow v. Fitzgerald*, *supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials “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.” 457 U.S. at 818. Whether an official may prevail in his qualified immunity defense depends upon the “objective reasonableness of [his] conduct as measured by reference to clearly established law.” *Ibid.* (footnote deleted). No other “circumstances” are relevant to the issue of qualified immunity.

[10] Appellee suggests, however, that the District Court judgment can be reconciled with *Harlow* in two ways. First, appellee urges that the record evinces a violation of constitutional rights that were clearly established. Second, in appellee’s view, the District Court correctly found that, absent a violation of clearly established constitutional rights, appellants’ violation of the state administrative regulation—although irrelevant to the merits of appellee’s underlying constitutional claim—was decisive of the qualified immunity question. In our view, neither submission is consistent with our prior cases.

A

[11] Appellee contends that the District Court’s reliance in its qualified immunity analysis upon the state regulation was “superfluous,” Brief for Appellee 19, because the federal constitutional right to a pretermination or a prompt post-termination hearing was well established in the Fifth Circuit at the time of the conduct in question. As the District Court recognized in rejecting appellee’s contention, *Weisbrod v. Donigan*, 651 F.2d 334 (CA5 1981), is authoritative precedent to the contrary. The Court of Appeals in that case found that the State had violated no clearly established due process right when it discharged a civil service employee without *any* pretermination hearing.^[4]

[12] Nor was it unreasonable in this case, under Fourteenth Amendment due process principles, for the Department to conclude that appellee had been provided with the fundamentals of due process.^[5] As stated above, the District Court found that appellee was informed several times of the Department’s objection to his second employment and took advantage of several opportunities to present his reasons for believing that he should be permitted to retain his part-time employment despite the contrary rules of the Patrol. Appellee’s statement of reasons and other relevant information were before the senior official who made the decision to discharge appellee. And Florida law provided for a full evidentiary hearing after termination. We conclude that the District Court correctly held that appellee has demonstrated no violation of his *clearly established* constitutional rights.

B

[13] Appellee’s second ground for affirmance in substance is that upon which the District Court relied. Appellee submits that appellants, by failing to comply with a clear state regulation, forfeited their qualified immunity from suit for violation of federal constitutional rights.

[14] Appellee makes no claim that the appellants’ violation of the state regulation either is itself actionable under § 1983 or bears upon the claim of constitutional right that appellee asserts under § 1983.^[6] And appellee also recognizes that *Harlow v. Fitzgerald* makes immunity available only to officials whose conduct conforms to a standard of “objective legal reasonableness.” 457 U.S., at 819. Nonetheless, in appellee’s

view, official conduct that contravenes a statute or regulation is not “objectively reasonable” because officials fairly may be expected to conform their conduct to such legal norms. Appellee also argues that the lawfulness of official conduct under such a statute or regulation may be determined early in the lawsuit on motion for summary judgment. Appellee urges therefore that a defendant official’s violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions.

[15] On its face, appellee’s reasoning is not without some force. We decline, however, to adopt it. Even before *Harlow*, our cases had made clear that, under the “objective” component of the good-faith immunity test, “an official would not be held liable in damages under § 1983 unless *the constitutional right he was alleged to have violated* was ‘clearly established’ at the time of the violation.” *Butz v. Economou*, 438 U.S., at 498 (emphasis added); accord, *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.^[7]

[16] We acknowledge of course that officials should conform their conduct to applicable statutes and regulations. For that reason, it is an appealing proposition that the violation of such provisions is a circumstance relevant to the official’s claim of qualified immunity. But in determining what circumstances a court may consider in deciding claims of qualified immunity, we choose “between the evils inevitable in any available alternative.” *Harlow v. Fitzgerald*, 457 U.S., at 813-814. Appellee’s submission, if adopted, would disrupt the balance that our cases strike between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated. See *Butz v. Economou*, *supra*, at 506-507; *Harlow v. Fitzgerald*, *supra*, at 814, 818-819. Yet, under appellee’s submission, officials would be liable in an indeterminate amount for violation of any constitutional right—one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation—merely because their official conduct also violated some statute or regulation. And, in § 1983 suits, the issue whether an official enjoyed qualified immunity then might depend upon the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment.

[17] Appellee proposes that his new rule for qualified immunity be limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights. Yet, once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner. Federal judges would be granted large discretion to extract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct,^[8] but also for trial courts to decide even frivolous suits without protracted litigation.

[18] Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, “often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.” See P. SCHUCK, *SUING GOVERNMENT* 66 (1983). In these circumstances, officials should not err always on the side of caution. “[Officials] with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.” *Scheuer v. Rhodes*, 416 U.S., at 246.^[9]

III

[19] A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. As appellee has made no such showing, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Stevens join, concurring in part and dissenting in part.

[20] In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court decided that Government officials seeking to establish qualified immunity must show that the acts or omissions violating the plaintiff's rights were objectively reasonable—specifically, that the conduct at issue did not “violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.*, at 818. The Court today does not purport to change that standard. Yet it holds that, despite discharging a civil service employee in 1977 without meaningful notice and an opportunity to be heard, appellants are entitled to immunity from a suit for damages. The Court reaches this decision essentially by ignoring both the facts of this case and the law relevant to appellants' conduct at the time of the events at issue. In my view, appellants plainly violated appellee's clearly established rights and the Court's conclusion to the contrary seriously dilutes *Harlow's* careful effort to preserve the availability of damages actions against governmental officials as a critical “avenue for vindication of constitutional guarantees.” *Id.*, at 814. Accordingly, I dissent from that portion of the judgment reversing the award of damages.

[21] In order to determine whether a defendant has violated a plaintiff's clearly established rights, it would seem necessary to make two inquiries, both of which are well within a court's familiar province: (1) which particular act or omission of the defendant violated the plaintiff's federal rights, and (2) whether governing case or statutory law would have given a reasonable official cause to know, at the time of the relevant events, that those acts or omissions violated the plaintiff's rights. The Court, however, asks neither question. Its brief treatment of the issue includes no reference to the District Court's findings of fact with respect to the conduct at issue here. This is not surprising since those findings—which were affirmed summarily by the Court of Appeals and which appellants do not claim to be clearly erroneous—demonstrate that appellee was never informed that he might be fired for violating regulations against dual employment. Nor did appellee ever have an opportunity to persuade the relevant decisionmaker that he should not be disciplined.

[22] By failing to warn appellee that his conduct could result in deprivation of his protected property interest in his Highway Patrol job and by denying him an opportunity to challenge that deprivation, appellants violated the most fundamental requirements of due process of law—meaningful notice and a reasonable opportunity to be heard. Contrary to the Court's conclusion, these requirements were “clearly established” long before October 25, 1977, the date on which appellee learned he was fired. As long ago as 1914, the Court emphasized that “[the] fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394. In 1925, the Court explained that a government failure to afford reasonable notice of the kinds of conduct that will result in deprivations of liberty and property “violates the first essential of due process of law.” *Connally v. General Construction Co.*, 269 U.S. 385, 391. And in several decisions in the 1950's, the Court concluded that public employees have interests in maintaining their jobs

that cannot be abridged without due process. *E.g.*, *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); see *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972).

[23] In January 1972, nearly six years prior to appellee's termination, the Court reaffirmed that

"[before] a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie v. Connecticut*, 401 U.S. 371, 379. 'While "[many] controversies have raged about ... the Due Process Clause," ... it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest ..., it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.' *Bell v. Burson*, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e.g.*, *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566; *Phillips v. Commissioner*, 283 U.S. 589, 597; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594." *Board of Regents v. Roth*, *supra*, at 570, n.7.

[24] Similarly, in 1974, based on an exhaustive review of our cases, Justice White explained that "where there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State in the administration of its law, that a person be given notice and a hearing before he is finally discharged." *Arnett v. Kennedy*, 416 U.S. 134, 185 (concurring in part and dissenting in part). See *id.*, at 170 (opinion of Powell, J.); *id.*, at 203 (Douglas, J., dissenting); *id.*, at 212-227 (Marshall, J., dissenting). And finally, in February 1976, more than a year and a half prior to appellee's termination, Justice Powell summarized for the Court fundamental legal principles whose sources could be traced to cases from the 19th century:

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). See, *e.g.*, *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). See also *Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)." *Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976).

See also *Goss v. Lopez*, 419 U.S. 565 (1975); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971) (*per curiam*); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

[25] If there were any ambiguity in the repeated pronouncements of this Court, appellants had several other reasons to know that their failure to afford appellee meaningful pretermination notice and hearing violated due process. Two years prior to appellee's discharge, the Florida Attorney General explained in an official opinion that "[career] service employees who have attained permanent status in the career service system have acquired a property interest in their public positions and emoluments thereof—such as job security and seniority which they may not be deprived of without due process of law." Fla. Op. Atty. Gen. 075-94, p. 161 (1975). And more than a year before the events at issue here, in a case involving the Jacksonville, Fla., City Civil Service Board, the Court of Appeals for the Fifth Circuit left no doubt as to what it thought "clearly established" law required:

"Where a governmental employer chooses to postpone the opportunity of a nonprobationary employee to

secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.” *Thurston v. Dekle*, 531 F.2d 1264, 1273 (1976), *vacated and remanded on other grounds*, 438 U.S. 901 (1978).

[26] Finally, some two months prior to appellee’s discharge, the Florida Highway Patrol issued a regulation undoubtedly intended to conform administrative practice with decisions like *Thurston*.^[10] The regulation, which has the force of statutory law, see 543 F. Supp., at 20, provides in pertinent part:

“Upon receiving a report of ... a violation of Department or Division rules and regulations ... the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a ... dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.” General Order No. 43, § 1.C (Sept. 1, 1977), *quoted in* 543 F. Supp., at 19-20.

[27] The Court ignores most of this evidence demonstrating the objective unreasonableness of appellants’ conduct. Instead, the Court relies first on *Weisbrod v. Donigan*, 651 F.2d 334 (CA5 1981) (per curiam), as “authoritative precedent” for the proposition that appellee’s right to pretermination notice and a hearing was not “well established in the Fifth Circuit at the time of the conduct in question.” *Ante*, at 192. In *Weisbrod*, the Court of Appeals simply declared—without citation to any of the cases just discussed, including its own decision in *Thurston*—that “the record indicates defendants did not act in disregard of any well-settled constitutional rights” and that “*Weisbrod* offers no authority indicating the failure to hold a pretermination hearing and the delay in the process of her administrative appeal were clear violations of her constitutional rights.” 651 F.2d, at 336. It is unclear from the court’s brief per curiam opinion whether *Weisbrod*—unlike appellee in this case—was informed prior to discharge that her conduct constituted grounds for termination. See *id.*, at 335. In any event, the Court of Appeals’ dubious and cursory *ipse dixit* in *Weisbrod*, rendered four years after the conduct at issue in this case, is hardly persuasive, much less controlling, authority for this Court’s decision that appellee’s rights were not clearly established in 1977.

[28] The other basis for the Court’s rejection of appellee’s claim is an assertion that it was not “unreasonable in this case, under Fourteenth Amendment principles, for the Department to conclude that appellee had been provided with the fundamentals of due process.” *Ante*, at 192. The Court seeks to support this statement by relying on the fact that appellee had been told to discontinue his second job and that he “took advantage of several opportunities to present his reasons for believing that he should be permitted to retain his part-time employment.” *Ibid.* Appellee did not, however, have an opportunity to present his reasons for retaining his civil service job with the Florida Highway Patrol—the employment in which he had a protected property interest. See 543 F. Supp., at 12. Indeed, he was, according to the District Court, never told that his Highway Patrol job was in jeopardy, and he never had a chance to try to persuade the relevant decisionmaker that the second job did not create a conflict of interest. The Court concedes that our decisions by 1978 had required notice and “‘some kind of a hearing’ ... prior to discharge of an employee who had a constitutionally protected property interest in his employment.” *Ante*, at 192, n.10. In this case, appellee received no meaningful notice and no kind of hearing before the official who fired him.

[29] In sum, I believe that appellants’ actions “[violated] clearly established statutory or constitutional rights of which a reasonable person would have known,” *Harlow*, 457 U.S., at 818, and I would therefore affirm the District Court’s award of damages.



[Davis v. Scherer – Audio and Transcript of Oral Argument](#)

Footnotes

1. These regulations specified in pertinent part: “Upon receiving a report of ... a violation of Department or Division rules and regulations ..., the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a ... dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.” General Order No. 43, § 1.C (Sept. 1, 1977), quoted at 543 F. Supp., at 19-20. [↴](#)
2. The Florida civil service statute now in force replaced the statute under which appellee’s employment was terminated. As the current state statute was never applied to appellee, he lacks standing to question its constitutionality. Cf. *Golden v. Zwickler*, 394 U.S. 103 (1969). Appellee’s concession does not deprive the Court of appellate jurisdiction over the remaining issue in the case. In cases where the Court of Appeals has declared a state statute unconstitutional, this Court may decide the “Federal questions presented,” 28 U.S.C. § 1254(2). Cf. *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944); *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). Under § 1254(2), the Court retains discretion to decline to consider those issues in the case not related to the declaration that the state statute is invalid. In the present case, however, we choose to consider the important question whether the District Court and the Court of Appeals properly denied appellants’ good-faith immunity from suit. [↴](#)
3. As we discuss below, it is contested whether these constitutional rights were clearly established at the time of appellants’ conduct. [↴](#)
4. We see no reason to doubt, as does the partial dissent, that the Court of Appeals in *Weisbrod* had full knowledge of its own precedents and correctly construed them. [↴](#)
5. As the partial dissent explains at some length, the decisions of this Court by 1978 had required “some kind of a hearing,” *Board of Regents v. Roth*, 408 U.S. 564, 570, n.7 (1972), prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. Such a determination would require a careful balancing of the competing interests—of the employee and the State—implicated in the official decision at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As the Court had considered circumstances in which no hearing at all had been provided prior to termination, *Perry v. Sindermann*, 408 U.S. 593 (1972), or in which the requirements of due process were met, *Board of Regents v. Roth*, *supra*; *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Bishop v. Wood*, 426 U.S. 341 (1976); *Codd v. Velger*, 429 U.S. 624 (1977), there had been no occasion to specify any minimally acceptable procedures for termination of employment. The partial dissent cites no case establishing that appellee was entitled to more elaborate notice, or a more formal opportunity to respond, than he in fact received. [↴](#)
6. State law may bear upon a claim under the Due Process Clause when the property interests protected by the Fourteenth Amendment are created by state law. See *Board of Regents v. Roth*, *supra*, at 577. Appellee’s property interest in his job under Florida law is undisputed. Appellee does not contend here that

the procedural rules in state law govern the constitutional analysis of what process was due to him under the Fourteenth Amendment. [↴](#)

7. Harlow, the Court acknowledged that officials may lose their immunity by violating “clearly established statutory ... rights.” 457 U.S. at 818. This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in Harlow itself, see *id.*, at 820, n.36, and as in many § 1983 suits, see, e.g., *Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that § 1983 creates cause of action against state officials for violating federal statutes). For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages. And if a statute or regulation does give rise to a cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages caused by that violation. In the present case, as we have noted, there is no claim that the state regulation itself or the laws that authorized its promulgation create a cause of action for damages or provide the basis for an action brought under § 1983. Harlow was a suit against federal, not state, officials. But our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). See *Butz v. Economou*, 438 U.S. at 504. Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon. [↴](#)
8. Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally. [↴](#)
9. Appellee urges as well that appellants’ violation of the personnel regulation constituted breach of their “ministerial” duty—established by the regulation—to follow various procedures before terminating appellee’s employment. Although the decision to discharge an employee clearly is discretionary, appellee reasons that the Highway Patrol regulation deprived appellants of all discretion in determining what procedures were to be followed prior to discharge. Under this view, the Harlow standard is inapposite because this Court’s doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial, functions. Appellee’s contention mistakes the scope of the “ministerial duty” exception to qualified immunity in two respects. First, as we have discussed, breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee’s cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated. See *supra*, at 193-194, and n.12. In any event, the rules that purportedly established appellants’ “ministerial” duties in the present case left to appellants a substantial measure of discretion. Cf. *Amy v. The Supervisors*, 78 U.S. 136, 138 (1871); *Kendall v. Stokes*, 44 U.S. 87, 98 (1845). Appellants were to determine, for example, what constituted a “complete investigation” and a “thorough study of all information” sufficient to justify a decision to terminate appellee’s employment. See n.6, *supra*. And the District Court’s finding that appellants ignored a clear legal command does not bear on the “ministerial” nature of appellants’ duties. A law that fails to

specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused. *Cf. Kendall v. Stokes, supra*. [↴](#)

10. Because I believe appellants were not entitled to qualified immunity under the standards set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), I need not consider whether, as appellee contends, violation of the department regulation would defeat immunity for violating federal rights of which the officials had no reasonable knowledge. It seems plain to me, however, that the existence of the regulation is relevant to the *Harlow* analysis. Regardless of whether this Court or the Court of Appeals now thinks appellee's right to pretermination notice and hearing was not "clearly established" in 1977, the presence of a clear-cut regulation obviously intended to safeguard public employees' constitutional rights certainly suggests that appellants had reason to believe they were depriving appellee of due process. *Cf. Harlow, supra*, at 821 (Brennan, J., concurring). Such an objective basis of knowledge provides at least as reliable a measure of the reasonableness of official action as does a court's post hoc parsing of cases. See 457 U.S., at 815-819. [↴](#)

Notes on *Davis v. Scherer*

A. The Qualified Immunity Test

1. Did [Davis](#) answer whether the abrogation of the subjective tier of the qualified immunity in [Harlow v. Fitzgerald](#) applies to Section 1983 actions? See [Wilson v. Layne](#), 526 U.S. 603, 609 (1999) ("Although this case involves suits under both § 1983 and *Bivens*, the qualified immunity analysis is the same under either cause of action."). What was the plaintiff/appellee's position on the issue?

B. Sources of Law Relevant to Whether the Right Violated was Clearly Established

2. Why did the Court conclude that the defendants had not violated a clearly established due process right? What source(s) of law did the Court utilize in making this determination?
 - a. The *Davis* Court found that plaintiff had not suffered a clearly established deprivation of due process in part because of the Fifth Circuit's intervening decision in [Weisbrod v. Donigan](#), 651 F.2d 334 (5th Cir. 1981). The entirety of the Fifth Circuit's reasoning in *Weisbrod* is as follows:

As to the due process claims, Weisbrod offers no authority indicating the failure to hold a pretermination hearing and the delay in the processing of her administrative appeal were clear violations of her constitutional rights.

Id. at 336. Why didn't the *Weisbrod* court consider [Thurston v. Dekle](#), 531 F.2d 1264 (5th Cir. 1976), vacated and remanded on other grounds, [438 U.S. 901](#) (1978), discussed in Justice Brennan's dissenting opinion?

- b. Should defendants be permitted to claim immunity by relying upon a conflict in the law

developed after the unconstitutional action? See [Stanton v. Sims](#), 571 U.S. 3 (2013) (per curiam) (citing post-arrest district court case to reinforce finding that it was not clearly established that warrantless entry to arrest fleeing suspect for a misdemeanor was unconstitutional); [Reichle v. Howard](#), 566 U.S. 658 (2012) (invoking post-arrest decisions of other federal courts of appeals to support finding that Tenth Circuit precedents did not clearly establish that retaliatory arrest supported by probable cause could violate First Amendment); [Wilson v. Layne](#), 526 U.S. 603, 618 (1999) (“Between the time of the events of this case and today’s decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”).

- c. May the *plaintiff* offer decisions rendered after the constitutional violation giving rise to the Section 1983 action to prove that the right was clearly established? See *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021) (per curiam) (reversing denial of qualified immunity; “*Estate of Ceballos*, decided after the shooting at issue, is of no use in the clearly established inquiry.”); [Plumhoff v. Rickard](#), 527 U.S. 765 (2014) (to defeat qualified immunity, plaintiff must show unconstitutionality of shooting driver of fleeing car was clearly established by case law as of the time of the shooting); [Brosseau v. Haugen](#), 543 U.S. 194, 200 n.4 (2004) (“The parties point us to a number of other cases in this vein that postdate the conduct in question [citations omitted]. These decisions, of course, could not have given fair notice to [defendant] Brosseau and are of no use in the clearly established inquiry.”); [Davis v. United States](#), 564 U.S. 229 (2011) (good-faith exception to the exclusionary rule requires denying suppression of evidence obtained by a warrantless search that complied with binding appellate precedent at time of search, even though Supreme Court overruled those precedents two years after the search).
3. In determining whether a right is clearly established, is the court limited to considering the cases cited by the parties? In [Elder v. Holloway](#), 510 U.S. 510 (1994), the district court found police officers entitled to qualified immunity in plaintiff’s Section 1983 action alleging an unreasonable seizure. Contrary to the district court’s conclusion that there was no controlling case law, the Ninth Circuit had decided a case that was relevant to the constitutionality of the officers’ actions. The court of appeals declined to consider the precedent in reviewing the conferral of immunity, interpreting [Davis v. Scherer](#) to place the burden on the plaintiff to put into the trial record the “legal facts” showing that the right asserted was clearly established.

The Supreme Court reversed, reasoning as follows:

The central purpose of affording public officials qualified immunity from suit is to protect them “from undue interference with their duties and from potentially disabling threats of liability.” The rule announced by the Ninth Circuit does not aid this objective because its operation is unpredictable in advance of the district court’s adjudication. Nor does the rule further the interests on the other side of the balance: deterring public officials’ unlawful actions and compensating victims of such conduct. Instead, it simply releases defendants because of shortages in counsel’s or the court’s legal research or briefing.

Whether an asserted federal right was clearly established at a particular time ... presents a question of law, not one of “legal facts.” That question of law, like the generality of such questions, must be resolved *de novo* on appeal. A court engaging in review of a qualified

immunity judgment should therefore use its “full knowledge of its own [and other relevant] precedents.”

Id. at 514-16 (citations omitted). Under the *Elder* rule, was the due process right in *Scherer* clearly established under Fifth Circuit precedents?

4. What sources of law may a court consult in determining whether the constitutional right in issue was clearly established?
- a. In [*District of Columbia v. Wesby*](#), 138 S. Ct. 577 (2018), five District of Columbia police officers, responding to a complaint, arrested and charged 21 partygoers. After the charges were dropped, sixteen of those arrested sued the police officers for false arrest in violation of the Fourth Amendment. The court of appeals affirmed the district court’s grant of summary judgment to plaintiffs, concluding that the officers lacked probable cause to arrest the partygoers for unlawful entry. The court also denied immunity, finding that the officers knew or should have known that to establish probable cause, they needed evidence that the partygoers knew or should have known that their entry into the home where the party was held was against the will of the owner. The Supreme Court reversed. After finding the officers had probable cause, the Court exercised its discretion to correct error and ruled further that the court of appeals mistakenly denied immunity. Noting the court of appeals had simply relied on one of its precedents, the Court observed in a footnote:

We have not yet decided what precedents—other than our own—qualify as a controlling authority for purposes of qualified immunity. See, e.g., *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving the question whether court of appeals decisions can be “a dispositive source of clearly established law.”). We express no view on that question here.

Id. at 591. See also *Rivas-Villegas v. Cortesluna*, 595 U.S. ____ (2021) (per curiam) (“Even assuming that controlling Circuit precedent clearly establishes law for purposes of § 1983, *LaLonde* did not give fair notice to Rivas-Villegas”); [Antiterrorism and Effective Death Penalty Act of 1996](#), 28 U.S.C. § 2254(d) (Application for writ of habeas corpus with respect to claim adjudicated in state court proceeding shall not be granted unless decision “was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States”); [Lopez v. Smith](#), 574 U.S. 1 (2014) (per curiam) (Where no United States Supreme Court precedent clearly establishes legal proposition, court of appeals erred in relying on its own precedent to grant federal habeas relief on ground that state court misapplied federal law).

- b. May district court decisions render a right clearly established? In [Ashcroft v. al-Kidd](#), 563 U.S. 731 (2011), the court of appeals held that Attorney General Ashcroft violated clearly established law by authorizing law enforcement officials to use the federal material witness statute as a pretext to detain individuals suspected of links to terrorist organizations. The court of appeals found that because of a footnote in a district court opinion, Attorney General Ashcroft had fair warning that his conduct violated the Fourth Amendment. That footnote expressly repudiated the legality of Ashcroft’s reported statements advocating aggressive use of the material witness statute to prevent new acts of terrorism. The court of appeals reasoned that the footnote “was categorical, and it addressed *exactly* what al-Kidd alleges happened ten months after the opinion was first issued.” [al-Kidd v. Ashcroft](#), 580 F.3d 949, 972 (8th Cir. 2009). The Supreme Court reversed, holding Ashcroft was entitled to qualified immunity. The Court rejected the

court of appeals' reliance on the district court opinion:

We will indulge the assumption (though it does not seem to us realistic) that the Justice Department lawyers bring to the Attorney General's personal attention all district judges' footnoted specifications that boldly "call him out by name." On that assumption, would it prove that for him (and for him only?) it became clearly established that pretextual use of the material-witness statute rendered the arrest constitutional? An extraordinary proposition. Even a district judge's *ipse dixit* of a holding is not "controlling authority" in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust "consensus of cases of persuasive authority."

Ashcroft, 563 U.S. at 741. In a concurring opinion, Justice Kennedy asserted that the stature of the office was relevant to whether case law in a single district could clearly establish a right:

Some federal officers perform their functions in a single jurisdiction, say within the confines of one state or one federal district. They "reasonably can anticipate when their conduct may give rise to liability for damages" and so are expected to adjust their behavior in accordance with local precedent. In contrast, the Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country.

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule ... [T]oo expansive a view of "clearly established law" would risk giving local judicial determinations the effect of rules with *de facto* national significance, contrary to the normal process of ordered appellate review.

Ashcroft, 563 U.S. at 746 (Kennedy, J. concurring). See [Greason v. Kemp](#), 891 F.2d 829, 833 (11th Cir. 1990). ("To decide whether ... prisoners had a clearly established constitutional right to psychiatric care, we look to the law established by the Supreme Court, the courts of appeals, and the district courts.")

- c. May decisions of other circuit courts of appeals be consulted in determining whether a right is clearly established? See [Taylor v. Barks](#), 575 U.S. 822 (2015) (per curiam) (citing cases decided by United States Courts of Appeal in the Sixth, Eleventh, Fifth, and Fourth Circuits to find Third Circuit erred in holding its own precedents clearly established the right); [Carroll v. Carman](#), 574 U.S. 13 (2014) (per curiam) (reversing Third Circuit's denial of immunity based on single case from that court, citing contradictory decisions of sister courts of appeal and New Jersey Supreme Court); [Lane v. Franks](#), 573 U.S. 228 (2014) (refusing to consider precedents from other circuit courts of appeal where there is discrepancy among decisions of controlling circuit); [Plumhoff v. Rickard](#), 572 U.S. 765, 779 (2014) (to defeat immunity, plaintiff must show unconstitutionality of use of deadly force to end high speed chase was established by "controlling authority" or a "robust consensus of cases of persuasive authority."); [Cleveland-Perdue v. Brutsche](#), 881 F.2d 427, 431 (7th Cir. 1989). ("In the absence of a controlling precedent we look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful.... This approach makes eminent sense for it precludes an official from escaping liability for

unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue.”); [Jean v. Collins](#), 155 F.3d 701, 709 (4th Cir. 1998) (“The very immensity of American jurisprudence creates the distinct likelihood that jurisdictions will offer conflicting opinions over how government officials should carry out their tasks. To hold officials responsible for sorting out these conflicts could generate widespread confusion over the scope of official obligations. Ordinarily, therefore, courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular time.”).

- d. Are unpublished opinions relevant to whether a right is clearly established? See [Prison Legal News v. Cook](#), 238 F.3d 1145, 1152 (9th Cir. 2001) (“Although unpublished decisions carry no precedential weight, Departmental officials may have relied on these decisions to inform their view on whether the regulation was valid and whether enforcing it would be lawful.”)
 - e. May the court consider cases from the state supreme court? See [Courson v. McMillian](#), 939 F.2d 1479, 1498 n.32 (11th Cir. 1991). (“Clearly established law in this circuit may include court decisions of the highest state court in the states that comprise this circuit as to those respective states, when the state supreme court has addressed a federal constitutional issue that has not been addressed by the United States Supreme Court or the Eleventh Circuit.”)
5. Does the fact that courts have generated conflicting results render the right *per se* not clearly established? In [Stanton v. Sims](#), 571 U.S. 3 (2013) (per curiam), the Court reversed the denial of immunity to a police officer who had injured the plaintiff while making a warrantless entry and pursuing an individual who had ignored the officer’s order to stop:

To summarize the law at the time Stanton made his split-second decision to enter Sims’ yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeals affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided.

[W]hether or not the constitutional rule applied by the court below was correct, it was not “beyond debate.” Stanton may have been mistaken in believing his actions were justified, but he was not “plainly incompetent.”

Id. at 10-11. See also [Safford Unified Sch. Dist. v. Redding](#), 557 U.S. 364, 366 (2009) (“We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state courts, and the fact that a single judge, or even a group of judges disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law.”); [Wilson v. Layne](#), 526 U.S. 603, 617 (1999) (“Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction ... nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”); [Lum v. Jensen](#), 876 F.2d 1385, 1398 (9th Cir. 1989) (“[T]he absence of a binding precedent in the circuit plus the conflict between the circuits is sufficient, under the circumstances of this case, to undermine the

clearly established nature of this right.”); [Garcia v. Miera](#), 817 F.2d 650, 658 (10th Cir. 1987) (“[T]o give preclusive effect to a conflict among the circuits would effectively bind this circuit by decisions of others. Moreover, the binding would always be in denigration of the constitutional right in issue.”).

6. On what basis did the *Davis* Court find the state regulation to be irrelevant in determining whether the state officials were immune?
 - a. As a behavioral matter, what role do state regulations likely play in a government official's belief in whether his actions comport with the federal Constitution? Does *Davis* correspond with the expected decision-making process of government officials?
 - b. Does *Davis* preclude a state or local official from offering evidence that state regulations authorize or do not proscribe her conduct in order to support a claim to qualified immunity? See [Pierson v. Ray](#), *supra*.
 - i. In [Roska v. Peterson](#), 328 F.3d 1230, 1251-53 (10th Cir. 2003), the court of appeals explained the salience of state law to a government official's entitlement to qualified immunity:

Once the district court determines that the right at issue was “clearly established,” it becomes defendant's burden to prove that her conduct was nonetheless objectively reasonable....

In considering the “objective legal reasonableness” of the state officer's actions, one relevant factor is whether defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question. Of course, an officer's reliance on an authorizing statute does not render the conduct per se reasonable. Rather, “the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.”

[I]n considering the relevance of a statute under a qualified- immunity analysis, the appropriate inquiry is not whether a reasonable state officer could have concluded that the statute authorized the unconstitutional conduct in question. Rather, a court must consider whether reliance on the statute rendered the officer's conduct “objectively reasonable,” considering such factors as: (1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional.

See also [Vives v. City of New York](#), 405 F.3d 115 (2d Cir. 2004) (for purposes of qualified immunity, state officials are entitled to rely upon presumptively valid state statute unless and until statute is explicitly held unconstitutional except where law is so grossly and flagrantly unconstitutional that person of reasonable prudence would be aware of its flaws).

- ii. In [Wilson v. Layne](#), 526 U.S. 603, 617 (1999), the Supreme Court relied in part on internal policies to hold that police officers were immune for inviting representatives of the media to accompany them in executing arrest warrants in private homes:

[I]mportant to our conclusion was the reliance by the United States marshals in

this case on a Marshal's Service ride-along policy which explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests. The Montgomery County Sheriff's Department also at this time had a ride-along program that did not explicitly prohibit media entry into private homes.... Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies.

- c. May plaintiff rely upon internal policies to support the argument that the right in issue was clearly established? Will plaintiff even have the opportunity to discover such policies under the Court's immunity jurisprudence? In [Groh v. Ramirez](#), 540 U.S. 551 (2004), the Supreme Court affirmed denial of qualified immunity to an agent of the Bureau of Alcohol, Tobacco and Firearms who executed a warrant that failed to include the identity of the items to be seized that were set forth in the probable cause affidavit provided to the issuing magistrate. In support of its finding that no reasonable official could have believed the warrant to be valid, the Court noted that "an ATF directive in force at the time of this search warned: 'Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate.'" *Id.* at 564. In a footnote, however, the Court cautioned:

We do not suggest that an official is deprived of qualified immunity whenever he violates an internal guideline. We refer to the ATF Order only to underscore that petitioner should have known that he should not execute a patently defective warrant.

Id. at 564, n.7. See also [Hope v. Pelzer](#), 536 U.S. 730, 743-44 (2002) (finding Alabama Department of Corrections regulation limiting conditions under which prisoner may be handcuffed to hitching post as sanction for refusing to work relevant to whether prior cases afforded fair warning that conduct violated Constitution); [Anaya v. Crossroads Managed Care Systems, Inc.](#), 195 F.3d 584, 595 (10th Cir. 1999) ("[W]hile we do not look to state law in determining the scope of federal rights, the fact that the Colorado Supreme Court and legislature limited the power of the police over the intoxicated in precisely the manner the Fourth Amendment would limit such power is indicative of the degree to which the Fourth Amendment limit was established.").

ANDERSON v. CREIGHTON, 483 U.S. 635 (1987)

SEARCH WARRANT
G.L. c. 276, §§ 1-7

TRIAL COURT OF MASSACHUSETTS
DISTRICT
ATTLEBORO
DIVISION

SEARCH WARRANT DOCKET NUMBER
135750450

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is PROBABLE CAUSE to believe that the property described below.

☐ has been stolen, embezzled, or obtained by false pretenses.
☐ is intended for use or has been used as the means of committing a crime.
☒ has been concealed to prevent a crime from being discovered.
☐ is unlawfully possessed or concealed for an unlawful purpose.
☒ is evidence of a crime or is evidence of criminal activity.
☐ other (specify) _____

YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:
A SAMSUNG CELLULAR "FLIP" STYLE TELEPHONE, DARK IN COLOR, WITH A DISPLAY WINDOW ON THE EXTERIOR FACE OF THE TELEPHONE. THIS STYLE CELLULAR TELEPHONE IS SIMILAR TO THE SAMSUNG SCH V365 MODEL

Search Warrant



FBI

Justice Scalia delivered the opinion of the Court.

[1] The question presented is whether a federal law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment.

I

[2] Petitioner Russell Anderson is an agent of the Federal Bureau of Investigation. On November 11, 1983, Anderson and other state and federal law enforcement officers conducted a warrantless search of the home of respondents, the Creighton family. The search was conducted because Anderson believed that Vadaain Dixon, a man suspected of a bank robbery committed earlier that day, might be found there. He was not.

[3] The Creightons later filed suit against Anderson in a Minnesota state court, asserting among other things a claim for money damages under the Fourth Amendment, see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). After removing the suit to Federal District Court, Anderson filed a motion to dismiss or for summary judgment, arguing that the *Bivens* claim was barred by Anderson's qualified immunity from civil damages liability. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Before any discovery took place, the District Court granted summary judgment on the ground that the search was lawful, holding that the undisputed facts revealed that Anderson had had probable cause to search the Creighton's home and that his failure to obtain a warrant was justified by the presence of exigent circumstances. App. to Pet. for Cert. 23a-25a.

[4] The Creightons appealed to the Court of Appeals for the Eighth Circuit, which reversed. *Creighton v. St. Paul*, 766 F.2d 1269 (1985). The Court of Appeals held that the issue of the lawfulness of the search could not properly be decided on summary judgment, because unresolved factual disputes made it impossible to determine as a matter of law that the warrantless search had been supported by probable cause and exigent circumstances. *Id.* at 1272-1276. The Court of Appeals also held that Anderson was not entitled to summary judgment on qualified immunity grounds, since the right Anderson was alleged to have violated—the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances—was clearly established. *Ibid.*

[5] Anderson filed a petition for certiorari, arguing that the Court of Appeals erred by refusing to consider his argument that he was entitled to summary judgment on qualified immunity grounds if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful. We granted the petition, 478 U.S. 1003 (1986), to consider that important question.

II

[6] When government officials abuse their offices, “action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow v. Fitzgerald*, 457 U.S. at 814. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”); *id.* at 344-345 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless “the law clearly proscribed the actions” they took); *Davis v. Scherer*, 468 U.S. 183, 191 (1984); *id.* at 198 (Brennan, J., concurring in part and dissenting in part); *Harlow v. Fitzgerald*, *supra*, at 819. Cf., e.g., *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the

“objective legal reasonableness” of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were “clearly established” at the time it was taken, *id.* at 818.

[7] The operation of this standard, however, depends substantially upon the level of generality at which the relevant “legal rule” is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation.

But if the test of “clearly established law” were to be applied at this level of generality, it would bear no relationship to the “objective legal reasonableness” that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy “the balance that our cases strike between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties,” by making it impossible for officials “reasonably [to] anticipate when their conduct may give rise to liability for damages.” *Davis, supra* at 195.^[1]

It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell, supra*, at 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent. See, e.g., *Malley, supra*, at 344-345; *Mitchell, supra*, at 528; *Davis, supra*, at 191, 195.

[8] Anderson contends that the Court of Appeals misapplied these principles. We agree. The Court of Appeals’ brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated—the right to be free from warrantless searches of one’s home unless the searching officers have probable cause and there are exigent circumstances—was clearly established. The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson’s search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable. See *Malley, supra*, at 344-345. The same is true of their conclusions regarding exigent circumstances.

[9] It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. But contrary to the Creightons’ assertion, this does not reintroduce into qualified immunity analysis the inquiry into officials’ subjective intent that *Harlow* sought to minimize. See *Harlow*, 457 U.S. at 815-820. The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson’s subjective beliefs about the search are irrelevant.

[10] The principles of qualified immunity that we reaffirm today require that Anderson be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a matter of law, reasonably have believed that the search of the Creightons’ home was lawful.

[11] The Creightons argue that it is inappropriate to give officials alleged to have violated the Fourth Amendment—and thus necessarily to have *unreasonably* searched or seized—the protection of a qualified immunity intended only to protect reasonable official action. It is not possible, that is, to say that one “reasonably” acted unreasonably. The short answer to this argument is that it is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment. See *Malley, supra* (police officers alleged to have caused an unconstitutional arrest); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (officials alleged to have conducted warrantless wiretaps). Even if that were not so, however, we would still find the argument unpersuasive. Its surface appeal is attributable to the circumstance that the Fourth Amendment’s guarantees have been expressed in terms of “unreasonable” searches and seizures. Had an equally serviceable term, such as “undue” searches and seizures been employed, what might be termed the “reasonably unreasonable” argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term “reasonable process of law” had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution’s civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable, so that the Creightons’ objection, if it has any substance, applies to the application of *Harlow* generally. We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. See, e.g., *Malley, supra*, at 341. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

[12] For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.^[12]

It is so ordered.

Justice Stevens, with whom Justice Brennan and Justice Marshall join, dissenting.

[13] Concern for the depletion and diversion of public officials’ energies led the Court in *Harlow* to abolish the doctrine that an official would be deprived of immunity on summary judgment if the plaintiff alleged that the official had acted with malicious intent to deprive his constitutional rights. See, e.g., *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

[14] The Court’s decision today, however, fails to recognize that *Harlow*’s removal of one arrow from the plaintiff’s arsenal at the summary judgment stage did not also preclude the official from advancing a good-faith reasonableness claim at trial if the character of his conduct as established by the evidence warranted this strategy. The rule of the *Harlow* case, in contrast, focuses on *the character of the plaintiff’s legal claim* and, when properly invoked, protects the government executive from spending his time in depositions, document review, and conferences about litigation strategy. Consistently with this overriding concern to avoid “the litigation of the subjective good faith of government officials,” 457 U.S., at 816, *Harlow* does not allow discovery until the issue whether the official’s alleged conduct violated a clearly established constitutional right has been determined on a motion for summary judgment. *Id.*, at 818. *Harlow* implicitly assumed that

many immunity issues could be determined as a matter of law before the parties had exchanged depositions, answers to interrogatories, and admissions.^[13]

* * * * *

[15] The Court errs by treating a denial of immunity for failure to satisfy the *Harlow* standard as necessarily tantamount to a ruling that the defendants are exposed to damages liability for their every violation of the Fourth Amendment. Such a denial would not necessarily foreclose an affirmative defense based on the Second Circuit's thesis in *Bivens* that an officer may not be liable if his conduct complied with a lesser standard of reasonableness than the constitutional standard which it violated. The Court's failure to recognize that federal agents may retain a partial shield from damages liability, although not necessarily from pretrial and trial proceedings, leads it to the erroneous conclusion that petitioner must have *Harlow* immunity or else none at all save the Fourth Amendment itself.

[16] Part III, I explain why the latter alternative is appropriate. For now, I assert the more limited proposition that the Court of Appeals quite correctly rejected Anderson's claim that he is entitled to immunity under *Harlow*. *Harlow* does not speak to the extent, if any, of an official's insulation from monetary liability when the official concedes that the constitutional right he is charged with violating was deeply etched in our jurisprudence, but argues that he reasonably believed that *his* particular actions comported with the constitutional command.

* * * * *

[17] The Court of Appeals also was correct in rejecting petitioner's argument based on the holding in *Harlow* that the qualified-immunity issue ought to be resolved on a motion for summary judgment before any discovery has taken place. 457 U.S., at 818-819.^[14]

The Court of Appeals rejected this argument because it was convinced that the rule of law was clear. It also could have rejected the argument on an equally persuasive ground—namely, that the *Harlow* requirement concerning clearly established law applies to the rule on which the plaintiff relies, and that there was no doubt about the proposition that a warrantless entry into a home without probable cause is always unlawful. The court does not even reach the exigent-circumstances inquiry unless and until the defendant has shown probable cause and is trying to establish that the search was legal notwithstanding the failure of the police to obtain a warrant. Thus, if we assume that the Court of Appeals was correct in its conclusion that probable cause had not been established, it was also correct in rejecting petitioner's claim to *Harlow* immunity, either because the exigent-circumstances exception to the warrant requirement was clearly established, or because a warrantless entry into a home without probable cause is always unlawful whether or not exigent circumstances are present.

* * * * *

[18] The good-faith argument advanced by petitioner might support a judgment in his favor after there has been a full examination of the facts, but it is not the kind of claim to immunity, based on the tentativeness or nonexistence of the constitutional rule allegedly violated by the officer, that we accepted in *Harlow* or in *Mitchell*.

III

[19] Although the question does not appear to have been argued in, or decided by, the Court of Appeals, this Court has decided to apply a double standard of reasonableness in damages actions against federal agents who are alleged to have violated an innocent citizen's Fourth Amendment rights. By double standard I mean a standard that affords a law enforcement official two layers of insulation from liability or other adverse consequence, such as suppression of evidence. Having already adopted such a double standard in applying the exclusionary rule to searches authorized by an invalid warrant, *United States v. Leon*, 468 U.S. 897 (1984), the Court seems prepared and even anxious in this case to remove any requirement that the

officer must obey the Fourth Amendment when entering a private home. I remain convinced that in a suit for damages as well as in a hearing on a motion to suppress evidence, “an official search and seizure cannot be both ‘unreasonable’ and ‘reasonable’ at the same time.” *Id.* at 960 (Stevens, J., dissenting).

[20] Indeed, it is worth emphasizing that the probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work. The concept of probable cause leaves room for mistakes, provided always that they are mistakes that could have been made by a reasonable officer. See 1 W. LAFAVE, *SEARCH AND SEIZURE* 567 (2d ed. 1987).

[21] Thus, until now the Court has not found intolerable the use of a probable-cause standard to protect the police officer from exposure to liability simply because his reasonable conduct is subsequently shown to have been mistaken. Today, however, the Court counts the law enforcement interest twice and the individual’s privacy interest only once.

[22] The Court’s double-counting approach reflects understandable sympathy for the plight of the officer and an overriding interest in unfettered law enforcement. It ascribes a far lesser importance to the privacy interest of innocent citizens than did the Framers of the Fourth Amendment. The importance of that interest and the possible magnitude of its invasion are both illustrated by the facts of this case. The home of an innocent family was invaded by several officers without a warrant, without the owner’s consent, with a substantial show of force, and with blunt expressions of disrespect for the law and for the rights of the family members. As the case comes to us, we must assume that the intrusion violated the Fourth Amendment. See *Steagald v. United States*, 451 U.S. 204, 211 (1981). Proceeding on that assumption, I see no reason why the family’s interest in the security of its own home should be accorded a lesser weight than the Government’s interest in carrying out an invasion that was unlawful. Arguably, if the Government considers it important not to discourage such conduct, it should provide indemnity to its officers. Preferably, however, it should furnish the kind of training for its law enforcement agents that would entirely eliminate the necessity for the Court to distinguish between the conduct that a competent officer considers reasonable and the conduct that the Constitution deems reasonable. “Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.” *Butz v. Economou*, 438 U.S., at 507. On the other hand, surely an innocent family should not bear the entire risk that a trial court, with the benefit of hindsight, will find that a federal agent reasonably believed that he could break into their home equipped with force and arms but without probable cause or a warrant.



[Anderson v. Creighton – Audio and Transcript of Oral Argument](#)

Footnotes

11. The dissent, which seemingly would adopt this approach, seeks to avoid the unqualified liability that would follow by advancing the suggestion that officials generally (though not law enforcement officials, see post, at 654, 661-662, and officials accused of violating the Fourth Amendment, see post, at 659-667) be permitted to raise a defense of reasonable good faith, which apparently could be asserted and proved only at trial. See post, at 653. But even when so modified (and even for the fortunate officials to whom the modification applies) the approach would totally abandon the concern—which was the driving force behind Harlow’s substantial reformulation of qualified-immunity principles—that “insubstantial claims” against government officials be resolved prior to discovery and on summary judgment if possible. *Harlow*, 457 U.S., at 818-819. A passably clever

plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated, and the good-faith defense envisioned by the dissent would be available only at trial. [↵](#)

12. Noting that no discovery has yet taken place, the Creightons renew their argument that, whatever the appropriate qualified immunity standard, some discovery would be required before Anderson's summary judgment motion could be granted. We think the matter somewhat more complicated. One of the purposes of the Harlow qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S., at 817 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. *Id.*, at 818. See also *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1986). Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. Cf. *ibid.* If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity. [↵](#)
13. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S., at 818. Logically, this reasoning does not extend to cases such as this one in which both the constitutional command and an exception to the rule for conduct that responds to a narrowly defined category of factual situations are clearly established, and the dispute is whether the situation that the officer confronted fits within the category. [↵](#)
14. The *Harlow* standard of qualified immunity precludes a plaintiff from alleging the official's malice in order to defeat a qualified-immunity defense. By adopting a purely objective standard, however, *Harlow* may be inapplicable in at least two types of cases. In the first, the plaintiff can only obtain damages if the official's culpable state of mind is established. See, e.g., *Allen v. Scribner*, 812 F.2d 426, 436 (CA9 1987); Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L. J. 126, 136-137 (1985). In the second, an official's conduct is not susceptible to a determination that it violated clearly established law because it is regulated by an extremely general and deeply entrenched norm, such as the command of due process or probable cause. The principle is clearly established, but whether it would brand the official's planned conduct as illegal often cannot be ascertained without reference to facts that may be in dispute. See *Reardon v. Wroan*, 811 F.2d 1025 (CA7 1987) (police officers denied qualified immunity on summary judgment because their conclusion of probable cause could be found objectively unreasonable when the facts are viewed in light most favorable to the plaintiffs); *Jasinski v. Adams*, 781 F.2d 843 (CA11 1986) (*per curiam*) (federal agent denied qualified immunity on summary judgment because of genuine issue of probable cause); *Deary v. Three UnNamed Police Officers*, 746 F.2d 185 (CA3 1984) (police officers denied qualified immunity on summary judgment because of genuine issue of probable cause). [↵](#)

Notes on *Anderson v. Creighton*

A. Qualified Immunity and the Plaintiff's Prima Facie Case

1. Justice Stevens' dissenting opinion in *Anderson* proposed that the qualified immunity defense is unavailable where the plaintiff must prove an unreasonable search and seizure to establish a Fourth Amendment violation. While the majority rejected Justice Stevens' assertion that "unreasonableness" for Fourth Amendment purposes is the same as a negligence standard, should the official be barred from raising qualified immunity where plaintiff must prove defendant's negligence, recklessness or intent to establish a constitutional violation?

- a. In [*Goodwin v. Circuit Court of St. Louis County*](#), 729 F.2d 541, 545-6 (8th Cir. 1984), the court of appeals affirmed the district court's refusal to instruct the jury on the qualified immunity:

We ... hold that the defense of "good faith" or qualified immunity is not available in this case. By definition, there can be no liability in such an action unless the plaintiff shows that the defendant intentionally discriminated against her because of her sex... If the jury finds that intentional discrimination has occurred, and if, as in this case, the evidence is sufficient to support that finding, "good faith" on the part of the defendant is logically excluded.

See also [*Miller v. Solem*](#), 728 F.2d 1020, 1025 (8th Cir. 1984) ("if an officer recklessly disregards an inmate's need for safety he certainly cannot maintain an objective good faith immunity defense."); Gary S. Gildin, [*The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*](#), 11 HOFSTRA L. REV. 557 (1983).

- b. In [*Saucier v. Katz*](#), 533 U.S. 194 (2001), the Court reversed the court of appeals' ruling that the qualified immunity test is identical to the standard governing the merits of claims of excessive force under the Fourth Amendment:

In *Graham*, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's "objective reasonableness standard," not under substantive due process principles. Because "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, "requiring careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.

The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to

determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force," and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful....

The deference owed officers facing suits for alleged excessive force is not different in some qualitative respect from the probable cause inquiry in *Anderson*. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

- c. In [Beard v. Mitchell](#), 604 F.2d 485, 496 (7th Cir. 1979), the court of appeals held the trial court's instruction that plaintiff must prove recklessness to prevail does not duplicate defendant's burden of proving the qualified immunity because defendant "was entitled to prove that his *belief* in the legality of his acts was reasonable but was not required to prove that his *conduct* was reasonable." See also McCann, [The Interrelationship of Immunity and the Prima Facie Case in Section 1983 and Bivens Actions](#), 21 GONZAGA L. REV. 117, 139 (1985/86) ("[T]here is a distinction between the negligence standard in the *prima facie* case, which analyzes the reasonableness of the defendant's *conduct* with respect to the plaintiff, and *Harlow's* objective immunity standard, which addresses the reasonableness of the defendant's *knowledge* of constitutional rights."). Is the distinction drawn in *Beard v. Mitchell* a viable one? Could it ever be reasonable for an official to believe his conduct was proper yet be unreasonable to act on that belief? May the immunity defense be distinguished on the ground that it addresses only the state official's knowledge that his conduct violated the Constitution and not the reasonableness of his conduct under all the circumstances? Would a jury be able to understand and apply this distinction? Would the evidence that a jury would find relevant in determining whether defendant acted negligently be different than the evidence it would consider apposite to whether defendant had reason to know his actions were unconstitutional? See also [Llanguo v. Mingey](#), 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc) ("to go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites of the apple."); Balcerzak, [Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation](#), 95 YALE L.J. 126, 144-47 (1985).

- d. Some courts have attempted to reconcile the qualified immunity defense with plaintiff's burden of proving culpability in its prima facie case by holding the immunity issue is a question of law for the judge to decide. How is the judge to determine immunity where material facts relevant to immunity are in dispute? In [Warren v. City of Lincoln, Nebraska](#), 816 F.2d 1254, 1262 (8th Cir. 1987), the court described the roles of the judge and jury as follows:

On remand, the jury should initially determine under proper instructions whether the arrest of Warren was a pretext employed to gather evidence of unrelated crimes. If the jury determines that it was a pretext, then the district court should determine whether the law prohibiting pretextual arrests was clearly established in 1985. If the jury finds that the arrest was not pretextual but rather a lawful arrest pursuant to a traffic warrant, then it should determine whether Warren was detained beyond the time necessary to process the traffic offense for questioning on an unrelated matter. If the jury determines that he was so detained, then the district court should determine whether the law prohibiting such a detention was clearly established in 1985. The jury should finally determine whether the officers continued to question Warren after he requested counsel. If it answers this question affirmatively, then the district court should determine whether the law prohibiting continued custodial questioning after request for counsel was clearly established in 1985.

B. When is a Right Clearly Established—Factual Proximity

2. How close factually must the relevant precedent cases be to the facts of the *Anderson* case in order for the trial court to find that “a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed?”
- a. Why did the Supreme Court in [Davis v. Scherer](#) find that the right to a pre-termination hearing was not clearly established by its own precedents? Under *Davis*, how factually on point must a precedent be to “clearly establish” the constitutional right allegedly violated in a Section 1983 action?
- b. In [Lassiter v. Alabama A & M University](#), 28 F.3d 1146, 1149-50 (11th Cir. 1994) (en banc), the Eleventh Circuit set forth the principles it understood to control qualified immunity cases:

That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their *individual capacities*...

For the law to be clearly established to the point that qualified immunity does not apply, the law must earlier have been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant’s place, that “what he is doing” violates federal law...

“General propositions have little to do with the concept of qualified immunity” ... “If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.”... For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or raise a question about), the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law *in the circumstances*.

See also [Ashcroft v. Iqbal](#), 563 U.S. 731, 741 (2011) (“We do not require a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate.”); [McVey v. Stacy](#), 157 F.3d

271, 277 (4th Cir. 1988) (“[P]articularly in First Amendment cases, where a sophisticated balancing of interests is required to determine whether the plaintiff’s constitutional rights have been violated, only infrequently will it be ‘clearly established’ that a public employee’s speech on a matter of public concern is constitutionally protected.”).

- c. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court reviewed the decision of the Court of Appeals for the Eleventh Circuit granting summary judgment to state prison officials who were sued for subjecting Larry Hope to cruel and unusual punishment. The officials allegedly had required Hope to stand handcuffed to a hitching post for seven hours with his two hands shackled relatively close together at face level; removed Hope’s shirt, causing the sun to burn his skin; afforded Hope no bathroom breaks; provided Hope water only once or twice in the seven hours; and taunted Hope about his thirst by giving water to some dogs, bringing the water cooler close to Hope, and then kicking the water cooler over, spilling the water to the ground. The court of appeals found the officials immune because the facts of the relevant precedent cases, while analogous, were not materially similar to Hope’s situation. Holding the court of appeals had applied the wrong standard for immunity, the Supreme Court reversed:

Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242. Section 242 makes it a crime for a state official to act “willfully” and under color of law to deprive a person of rights protected by the Constitution. In *United States v. Lanier*, 520 U.S. 259, 137 L. Ed.2d 432, 117 S. Ct. 1219 (1997), we held that the defendant was entitled to “fair warning” that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was “clearly established” in civil litigation under § 1983.

In *Lanier*, the Court of Appeals had held that the indictment did not charge an offense under § 242 because the constitutional right allegedly violated had not been identified in any earlier case involving a factual situation “fundamentally similar” to the one in issue. We reversed, explaining that the “fair warning” requirement is identical under § 242 and the qualified immunity standard. We pointed out that we had “upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.” *Id.*, at 269. We explained:

This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful,’ *Anderson, supra*, at 640. 74 F.3d 266 at 270-271 (citation omitted).

Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be “fundamentally similar.” Although earlier cases involving “fundamentally similar” facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of

cases with “materially similar” facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Hope, 536 U.S. at 739-41. See also *Weise v. Casper*, 562 U.S. 976 (2010) (Ginsburg, J., dissenting from denial of certiorari) (“[s]olidly established law ‘may apply with obvious clarity’ even to conduct startling in its novelty.”); *DeBoer v. Pennington*, 206 F.3d 857, 864-65 (9th Cir. 2000) (“[W]hen the defendants’ conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required.... Thus, a constitutional right may be clearly established by common sense as well as closely analogous pre-existing case law.”); *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992) (“[T]hat no precisely analogous case exists does not defeat McDonald’s claim. It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.... There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune ... because no previous case had found liability in those circumstances.”)

3. In *Messerschmidt v. Millender*, 565 U.S. 535 (2012), the Court held that the court of appeals erred in denying qualified immunity to a police officer who applied for, and conducted a search pursuant to, a warrant that was not supported by probable cause. In finding that no reasonable officer could have believed the warrant was valid, the court of appeals relies upon *Groh v. Ramirez*, 540 U.S. 551 (2004). In *Groh*, the Court had denied qualified immunity to officers who conduct a search pursuant to a warrant that described the house to be searched, but did not detail the items to be seized. The *Messerschmidt* Court held that *Groh* did not clearly establish that the search in issue violated the Fourth Amendment:

In contrast to *Groh*, any defect here would not have been obvious from the face of the warrant. Rather, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all items listed in the warrant. This is not an error that “just a simple glance” would have revealed.

Messerschmidt, 565 U.S. at 555-56.

- a. By what standard can the trial court determine whether the facts of the relevant precedent cases proscribing warrantless searches are sufficiently analogous so that a reasonable officer could not have believed that Anderson’s actions were lawful?
 - b. By what standard can the trial court determine whether the facts of the relevant precedent cases proscribing warrantless searches are sufficiently distinguishable so that a reasonable officer could have believed that Anderson’s actions were lawful?
4. Does the *Anderson* standard accurately reflect the questions that the FBI agent considered prior to entering the Creighton’s residence? In *Savidge v. Fincannon*, 836 F.2d 898, 908-09 (5th Cir. 1988), the court of appeals declined to engage in narrow factual distinction of precedents in evaluating whether defendants should have known of the constitutional right to minimally adequate care and treatment for institutionalized persons:

In this circuit, the right of civilly committed retardates to “such individual treatment as will help ...

them to be cured or to improve [their] mental condition” is at least as old as *Wyatt v. Aderholt*. In that case we also affirmed the plaintiffs’ right to a “humane” and presumably safe environment. *Wyatt* survives *Lelsz*; it was certainly good law in the early 1980’s when most of the damage that the plaintiffs allege in this case took place.

The defendants contend that *Wyatt*, unlike *Youngberg*, depends in its reasoning upon the state’s participation in a formal civil commitment proceeding. This observation, though arguably correct, must not be allowed to obscure the fact that as a general matter the duty to provide institutionalized retardates with constitutionally adequate care was firmly established in this circuit by 1980. We reject any approach to immunity doctrine that requires us to imagine the defendants saying to themselves, “We can safely give Jonathan Savidge inadequate treatment; he was not committed to the FWSS through formal judicial proceedings and so the rationale in *Wyatt* may not apply to him.” We simply do not envision reasonable doctors and administrators calibrating their responsibilities to each child on the basis of such narrow distinctions. If the allegations in the plaintiff’s complaint are true, and they must be accepted as true, the individual defendants should have known that they were treating Jonathan Savidge in an unconstitutional manner.

5. In *Anderson*, the officers conducted the search without benefit of a warrant. In [*Malley v. Briggs*](#), 475 U.S. 335 (1986), the Court held the fact that a neutral magistrate had issued a warrant did not *per se* confer qualified immunity upon the officers who executed the warrant. Rather, if “a reasonably well-trained officer in [defendant’s] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant,” the officer would not be immune. *Malley*, 475 U.S. at 345. In [*Messerschmidt v. Millender*](#), 565 U.S. 535 (2012), the Court ruled that “the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner.” *Id.* at 546. The “threshold for establishing [an] exception [to conferral of qualified immunity] is a high one,” *id.*, met only on “rare” occasions. *Id.* at 546. The Court further reasoned that the fact that the officer sought and obtained approval from his superiors and the district attorney was “certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause.” *Id.* at 555. Justices Sotomayor and Ginsberg dissented from the majority’s presumption immunizing officers whenever a neutral magistrate has approved a search:

In cases in which it would be not only wrong but unreasonable for a well-trained officer to seek a warrant, allowing a magistrate’s approval to immunize the police officer’s unreasonable action retrospectively makes little sense... . To the extent it proposes to cut back on *Malley*, the majority will ... encourag[e] sloppy police work and exacerbat[e] the risk that searches will not comport with the requirements of the Fourth Amendment.

Messerschmidt, 565 U.S. at 572-73 (Sotomayor, J., dissenting). The dissenting justices likewise disagreed with the majority’s finding that approval by the officer’s superior supported conferral of immunity.

Giving weight to that fact [that two superior police officers and the district attorney reviewed the warrant application] would turn the Fourth Amendment on its head.... The effect of the Court’s rule ... is to hold blameless the “plainly incompetent” action of the police officer seeking a warrant because of the “plainly incompetent” approval of his superiors and the district attorney. Under the majority’s test, four wrongs apparently make a right. I cannot agree, however, that the “objective legal reasonableness” of an official’s acts” turns on the number of police officers or prosecutors who improperly sanction a search that violates the Fourth Amendment.

Messerschmidt, 565 U.S. at 573 (Sotomayor, J., dissenting). See also *id.* at 558 (Kagan, J. concurring in part and dissenting in part) (“All of these individuals ... are ‘part of the prosecution team.’ To make their views

relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity upon each other for unreasonable conduct—like applying for a warrant without anything resembling probable cause.”).

C. The Impact of *Iqbal* and *Anderson* on Plaintiff’s Ability to Successfully Plead a Claim under Section 1983

6. In [Gomez v. Toledo](#), 446 U.S. 635, 640 (1980), the Court held that qualified immunity was an affirmative defense that must be pleaded by the defendant. The Court relied on the fact that neither the language nor the legislative history of Section 1983 requires plaintiff to allege anything beyond a constitutional violation caused by a person acting under color of law to state a claim for relief. Later, in [Ashcroft v. Iqbal](#), 556 U.S. 662 (2009), the Court required plaintiff to plead “plausibly” that defendants were not entitled to immunity. The *Iqbal* Court concluded that it had to decide whether “plaintiff ... plead factual matter that, if taken as true, states a claim that [defendants] deprived him of his clearly established constitutional rights.” *Id.* at 666. Since *Iqbal*, most lower federal courts have held plaintiffs in Section 1983 actions now need to plead facts that make it plausible that qualified immunity does not bar the claim. See [Argueta v. United States Immigration Customs Enforcement](#), 643 F.3d 60 (3rd Cir. 2011); (reversing district court’s denial of motion to dismiss complaint on grounds of qualified immunity); [Randall v. Scott](#), 610 F.3d 701 (11th Cir. 2010); [Maldonado v. Fontanes](#), 568 F.3d 263 (1st Cir. 2009); [Sanchez v. Pereira-Castillo](#), 590 F.3d 31 (1st Cir. 2009). But see [Evans ex rel. Evans v. Richardson](#), 2010 U.S. Dist. LEXIS 26923 (N.D. Ill. 2010) (noting that plaintiffs were not required to plead allegations to defeat qualified immunity, citing pre-*Iqbal* decision in [Jacobs v. City of Chicago](#), 215 F.3d 758, 770 (7th Cir. 2000)).
7. How can a plaintiff plead factual allegations that make it plausible that a reasonable officer could not have believed that a search was lawful, “in light of clearly established law *and* the information the searching officers possessed,” where only the officers possess knowledge of the facts that caused them to conduct the search?
 - a. Some courts have strictly applied the *Iqbal* plausibility standard, regardless of whether plaintiff had access to factual information necessary to satisfy the standard. In [Ibrahim v. Dept. of Homeland Security](#), 2009 U.S. Dist. LEXIS 64619 (N.D. Cal. 2009), plaintiff was a Muslim doctoral student at Stanford University. When Ms. Ibrahim attempted to fly to Kuala Lumpur to present her research at a conference sponsored by Stanford, she was detained because her name was on the “no fly” list established by the Transportation Security Administration. Ms. Ibrahim alleged that she had no criminal record and no connections or association with terrorists. The plaintiff further alleged that she was discriminated against because of her religion and national origin.

The district court noted that in order to state a claim for discrimination, the plaintiff had to show that defendant acted “not for a neutral investigative reason but for the purpose of discriminating” based on “race, religion or national origin.” *Id.* at *23. The court reasoned that under *Iqbal*, plaintiff’s allegations that she “was Muslim and detained” was not sufficient to make it plausible that she was detained because she was Muslim.

The *Ibrahim* court conceded that “a good argument can be made” that the *Iqbal* pleading standard would be “too demanding” for plaintiffs who do not have access to important facts. *Id.* at *33. The court further admitted that “[v]ictims of discrimination and profiling will often not have specific facts to plead without benefit of discovery.” *Id.* Nonetheless, the court concluded that regardless of whether plaintiff had access to information, the lower courts were bound to apply the law as “laid down by the

Supreme Court.” *Id.* See also [Santiago v. Warminister Township](#), 629 F.3d 121, 134 n.10 (3rd Cir. 2010) (“We recognize that plaintiffs may face challenges in drafting claims despite an information asymmetry between plaintiffs and defendants. Given that reality, reasonable minds may take issue with *Iqbal* and urge a different balance between ensuring, on the one hand, access to the courts so that victims are able to obtain recompense and, on the other, ensuring that municipalities and police officers are not unnecessarily subjected to the burdens of litigation.... The Supreme Court has struck the balance however, and we abide by it.”); [Shihadeh v. Smeal](#), 2011 WL 17443398 at * 3 (E.D. Pa. 2011) (“To be extent that Plaintiff is arguing that this Court should permit discovery in order to give him access to information with which he *might* state a cognizable [§ 1983] claim against Defendant in her individual capacity, we find that ... *Iqbal*... disallow[s] such a practice by placing the burden of factual specificity on pleadings on plaintiffs.”); [Padron v. Wal-Mart Stores, Inc.](#), 783 F.Supp. 2d 1042, 1048 (N.D. Ill. 2011) (“*Twombly* discourages correcting perceived informational asymmetry through discovery”).

- b. Some courts have refused to dismiss the complaint before discovery where necessary facts were in the sole possession of the defendant. In [Morgan v. Hubert](#), 335 Fed. Appx. 466 (5th Cir. 2009), plaintiff was a prisoner in protective custody at the Orleans Parish Prison. Because of Hurricane Katrina, all the prisoners had to be transferred to the Elayn Hunt Correctional Center (EHCC). Upon arrival at the EHCC, Morgan and other inmates in protective custody informed the guards of their status and asked to be segregated from the general population. Despite his protest, the guard placed Morgan with the general prison population. Thirty minutes after arriving, Morgan was beaten and stabbed in the head and neck. Morgan filed a Section 1983 action against the warden of the EHCC alleging violation of the Eighth Amendment. Warden Hubert moved to dismiss on the basis of qualified immunity.

The court of appeals noted that to have violated the Eighth Amendment, Warden Hubert must have known the facts from which he reasonably could have concluded an excessive risk of serious harm was present and subjectively decided to disregard that risk. Plaintiff’s complaint failed to state specifically when Warden Hubert knew of the prison transfers or what policies he adopted concerning the handling of prisoners in protective custody. However, the court reasoned, “we do not require a plaintiff to plead facts ‘peculiarly within the knowledge of defendants’ ... and the facts omitted fall squarely within that category.” *Id.* at 472.

While denying the motion to dismiss, the court remained “mindful that the protection afforded by qualified immunity applies to the lawsuit itself, and not merely to liability, and thus the issue should be resolved as early as possible.” *Id.* The court of appeals remanded for discovery limited to the issue of qualified immunity and instructed the district court to decide the immunity issue once that discovery is complete. *Id.* at 473-74. See also [Gee v. Pacheco](#), 627 F.3d 1178, 1185 (10th Cir. 2010) (Reasoning that prisoners filing claims of constitutional violations by prison officials will “rarely suffer from information asymmetry” because they will learn the justification for the challenged conduct through the administrative claims they must bring as a prerequisite to suit under the Prison Litigation Reform Act. However, “if the complaint alleges that the prisoner received no explanation in the grievance process (or was coerced into not pursuing a grievance), claims that the officer lacked justification “may become plausible.”); Scott Dodson, [New Pleading, New Discovery](#), 109 MICH. L. REV. 53, 72 (2010) (noting that when important facts are in the sole possession of the defendant, plaintiff should be allowed limited discovery to obtain them; claims dealing with “the defendant’s state of mind or secretive conduct” would be very hard to plead plausibly unless plaintiff was allowed to conduct limited discovery); Suzette M. Malveaux, [Front Loading and Heavy Lifting! How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases](#), 14 LEWIS & CLARK L. REV. 65, 106-107 (2010) (reasoning that courts should allow plaintiffs to conduct “pre-dismissal” or “plausibility” discovery when they are not in possession of important facts to “prevent unjust dismissals of otherwise worthy

claims”); Ray Worthy Campbell, [Getting a Clue: Two Stage Complaint Pleadings as a Solution to The Conley-Iqbal Dilemma](#), 114 PENN ST. L. REV. 1191, 1239 (2010) (proposing “bifurcating” of the pleading stage allowing plaintiff to submit a simple complaint and then submit a more detailed complaint following limited discovery).

- c. Could plaintiff’s counsel rely upon [Fed. R. Civ. P. 11\(b\)\(3\)](#) to survive a motion to dismiss where defendants are in sole possession of facts necessary to state a claim for relief? Rule 11(b)(3) provides that by signing a complaint, counsel certifies that

The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

In [Luttman v. Sheriff of Jay County](#), Case No. 1:10-CV-66 (N.D. Ind. May. 13, 2010), plaintiff filed a Section 1983 action against the Sheriff of Jay County after a police dog bit Luttman during the course of his arrest. The complaint did not include any factual allegations regarding the Sheriff’s personal involvement in, or supervisory responsibility for, alleged constitutional deprivations. The district court rejected plaintiff’s argument that the court should delay dismissal of the complaint to permit plaintiff to conduct discovery concerning the policies and practices of the Sheriff’s Department. However, the court, suggested:

This argument might have some legs to it if backed-up with the type of representation required by Rule 11(b)(3) ...

Notably absent from any of Luttman’s filings ... is so much as a whisper that he has the facts to support an official capacity claim or, in the words of Rule 11(b)(3), he will have them “after a reasonable opportunity for ... discovery.” Indeed, Luttman’s filings either totally avoid mentioning the claim, as in his complaint, or merely offer the argument that he may replead against Sheriff Newton “if future discovery reveals evidence” providing a basis to do so. (Resp. Br. 2-3). Both submissions fall short of Rule 11(b)(3).

Luttman, 2010 U.S. Dist. LEXIS 47536 at **7. See also *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 83715 at *12-13 (N.D. Cal. 2009) (“The portion of Rule 11(b)(3) on which Apple is relying merely relieves the attorney ... from certifying that he or she already possesses evidentiary support for the factual allegations, it does not release the party from the obligation to advance sufficient factual allegations to satisfy Rule 8.... If ... Apple still chooses to rely on Rule 11(b)(3), it should plainly allege infringement as a factual matter (and with the level of specificity required under Rule 8 and *Twombly* and *Iqbal*), and use Rule 11(b)(3) only for the purpose of relieving counsel from the obligation it would otherwise have to certify that it already possesses evidentiary support for all the factual allegations.”). But see Edward A. Hartnett, *Responding to Twombly and Iqbal: Where do we go from here?*, 95 IOWA L. REV. 24, 35 (2010) (arguing that it would not help a plaintiff “to try to invoke Rule 11(b)(3) in order to masquerade a conclusion applying the law to the facts as a factual allegation” because the court would easily conclude that “discovery is not likely to lead to evidence supporting the allegation.”).

- d. If plaintiff can assert sufficient factual allegations to make it plausible that defendant does not have qualified immunity on one claim for relief, many plaintiff engage in discovery on that claim to unearth facts in defendant’s possession that will enable plaintiff to assert additional claims?
 - i. The 2000 amendment to [Fed. R. Civ. P. 26\(b\)](#) changed the scope of discovery from matter relevant “to the subject matter of the action” to “matter that is relevant to any party’s claim or defense.” However, “[f]or good cause, the court may order discovery of any matter relevant to the subject

matter involved in the action.”

- ii. In [*Ibrahim v. Dept. of Homeland Security*](#), 2009 U.S. Dist. LEXIS 64619 (N.D. Cal. 2009), the court dismissed plaintiff’s equal protection claim despite the fact plaintiff may not have had access to facts necessary to state a claim. The court found the harshness of that outcome mitigated by the fact that plaintiff pleaded a viable claim for deprivation of her rights under Fourth Amendment.

During discovery, Ibrahim can inquire into facts that bear on the incident, including why her name was on the [no-fly] list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.

Id. at *33. But see [*Luttman v. Sheriff of Jay County*](#), Case No. 1:10-CV-66 (N.D. Ind. May. 13, 2010) (Despite fact that plaintiff had valid Section 1983 claim against Deputy Sheriff, court refused plaintiff’s request to make dismissal of claim against Sheriff provisional to permit plaintiff to conduct discovery on policies and practices of Sheriff’s Department).

- iii. May plaintiff successfully avoid dismissal under *Iqbal* by filing the Section 1983 claim in state court? How is defendant likely to respond? See [28 U.S.C. § 1441\(a\)](#).

- e. May plaintiff obtain facts necessary to satisfy *Iqbal* by utilizing pre-suit discovery authorized by state rules and then filing the lawsuit in federal court? See Pa. R. Civ. P. 4003.8 (“a plaintiff may obtain pre-complaint discovery where the information sought is material and necessary ... and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person.”); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010).

- 8. After *Davis* and *Anderson*, is anyone likely to file a Section 1983 action seeking to apply general constitutional rules to a new factual situation? If such an action is filed, will the court ever reach the issue of whether the government’s conduct violates the Constitution?

MULLENIX V. LUNA, 577 U.S. 7 (2015)

PER CURIAM.

[1] On the night of March 23, 2010, Sergeant Randy Baker of the Tulia, Texas Police Department followed Israel Leija, Jr., to a drive-in restaurant, with a warrant for his arrest. When Baker approached Leija’s car and informed him that he was under arrest, Leija sped off, headed for Interstate 27. Baker gave chase and was quickly joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety (DPS).

[2] Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija’s threats, together with a report that Leija might be intoxicated, to all concerned officers.

[3] As Baker and Rodriguez maintained their pursuit, other law enforcement officers set up tire spikes at three locations. Officer Troy Ducheneaux of the Canyon Police Department manned the spike strip at the first location Leija was expected to reach, beneath the overpass at Cemetery Road. Ducheneaux and the other officers had received training on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver.

[4] DPS Trooper Chadrin Mullenix also responded. He drove to the Cemetery Road overpass, initially intending to set up a spike strip there. Upon learning of the other spike strip positions, however, Mullenix began to consider another tactic: shooting at Leija's car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before, but he radioed the idea to Rodriguez. Rodriguez responded "10-4," gave Mullenix his position, and said that Leija had slowed to 85 miles per hour. Mullenix then asked the DPS dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was "worth doing." Before receiving Byrd's response, Mullenix exited his vehicle and armed with his service rifle, took a shooting position on the overpass, 20 feet above I-27. Respondents allege that from this position, Mullenix still could hear Byrd's response to "stand by" and "see if the spikes work first."^[5]

[5] As Mullenix waited for Leija to arrive, he and another officer, Randall County Sheriff's Deputy Tom Shipman, discussed whether Mullenix's plan would work and how and where to shoot the vehicle to best carry it out. Shipman also informed Mullenix that another officer was located beneath the overpass.

[6] Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, with Rodriguez in pursuit. As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled 2 1/2 times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block.

[7] Respondents sued Mullenix under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that he had violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on the ground of qualified immunity, but the District Court denied his motion, finding that "[t]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances."

[8] Mullenix appealed, and the Court of Appeals for the Fifth Circuit affirmed. 765 F.3d 531 (2014). The court agreed with the District Court that the "immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonably as a matter of law." *Id.*, at 538.

[9] Judge King dissented. She described the "'fact issue' referenced by the majority" as "simply a restatement of the objective reasonableness test that applies to Fourth Amendment excessive force claims," which, she noted, the Supreme Court has held "'is a pure question of law.'" *Id.*, at 544-545 (quoting *Scott v. Harris*, 550 U.S. 372, 381, n.8, 127 S. Ct. 1769, 167 L. Ed.2d 686 (2007)). Turning to that legal question, Judge King concluded that Mullenix's actions were objectively reasonable. When Mullenix fired, she emphasized, he knew not only that Leija had threatened to shoot the officers involved in his pursuit, but also that Leija was seconds away from encountering such an officer beneath the overpass. Judge King also dismissed the notion that Mullenix should have given the spike strips a chance to work. She explained that because spike strips are often ineffective, and because officers operating them are vulnerable to gunfire from passing cars, Mullenix reasonably feared that the officers manning them faced a significant risk of harm. 765 F.3d, at 548-549.

[10] Mullenix sought rehearing en banc before the Fifth Circuit, but the court denied his petition. Judge Jolly dissented, joined by six other members of the court. Judge King, who joined Judge Jolly's dissent, also filed a separate dissent of her own. 777 F.3d 221 (2014) (*per curiam*). On the same day, however, the two members forming the original panel's majority withdrew their previous opinion and substituted a new one. 773 F.3d 712. The revised opinion recognized that objective unreasonableness is a question of law that can be resolved on summary judgment—as Judge King had explained in her dissent—but reaffirmed the denial of qualified immunity. *Id.*, at 715, 718. The majority concluded that Mullenix's actions were objectively unreasonable because several of the factors that had justified deadly force in previous cases were absent here: There were no innocent bystanders, Leija's driving was relatively controlled, Mullenix had not first given the spike strips a chance to work, and Mullenix's decision was not a split-second judgment. *Id.*, at 720-724. The court went on to conclude that Mullenix was not entitled to qualified immunity

because “the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.” *Id.*, at 725.

[11] We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place, and now reverse.

[1]The doctrine of qualified immunity shields officials from civil liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982)). A clearly established right is one that is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed.2d 985, 989 (2012) (internal quotation marks and alteration omitted). “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed.2d 1149 (2011). Put simply, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed.2d 271 (1986).

“We have repeatedly told courts ... not to define clearly established law at a high level of generality.” *al-Kidd, supra*, at 742, 131 S. Ct. 2074, 179 L. Ed.2d 1149. The dispositive question is “whether the violative nature of *particular* conduct is clearly established.” *Ibid.* (emphasis added). This inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed.2d 583 (2004) (*per curiam*) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001)). Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” 533 U.S., at 205, 121 S. Ct. 2151, 150 L. Ed.2d 272.

[12] In this case, the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not “use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.” 773 F.3d, at 725. Yet this Court has previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context. In *Brosseau*, which also involved the shooting of a suspect fleeing by car, the Ninth Circuit denied qualified immunity on the ground that the officer had violated the clearly established rule, set forth in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985), that “deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.” *Haugen v. Brosseau*, 339 F.3d 857, 873 (CA9 2003) (internal quotation marks omitted). This Court summarily reversed, holding that use of *Garner*’s “general” test for excessive force was “mistaken.” *Brosseau*, 543 U.S., at 199, 125 S. Ct. 596, 160 L. Ed.2d 583. The correct inquiry, the Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer’s conduct in the “situation [she] confronted”: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.” *Id.*, at 199-200, 125 S. Ct. 596, 160 L. Ed.2d 583. The Court considered three Court of Appeals cases discussed by the parties, noted that “this area is one in which the result depends very much on the facts of each case,” and concluded that the officer was entitled to qualified immunity because “[n]one of [the cases] *squarely governs* the case here.” *Id.* at 201, 125 S. Ct. 596, 160 L. Ed.2d 583 (emphasis added).

[13] *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987), is also instructive on the required degree of specificity. There, the lower court had denied qualified immunity based on the clearly

established “right to be free from warrantless searches of one’s home unless the searching officers have probable cause and there are exigent circumstances.” *Id.*, at 640, 107 S. Ct. 3034, 97 L. Ed.2d 523. This Court faulted that formulation for failing to address the actual question at issue: whether “the circumstances with which Anderson was confronted ... constitute[d] probable cause and exigent circumstances.” *Id.*, at 640-641, 107 S. Ct. 3034, 97 L. Ed.2d 523. Without answering that question, the Court explained, the conclusion that Anderson’s search was objectively unreasonable did not “follow immediately” from—and thus was not clearly established by—the principle that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment. *Id.*, at 641, 107 S. Ct. 3034, 97 L. Ed.2d 523.

[14] In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances “beyond debate.” *al- Kidd, supra*, at 741, 131 S. Ct. 2074, 179 L. Ed.2d 1149. The general principle that deadly force requires a sufficient threat hardly settles this matter. See *Pasco v. Knoblauch*, 566 F.3d 572, 580 (CA5 2009) (“[I]t would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase....”).

[15] Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. In *Brosseau* itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered “other officers on foot who [she] *believed* were in the immediate area,” “the occupied vehicles in [his] path,” and “any other citizens who *might* be in the area.” 543 U.S., at 197, 125 S. Ct. 596, 160 L. Ed.2d 583 (first alteration in original; internal quotation marks omitted; emphasis added). The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. *Id.*, at 196-197, 125 S. Ct. 596, 160 L. Ed.2d 583. By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing toward an officer’s location.

[16] This Court has considered excessive force claims in connection with high-speed chases on only two occasions since *Brosseau*. In *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed.2d 686, the Court held that an officer did not violate the Fourth Amendment by ramming the car of a fugitive whose reckless driving “posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.” *Id.*, at 384, 127 S. Ct. 1769, 167 L. Ed.2d 686. And in *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed.2d 1056, 1060 (2014), the Court reaffirmed *Scott* by holding that an officer acted reasonably when he fatally shot a fugitive who was “intent on resuming” a chase that “pose[d] a deadly threat for others on the road.” 572 U.S., at 777, 134 S. Ct. 2012, 188 L. Ed.2d 1056, 1061). The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. Leija in his flight did not pass as many cars as the drivers in *Scott* or *Plumhoff*; traffic was light on I-27. At the same time, the fleeing fugitives in *Scott* and *Plumhoff* had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents “squarely governs” the facts here. Given Leija’s conduct, we cannot say that only someone “plainly incompetent” or who “knowingly violate[s] the law” would have perceived a sufficient threat and acted as Mullenix did. *Malley*, 475 U.S., at 341, 106 S. Ct. 1092, 89 L. Ed.2d 271.

[17] The dissent focuses on the availability of spike strips as an alternative means of terminating the chase. It argues that even if Leija posed a threat sufficient to justify deadly force in some circumstances, Mullenix nevertheless contravened clearly established law because he did not wait to see if the spike strips would work before taking action. Spike strips, however, present dangers of their own, not only to drivers who encounter them at speeds between 85 and 110 miles per hour, but also to officers manning them. See, e.g., *Thompson v. Mercer*, 762 F.3d 433, 440 (CA5 2014); Brief for National Association of Police

Organizations et al. as *Amici Curiae* 15-16. Nor are spike strips always successful in ending the chase. See, e.g., *Cordova v. Aragon*, 569 F.3d 1183, 1186 (CA10 2009); Brief for National Association of Police Organizations et al. as *Amici Curiae* 16 (citing examples). The dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alternative over another.

[18] Even so, the dissent argues, there was no governmental interest that justified acting before Leija's car hit the spikes. Mullenix explained, however, that he feared Leija might attempt to shoot at or run over the officers manning the spike strips. Mullenix also feared that even if Leija hit the spike strips, he might still be able to continue driving in the direction of other officers. The dissent ignores these interests by suggesting that there was no "possible marginal gain in shooting at the car over using the spike strips already in place." *Post*, 193 L. Ed.2d, at 266 (opinion of Sotomayor, J.). In fact, Mullenix hoped his actions would stop the car in a manner that avoided the risks to other officers and other drivers that relying on spike strips would entail. The dissent disputes the merits of the options available to Mullenix, *post*, at ___, 193 L. Ed.2d at 266-267, but others with more experience analyze the issues differently. See, e.g., Brief for National Association of Police Organizations et al. as *Amici Curiae* 15-16. Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances "beyond debate." *al-Kidd*, 563 U.S., at 741, 131 S. Ct. 2074, 179 L. Ed.2d 1149.

[19] More fundamentally, the dissent repeats the Fifth Circuit's error. It defines the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fails to consider that question in "the specific context of the case." *Brosseau*, *supra*. at 198, 125 S. Ct. 596, 160 L. Ed.2d 583 (internal quotation marks omitted). As in *Anderson*, the conclusion that Mullenix's reasons were insufficient to justify his actions simply does not "follow immediately" from the general proposition that force must be justified. 483 U.S., at 641, 107 S. Ct. 3034, 97 L. Ed.2d 523.

[20] Cases decided by the lower courts since *Brosseau* likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's. The Fifth Circuit here principally relied on its own decision in *Lytte v. Bexar County*, 560 F.3d 404 (2009), denying qualified immunity to a police officer who had fired at a fleeing car and killed one of its passengers. That holding turned on the court's assumption, for purposes of summary judgment, that the car was moving away from the officer and had already traveled some distance at the moment the officer fired. See *id.*, at 409. The court held that a reasonable jury could conclude that a receding car "did not pose a sufficient threat of harm such that the use of deadly force was reasonable." *Id.* at 416. But, crucially, the court also recognized that if the facts were as the officer alleged, and he fired as the car was coming towards him, "he would likely be entitled to qualified immunity" based on the "threat of immediate and severe physical harm." *Id.* at 412. Without implying that *Lytte* was either correct or incorrect, it suffices to say that *Lytte* does not clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly, given that Leija was speeding towards a confrontation with officers he had threatened to kill.

[21] Cases that the Fifth Circuit ignored also suggest that Mullenix's assessment of the threat Leija posed was reasonable. In *Long v. Slaton*, 508 F.3d 576 (2007), for example, the Eleventh Circuit held that a sheriff's deputy did not violate the Fourth Amendment by fatally shooting a mentally unstable individual who was attempting to flee in the deputy's car, even though at the time of the shooting the individual had not yet operated the cruiser dangerously. The court explained that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect" and concluded that the deputy had reason to believe Long was dangerous based on his unstable state of mind, theft of the cruiser, and failure to heed the deputy's warning to stop. *Id.*, at 581-582. The court also rejected the notion that the deputy should have first tried less lethal methods, such as spike strips. "[C]onsidering the unpredictability of Long's behavior and his fleeing in a marked police cruiser," the court held, "we think the police need not have taken that chance and hoped for the

best.” *Id.*, at 583 (alteration and internal quotation marks omitted). But see *Smith v. Cupp*, 430 F.3d 766, 774-777 (CA6 2005) (denying qualified immunity to an officer who shot an intoxicated suspect who had stolen the officer’s cruiser where a reasonable jury could have concluded that the suspect’s flight did not immediately threaten the officer or any other bystander).

[22] Other cases cited by the Fifth Circuit and respondents are simply too factually distinct to speak clearly to the specific circumstances here. Several involve suspects who may have done little more than flee at relatively low speeds. See, e.g., *Walker v. Davis*, 649 F.3d 502, 503 (CA6 2011); *Kirby v. Duva*, 530 F.3d 475, 479-480 (CA6 2008); *Adams v. Speers*, 473 F.3d 989, 991 (CA9 2007); *Vaughan v. Cox*, 343 F.3d 1323, 1330-1331, and n.7 (CA11 2003). These cases shed little light on whether the far greater danger of a speeding fugitive threatening to kill police officers waiting in his path could warrant deadly force. The court below noted that “no weapon was ever seen,” 773 F.3d, at 723, but surely in these circumstances the police were justified in taking Leija at his word when he twice told the dispatcher he had a gun and was prepared to use it.

[23] Finally, respondents argue that the danger Leija represented was less substantial than the threats that courts have found sufficient to justify deadly force. But the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here. The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux’s position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the “hazy border between excessive and acceptable force.” *Brosseau*, 543 U.S. at 201, 125 S. Ct. 596, 160 L. Ed.2d 583 (quoting *Saucier*, 533 U.S. at 206, 121 S. Ct. 2151, 150 L. Ed.2d 272; some internal quotation marks omitted).

[24] Because the constitutional rule applied by the Fifth Circuit was not “beyond debate,” *Stanton v. Sims*, 571 U.S. 3, 11, 134 S. Ct. 3, 187 L. Ed.2d 341, 344(2013) (*per curiam*), we grant Mullenix’s petition for certiorari and reverse the Fifth Circuit’s determination that Mullenix is not entitled to qualified immunity.

It is so ordered.

Justice Scalia, concurring in the judgment.

[25] I join the judgment of the Court but would not describe what occurred here as the application of deadly force in effecting an arrest. Our prior cases have reserved that description to the directing of force sufficient to kill *at the person* of the desired arrestee. See, e.g., *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed.2d 1056, 1061 (2014); *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed.2d 583 (2004) (*per curiam*); *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985). It does not assist analysis to refer to all use of force that happens to kill the arrestee as the application of deadly force. The police might, for example, attempt to stop a fleeing felon’s car by felling a large tree across the road; if they drop the tree too late, so that it crushes the car and its occupant, I would not call that the application of deadly force. Though it was force sufficient to kill, it was not applied with the object of harming the body of the felon.

[26] Thus, in *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed.2d 686 (2007), we declined to characterize officer Scott’s use of his pursuing vehicle’s bumper to push the fleeing vehicle off the road as the application of deadly force. Whether or not it was that, we said, “all that matters is whether Scott’s actions were reasonable.” *Id.* at 383, 127 S. Ct. 1769, 167 L. Ed.2d 686. So also here. But it stacks the deck against the officer, it seems to me, to describe his action as the application of deadly force.

[27] It was at least arguable in *Scott* that pushing a speeding vehicle off the road is targeting its occupant for injury or death. Here, however, it is conceded that Trooper Mullenix did not shoot to wound or

kill the fleeing Leija, nor even to drive Leija's car off the road, but only to cause the car to stop by destroying its engine. That was a risky enterprise, as the outcome demonstrated; but determining whether it violated the Fourth Amendment requires us to ask, not whether it was reasonable to kill Leija, but whether it was reasonable to shoot at the engine in light of the risk to Leija. It distorts that inquiry, I think, to make the question whether it was reasonable for Mullenix to "apply deadly force."

Justice **Sotomayor**, dissenting.

[28] Chadrin Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullenix's rogue conduct killed the driver, Israel Leija, Jr. Because it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired the shots, I respectfully dissent from the grant of summary reversal.

I

[29] Resolving all factual disputes in favor of plaintiffs, as the Court must on a motion for summary judgment, Mullenix knew the following facts before he shot at Leija's engine block: Leija had led police officers on an 18-minute car chase, at speeds ranging from 85 to 110 miles per hour. 773 F.3d 712, 716 (CA5 2014). Leija had twice called the police dispatcher threatening to shoot at officers if they did not cease the pursuit. *Ibid.* Police officers were deploying three sets of spike strips in order to stop Leija's flight. *Ibid.* The officers were trained to stop a car using spike strips. This training included how to take a defensive position to minimize the risk of danger from the target car. *Ibid.* Mullenix knew that spike strips were being set up directly beneath the overpass where he was stationed. *Id.*, at 723. There is no evidence below that any of the officers with whom Mullenix was in communication—including Officer Troy Ducheneaux, whom Mullenix believed to be below the overpass—had expressed any concern for their safety. *Id.* at 720.

[30] Mullenix had no training in shooting to disable a moving vehicle and had never seen the tactic done before. *Id.*, at 716. He also lacked permission to take the shots: When Mullenix relayed his plan to his superior officer, Robert Byrd, Byrd responded "stand by" and "see if the spikes work first." *Id.* at 716-717. Three minutes after arriving at the overpass, Mullenix fired six rounds at Leija's car. None hit the car's engine block; at least four struck Leija in the upper body, killing Leija. *Id.* at 717.

II

[31] When confronting a claim of qualified immunity, a court asks two questions. First, the court considers whether the officer in fact violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001). Second, the court asks whether the contours of the right were "sufficiently clear that a reasonable official would [have understood] that what he is doing violates that right." *Id.*, at 202, 121 S. Ct. 2151, 150 L. Ed.2d 272 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987)). This Court has rejected the idea that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.*, at 640, 107 S. Ct. 3034, 97 L. Ed.2d 523. Instead, the crux of the qualified immunity test is whether officers have "fair notice" that they are acting unconstitutionally. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed.2d 666 (2002).

[32] Respondents here allege that Mullenix violated the Fourth Amendment's prohibition on unreasonable seizures by using deadly force to apprehend Leija. This Court's precedents clearly establish that the Fourth Amendment is violated unless the "'governmental interests'" in effectuating a particular kind of seizure outweigh the "'nature and quality of the intrusion on the individual's Fourth Amendment

interests.” *Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed.2d 686 (2007) (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 77 L. Ed.2d 110 (1983)). There must be a “governmental interes[t]” not only in effectuating a seizure, but also in “how [the seizure] is carried out.” *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985).

[33] Balancing a particular governmental interest in the use of deadly force against the intrusion occasioned by the use of that force is inherently a fact-specific inquiry, not susceptible to bright lines. But it is clearly established that the government must have *some* interest in using deadly force over other kinds of force.

[34] Here, then, the clearly established legal question—the question a reasonable officer would have asked—is whether, under all the circumstances as known to Mullenix, there was a governmental interest in shooting at the car rather than waiting for it to run over spike strips.

[35] The Court does not point to *any* such interest here. It claims that Mullenix’s goal was not merely to stop the car, but to stop the car “in a manner that avoided the risks” of relying on spike strips. *Ante*, at ___, 193 L. Ed.2d, at 262. But there is no evidence in the record that shooting at Leija’s engine block would stop the car in such a manner.

[36] The majority first suggests that Mullenix did not wait for the results of the spikes, as his superior advised, because of his concern for the officers manning the strips. But Leija was going to come upon those officers whether or not Mullenix’s shooting tactic was successful: Mullenix took his shot when Leija was between 25 and 30 yards away from the spike strip, traveling at 85 miles per hour. Even if his shots hit Leija’s engine block, the car would not have stopped instantly. Mullenix would have bought the officers he was trying to protect—officers who had been trained to take defensive positions—less than three-quarters of a second over waiting for the spike strips. And whatever threat Leija posed after his car was stopped existed whether the car was stopped by a shot to the engine block or by the spike strips.

[37] Nor was there any evidence that shooting at the car was more reliable than the spike strips. The majority notes that spike strips are fallible. *Ante*, at ___-___, 193 L. Ed.2d, at 261-262. But Mullenix had no information to suggest that shooting to disable a car had a higher success rate, much less that doing so with no training and at night was more likely to succeed. Moreover, not only did officers have training in setting up the spike strips, but they had also placed two backup strips farther north along the highway in case the first set failed. A reasonable officer could not have thought that shooting would stop the car with less danger or greater certainty than waiting.

[38] The majority cites *Long v. Slaton*, 508 F.3d 576 (CA11 2007), for the proposition that Mullenix need not have “first tried less lethal methods, such as spike strips.” *Ante*, at ___, 193 L. Ed.2d, at 262. But in that case, there was a clear reason to prefer deadly force over the alternatives. In *Long*, an officer fired to stop a suspect from fleeing in a stolen police cruiser. 508 F.3d, at 583. When the officer fired, there were no alternative means of stopping the car in place. The Eleventh Circuit held that the governmental interest against waiting for a future deployment of spike strips that may never materialize justified the use of deadly force. *Ibid*.

[39] In this case, by contrast, neither petitioner nor the majority can point to any possible marginal gain in shooting at the car over using the spike strips already in place. It is clearly established that there must be some governmental interest that necessitates deadly force, even if it is not always clearly established what level of governmental interest is sufficient.

[40] Under the circumstances known to him at the time, Mullenix puts forth no plausible reason to choose shooting at Leija’s engine block over waiting for the results of the spike strips. I would thus hold that Mullenix violated Leija’s clearly established right to be free of intrusion absent some governmental interest.

III

[41] The majority largely evades this key legal question by focusing primarily on the governmental interest in *whether* the car should be stopped rather than the dispositive question of *how* the car should be stopped. But even assuming that Leija posed a “sufficient,” *ante*, at 193 L. Ed.2d, at 261, or “immediate,” *ante*, at ___, 193 L. Ed.2d, at 261, threat, Mullenix did not face a “choice between two evils” of shooting at a suspect’s car or letting him go. *Scott*, 550 U.S. at 384, 127 S. Ct. 1769, 167 L. Ed.2d 686; *see, e.g., Plumhoff v. Rickard*, 572 U.S. 765, 769, 134 S. Ct. 2012, 188 L. Ed.2d 1056, 1061 (2014); *Brosseau v. Haugen*, 543 U.S. 194, 196-197, 125 S. Ct. 596, 160 L. Ed.2d 583 (2004). Instead, Mullenix chose to employ a potentially lethal tactic (shooting at Leija’s engine block) in addition to a tactic specifically designed to accomplish the same result (spike strips). By granting Mullenix qualified immunity, this Court goes a step further than our previous cases and does so without full briefing or argument.

[42] Thus framed, it is apparent that the majority’s exhortation that the right at stake not be defined at “a high level of generality,” *see ante*, at ___, 193 L. Ed.2d at 262, is a red herring. The majority adduces various facts that the Fifth Circuit supposedly ignored in its qualified immunity analysis, including that Leija was “a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road.” *Ante*, at ___, 193 L. Ed.2d, at 260. But not one of those facts goes to the governmental interest in shooting over awaiting the spike strips. The majority also claims that established law does not make clear that “Mullenix’s reasons were insufficient to justify” his choice of shooting over following his superior’s orders to wait for the spikes. *Ante*, at ___-___ 193 L. Ed.2d, at 262. But Mullenix seemed to have *no* reasons to prefer shooting to following orders.

[43] Instead of dealing with the question whether Mullenix could constitutionally fire on Leija’s car rather than waiting for the spike strips, the majority dwells on the imminence of the threat posed by Leija. The majority recharacterizes Mullenix’s decision to shoot at Leija’s engine block as a split-second, heat-of-the-moment choice, made when the suspect was “moments away.” *Ante*, at ___, 193 L. Ed.2d at 260. Indeed, reading the majority opinion, one would scarcely believe that Mullenix arrived at the overpass several minutes before he took his shot, or that the rural road where the car chase occurred had few cars and no bystanders or businesses. 773 F.3d at 717, 720. The majority also glosses over the facts that Mullenix had time to ask Byrd for permission to fire upon Leija and that Byrd—Mullenix’s superior officer—told Mullenix to “stand by.” *Id.* at 717. There was no reason to believe that Byrd did not have all the same information Mullenix did, including the knowledge that an officer was stationed beneath the overpass. Even after receiving Byrd’s response, Mullenix spent minutes in shooting position discussing his next step with a fellow officer, minutes during which he received no information that would have made his plan more suitable or his superior’s orders less so. *Ibid.*

[44] An appropriate reading of the record on summary judgment would thus render Mullenix’s choice even more unreasonable. And asking the appropriate legal question would leave the majority with no choice but to conclude that Mullenix ignored the longstanding and well-settled Fourth Amendment rule that there must be a governmental interest not just in seizing a suspect, but in the level of force used to effectuate that seizure.

* * * * *

[45] When Mullenix confronted his superior officer after the shooting, his first words were, “How’s that for proactive?” *Ibid.* (Mullenix was apparently referencing an earlier counseling session in which Byrd suggested that he was not enterprising enough. *Ibid.*) The glib comment does not impact our legal analysis; an officer’s actual intentions are irrelevant to the Fourth Amendment’s “objectively reasonable” inquiry. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed.2d 443 (1989). But the comment seems to me revealing of the culture this Court’s decision supports when it calls it reasonable—or even

reasonably reasonable—to use deadly force for no discernible gain and over a supervisor’s express order to “stand by.” By sanctioning a “shoot first, think later” approach to policing, the Court renders the protections of the Fourth Amendment hollow.

[46] For the reasons discussed, I would deny Mullenix’s petition for a writ of certiorari. I thus respectfully dissent.

Per Curiam

Footnotes

15. Although Mullenix disputes hearing Byrd’s response, we view the facts in the light most favorable to respondents, who oppose Mullenix’s motion for summary judgment. See *Tolan v. Cotton*, 572 U.S. 650, 651, 134 S. Ct. 1861, 188 L. Ed.2d 895, 897 (2014). (per curiam). [↴](#)

Notes on *Mullenix v. Luna*

1. *Mullenix v. Luna* is a United States Supreme Court instructional manual on how to determine whether the right allegedly violated in a Section 1983 action is “clearly established.”
 - a. What standard(s) must precedent cases meet for the right allegedly violated to be clearly established?
 - b. How did the Court construe its opinion in *Brosseau v. Haugen* to support its conclusion that it was not clearly established that Mullenix’s use of force was constitutionally unreasonable?
 - c. How did the Court construe its opinions in *Scott v. Harris* and *Plumhoff v. Rickard* to support its conclusion that it was not clearly established that Mullenix’s use of force was constitutionally unreasonable?
 - d. Why did the Court find that the Fifth Circuit erred in relying on its prior decision in *Lytle v. Bexar County* in denying qualified immunity to Mullenix?
 - e. What additional cases does the Supreme Court find the court of appeals should have considered in determining whether Mullenix’s shooting of Leija violated clearly established constitutional rights? What bearing does the Court believe these cases have on the “clearly established rights” issue?
 - f. Why did the Court reason that other cases cited by the Fifth Circuit did not support its denial of qualified immunity to Mullenix?
 - g. How did the Court dispose of plaintiff’s argument that the threat to safety that Leija posed was less substantial than the danger in the cases where the Court has approved use of deadly force?

2. Did the Court consider the fact that while the officers who laid the spike strips had received training in their use, including how to minimize the risk to officer safety, Mullenix never received training on shooting to stop a fleeing motorist and had never attempted to do so? Did the Court consider other evidence on the utility of spike strips?
3. What consideration did the court give to the fact that Mullenix ignored the instruction of his superior officer to “stand by” and “see if the spikes work first.”?
4. How did the Court address the argument that even if Mullenix had succeeded in stopping Leija's car by shooting out its engine, the threat Leija posed to officers after his car stopped would be no different than if the spike strips stopped his car?
5. As Justice Sotomayor's dissent revealed, Sergeant Byrd—Mullenix's supervisor—had previously counselled Mullenix that he was not enterprising enough. Mullenix's first words to Byrd after the shooting was “How's that for proactive?”

How did the majority address the inference that Mullenix's decision to shoot at Leija's car—without having been trained to do and against Byrd's instruction to stand by—was not motivated by his belief as to the state of constitutional law but by an effort to refute earlier criticism by his superior officer?

TAYLOR v. RIOJAS, 592U.S.7 (2020)

PER CURIAM.

[1] Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells.^[16] The first cell was covered, nearly floor to ceiling, in “‘massive amounts’ of feces”: all over the floor, the ceiling, the window, the walls, and even “‘packed inside the water faucet.” *Taylor v. Stevens*, 946 F.3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

[2] The Court of Appeals for the Fifth Circuit properly held that such conditions of confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment. But, based on its assessment that “[t]he law wasn't clearly established” that “prisoners couldn't be housed in cells teeming with human waste” “for only six days,” the court concluded that the prison officials responsible for Taylor's confinement did not have “‘fair warning’ that their specific acts were unconstitutional.” 946 F.3d, at 222 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

[3] The Fifth Circuit erred in granting the officers qualified immunity on this basis. “Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). But no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary

conditions for such an extended period of time. See *Hope*, 536 U.S. at 741 (explaining that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question” (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997))); 536 U.S., at 745 (holding that “[t]he obvious cruelty inherent” in putting inmates in certain wantonly “degrading and dangerous” situations provides officers “with some notice that their alleged conduct violate[s]” the Eighth Amendment). The Fifth Circuit identified no evidence that the conditions of Taylor’s confinement were compelled by necessity or exigency. Nor does the summary-judgment record reveal any reason to suspect that the conditions of Taylor’s confinement could not have been mitigated, either in degree or duration. And although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor’s ordeal were deliberately indifferent to the conditions of his cells. See, e.g., 946 F.3d, at 218 (one officer, upon placing Taylor in the first feces-covered cell, remarked to another that Taylor was “going to have a long weekend”); *ibid.*, and n.9 (another officer, upon placing Taylor in the second cell, told Taylor he hoped Taylor would “f***ing freeze”).

[4] Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.^[17] We therefore grant Taylor’s petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of this case.

JUSTICE THOMAS dissents.

JUSTICE ALITO, concurring in the judgment.

[5] Because the Court has granted the petition for a writ of certiorari, I will address the question that the Court has chosen to decide. But I find it hard to understand why the Court has seen fit to grant review and address that question.

I

[6] To see why this petition is ill-suited for review, it is important to review the procedural posture of this case. Petitioner, an inmate in a Texas prison, sued multiple prison officers and asserted a variety of claims, including both the Eighth Amendment claim that the Court addresses (placing and keeping him in filthy cells) and a related Eighth Amendment claim (refusing to take him to a toilet). The District Court granted summary judgment for the defendants on all but one of petitioner’s claims under Federal Rule of Civil Procedure 54(b), which permitted petitioner to appeal the dismissed claims. On appeal, the Fifth Circuit affirmed as to all the claims at issue except the toilet-access claim. On the claim concerning the conditions of petitioner’s cells, the court held that the facts alleged in petitioner’s verified complaint were sufficient to demonstrate an Eighth Amendment violation, but it found that the officers were entitled to qualified immunity based primarily on a statement in *Hutto v. Finney*, 437 U.S. 678 (1978), and the Fifth Circuit’s decision in *Davis v. Scott*, 157 F.3d 1003 (1998).

[7] The Court now reverses the affirmance of summary judgment on the cell-conditions claim. Viewing the evidence in the summary judgment record in the light most favorable to petitioner, the Court holds that a reasonable corrections officer would have known that it was unconstitutional to confine petitioner under the conditions alleged. That question, which turns entirely on an interpretation of the record in one particular case, is a quintessential example of the kind that we almost never review. As stated in our Rules, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law,” this Court’s Rule 10. That is precisely the situation here. The Court does not dispute that the Fifth Circuit applied all the correct legal standards, but the Court simply disagrees with the Fifth Circuit’s application of those tests to the facts in a particular record. Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary judgment record is just enough or not

quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so.

[8] Instead, we have well-known criteria for granting review, and they are not met here. The question that the Court decides is not one that has divided the lower courts, see this Court's Rule 10, and today's decision adds virtually nothing to the law going forward. The Court of Appeals held that the conditions alleged by petitioner, if proved, would violate the Eighth Amendment, and this put correctional officers in the Fifth Circuit on notice that such conditions are intolerable. Thus, even without our intervention, qualified immunity would not be available in any similar future case.

[9] We have sometimes granted review and summarily reversed in cases where it appeared that the lower court had conspicuously disregarded governing Supreme Court precedent, but that is not the situation here. On the contrary, as I explain below, it appears that the Court of Appeals erred largely because it read too much into one of our decisions.

[10] It is not even clear that today's decision is necessary to protect petitioner's interests. We are generally hesitant to grant review of non-final decisions, and there are grounds for such wariness here. If we had denied review at this time, petitioner may not have lost the opportunity to contest the grant of summary judgment on the issue of respondents' entitlement to qualified immunity on his cell-conditions claim. His case would have been remanded for trial on the claims that remained after the Fifth Circuit's decision (one of which sought relief that appears to overlap with the relief sought on the cell-conditions claim), and if he was dissatisfied with the final judgment, he may have been able to seek review by this Court of the cell-conditions qualified immunity issue at that time. *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 508, n.1 (2001) (per curiam). And of course, there is always the possibility that he would have been satisfied with whatever relief he obtained on the claims that went to trial.

[11] Today's decision does not even conclusively resolve the issue of qualified immunity on the cell-conditions claim because respondents are free to renew that defense at trial, and if the facts petitioner alleges are not ultimately established, the defense could succeed. Indeed, if petitioner cannot prove the facts he alleges, he may not be able to show that his constitutional rights were violated.

[12] In light of all this, it is not apparent why the Court has chosen to grant review in this case.

II

[13] While I would not grant review on the question the Court addresses, I agree that summary judgment should not have been awarded on the issue of qualified immunity. We must view the summary judgment record in the light most favorable to petitioner, and when petitioner's verified complaint is read in this way, a reasonable fact-finder could infer not just that the conditions in the cells in question were horrific but that respondents chose to place and keep him in those particular cells, made no effort to have the cells cleaned, and did not explore the possibility of assignment to cells with better conditions. A reasonable corrections officer would have known that this course of conduct was unconstitutional, and the cases on which respondents rely do not show otherwise.

[14] Although this Court stated in *Hutto* that holding a prisoner in a "filthy" cell for "a few days" "might be tolerable," 437 U.S. at 686-687, that equivocal and unspecific dictum does not justify what petitioner alleges. There are degrees of filth, ranging from conditions that are simply unpleasant to conditions that pose a grave health risk, and the concept of "a few days" is also imprecise. In addition, the statement does not address potentially important factors, such as the necessity of placing and keeping a prisoner in a particular cell and the possibility of cleaning the cell before he is housed there or during the course of that placement. A reasonable officer could not think that this statement or the Court of Appeals' decision in *Davis* meant that it is constitutional to place a prisoner in the filthiest cells imaginable for up to six days despite the availability of other preferable cells or despite the ability to arrange for cleaning of the cells in question.

[15] For these reasons, I concur in the judgment.

Footnotes

16. The Fifth Circuit accepted Taylor's "verified pleadings [as] competent evidence at summary judgment." *Taylor v. Stevens*, 946 F.3d 211, 221 (2019). As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to Taylor's claim. [↗](#)
17. In holding otherwise, the Fifth Circuit noted "ambiguity in the caselaw" regarding whether "a time period so short [as six days] violated the Constitution." 946 F.3d, at 222. But the case that troubled the Fifth Circuit is too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor's right. See *Davis v. Scott*, 157 F.3d 1003, 1004 (CA5 1998) (no Eighth Amendment violation where inmate was detained for three days in dirty cell and provided cleaning supplies). [↗](#)
18. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 and n.30 (1982) (noting that the Court's decisions equate the qualified immunity of state officials sued under 42 U.S.C. § 1983 with the immunity of federal officers sued directly under the Constitution.) [↗](#)
19. In *Bunting*, the Court of Appeals followed the *Saucier* two-step protocol and first held that the Virginia Military Institute's use of the word "God" in a "supper role call" ceremony violated the Establishment Clause, but granted the defendants qualified immunity because the law was not clearly established at the relevant time. *Mellen v. Bunting*, 327 F.3d 355, 365-367 (CA4 2003), *cert. denied*, 541 U.S. 1019 (2004). Although they had a judgement in their favor below, the defendants asked this Court to review the adverse constitutional ruling. Dissenting from the denial of certiorari, JUSTICE SCALIA, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." 521 U.S. 1022. The "tangle" arose from the Court's "settled refusal" to entertain an appeal by a party on an issue as to which he prevailed" below, a practice that insulates from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id.*, at 1022, 1023, 1024. [↗](#)

Notes on *Taylor v. Riojas*

1. What general standard(s) did the Court apply to determine whether the right violated was clearly established?
2. How are the lower courts to determine when the facts of the case so egregious that the right violated is clearly established by the general constitutional rule recognized by the precedents? Why didn't Mullenix's shooting his rifle in the dark at a car traveling 85 miles per hour from an overpass 20 feet above the road; without training on and experience with the tactic; against his superior officer's instruction to stand by and see whether the spike strips worked; less than one second

before the car was going to travel over the spike strips; and firing six shots, none of which hit the car but four of which struck and killed Leija, satisfy the standard set forth in *Riojas*?

3. Justice Alito's concurring opinion criticized the Court for reviewing the lower court's disposition of a qualified immunity motion where the "asserted error consists of . . . the misapplication of a properly stated rule of law." Was it appropriate for the *Mullenix* Court to review and overturn the Fifth Circuit's denial of qualified immunity?

PEARSON v. CALLAHAN, 555 U.S. 223 (2009)

Justice Alito delivered the opinion of the Court.

[1] This is an action brought by respondent under Rev. Stat. §1979, 42 U.S.C. §1983, against state law enforcement officers who conducted a warrantless search of his house incident to his arrest for the sale of methamphetamine to an undercover informant whom he had voluntarily admitted to the premises. The Court of Appeals held that petitioners were not entitled to summary judgment on qualified immunity grounds. Following the procedure we mandated in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L. Ed.2d 272 (2001), the Court of Appeals held, first, that respondent adduced facts sufficient to make out a violation of the Fourth Amendment and, second, that the unconstitutionality of the officers' conduct was clearly established. In granting review, we required the parties to address the additional question whether the mandatory procedure set out in *Saucier* should be retained.

[2] We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement and that petitioners are entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional. We therefore reverse.

I

A

[3] The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales. In 2002, Brian Bartholomew, who became an informant for the task force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day.

[4] That evening, Bartholomew arrived at respondent's residence at about 8 p.m. Once there, Bartholomew went inside and confirmed that respondent had methamphetamine available for sale. Bartholomew then told respondent that he needed to obtain money to make his purchase and left.

[5] Bartholomew met with members of the task force at about 9 p.m. and told them that he would be able to buy a gram of methamphetamine for \$100. After concluding that Bartholomew was capable of completing the planned purchase, the officers searched him, determined that he had no controlled substances on his person, gave him a marked \$100 bill and a concealed electronic transmitter to monitor his conversations, and agreed on a signal that he would give after completing the purchase.

[6] The officers drove Bartholomew to respondent's trailer home, and respondent's daughter let him inside. Respondent then retrieved a large bag containing methamphetamine from his freezer and sold Bartholomew a gram of methamphetamine, which he put into a small plastic bag. Bartholomew gave the

arrest signal to the officers who were monitoring the conversation, and they entered the trailer through a porch door. In the enclosed porch, the officers encountered Bartholomew, respondent, and two other persons, and they saw respondent drop a plastic bag, which they later determined contained methamphetamine. The officers then conducted a protective sweep of the premises. In addition to the large bag of methamphetamine, the officers recovered the marked bill from respondent and a small bag containing methamphetamine from Bartholomew, and they found drug syringes in the residence. As a result, respondent was charged with the unlawful possession and distribution of methamphetamine.

B

[7] The trial court held that the warrantless arrest and search were supported by exigent circumstances. On respondent's appeal from his conviction, the Utah attorney general conceded the absence of exigent circumstances but urged that the inevitable discovery doctrine justified introduction of the fruits of the warrantless search. The Utah Court of Appeals disagreed and vacated respondent's conviction. See *State v. Callahan*, 2004 UT App. 164, 93 P.3d 103. Respondent then brought this damages action under 42 U.S.C. § 1983 in the United States District Court for the District of Utah, alleging that the officers had violated the Fourth Amendment by entering his home without a warrant. See *Callahan v. Millard Cty.*, No. 2:04-CV-00952, 2006 WL 1409130 (2006).

[8] In granting the officers' motion for summary judgment, the District Court noted that other courts had adopted the "consent-once-removed" doctrine, which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view. Believing that this doctrine was in tension with our intervening decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed.2d 208 (2006), the District Court concluded that "the simplest approach is to assume that the Supreme Court will ultimately reject the [consent-once-removed] doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment. The court then held that the officers were entitled to qualified immunity because they could reasonably have believed that the consent-once-removed doctrine authorized their conduct.

[9] On appeal, a divided panel of the Tenth Circuit held that petitioners' conduct violated respondent's Fourth Amendment rights. *Callahan v. Millard Cty.*, 494 F.3d 891, 895-899 (2007). The panel majority stated that "[t]he 'consent-once-removed' doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." *Id.* at 896. The majority took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions that "broade[n] this doctrine to grant informants the same capabilities as undercover officers." *Ibid.*

[10] The Tenth Circuit panel further held that the Fourth Amendment right that it recognized was clearly established at the time of respondent's arrest. *Id.* at 898-899. "In this case," the majority stated, "the relevant right is the right to be free in one's home from unreasonable searches and arrests." *Id.*, at 898. The Court determined that, under the clearly established precedents of this Court and the Tenth Circuit, "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id.* at 898-899. In the panel's words, "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id.* at 899. Against that backdrop, the panel concluded, petitioners could not reasonably have believed that their conduct was lawful because petitioners "knew (1) they had no warrant; (2) [respondent] had not consented to their entry; and (3) [respondent's] consent to the entry of an informant could not reasonably be interpreted to extend to them." *Ibid.*

[11] In dissent, Judge Kelly argued that "no constitutional violation occurred in this case" because, by inviting Bartholomew into his house and participating in a narcotics transaction there, respondent had compromised the privacy of the residence and had assumed the risk that Bartholomew would reveal their dealings to the police. *Id.* at 903. Judge Kelly further concluded that, even if petitioners' conduct had been

unlawful, they were nevertheless entitled to qualified immunity because the constitutional right at issue—“the right to be free from the warrantless entry of police officers into one’s home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause”—was not “clearly established” at the time of the events in question. *Id.* at 903–904.

[12] As noted, the Court of Appeals followed the *Saucier* procedure. The *Saucier* procedure has been criticized by Members of this Court and by lower court judges, who have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages. Accordingly, in granting certiorari, we directed the parties to address the question whether *Saucier* should be overruled. 552 U.S. 1279, (2008).

II

A

[13] In *Saucier*, 533 U.S. 194, 121 S. Ct. 2151, this Court mandated a two-step sequence for resolving government officials’ qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S. Ct. 2151. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. *Ibid.* Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right. *Anderson, supra*, at 640, 107 S. Ct. 3034.

[14] Our decisions prior to *Saucier* had held that “the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.” *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5, 118 S. Ct. 1708, 140 L. Ed.2d 1043 (1998). *Saucier* made that suggestion a mandate. For the first time, we held that whether “the facts alleged show the officer’s conduct violated a constitutional right ... *must* be the initial inquiry” in every qualified immunity case. 533 U.S. at 201, 121 S. Ct. 2151 (emphasis added). Only after completing this first step, we said, may a court turn to “the next, sequential step,” namely, “whether the right was clearly established.” *Ibid.*

[15] This two-step procedure, the *Saucier* Court reasoned, is necessary to support the Constitution’s “elaboration from case to case” and to prevent constitutional stagnation. *Ibid.* “The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.” *Ibid.*

III

[16] On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

A

[17] Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases,

we continue to recognize that it is often beneficial. For one thing, there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the “clearly established” prong. “[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be.” *Lyons v. Xenia*, 417 F.3d 565, 581 (C.A.6 2005) (Sutton, J., concurring). In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all. In addition, the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.

B

[18] At the same time, however, the rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.

[19] Unnecessary litigation of constitutional issues also wastes the parties’ resources. Qualified immunity is “an immunity from suit rather than a mere defense to liability.” *Mitchell*, 472 U.S. at 526, 105 S. Ct. 2806 (emphasis deleted). *Saucier*’s two-step protocol “disserve[s] the purpose of qualified immunity” when it “forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.” Brief for Nat. Assn. of Criminal Defense Lawyers as *Amicus Curiae* 30.

[20] Although the first prong of the *Saucier* procedure is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development. For one thing, there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases. See *Scott v. Harris*, 550 U.S. 372, 388, 127 S. Ct. 1769, 167 L. Ed.2d 686 (2007) (BREYER, J., concurring) (counseling against the *Saucier* two-step protocol where the question is “so fact dependent that the result will be confusion rather than clarity”); *Buchanan v. Maine*, 469 F.3d 158, 168 (C.A.1 2006) (“We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts”).

[21] A decision on the underlying constitutional question in a § 1983 damages action or a *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, (1971),^[18] action may have scant value when it appears that the question will soon be decided by a higher court. When presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to “bypass *Saucier*’s first step and decide only whether [the alleged right] was clearly established.” *Motley v. Parks*, 432 F.3d 1072, 1078, and n.5 (2005) (en banc). Similar considerations may come into play when a court of appeals panel confronts a constitutional question that is pending before the court en banc or when a district court encounters a constitutional question that is before the court of appeals.

[22] A constitutional decision resting on an uncertain interpretation of state law is also of doubtful precedential importance. As a result, several courts have identified an “exception” to the *Saucier* rule for cases in which resolution of the constitutional question requires clarification of an ambiguous state statute. *Egolf v. Witmer*, 526 F.3d 104, 109–111 (C.A.3 2008); accord, *Tremblay v. McClellan*, 350 F.3d 195, 200 (C.A.1 2003); *Ehrlich v. Glastonbury*, 348 F.3d 48, 57–60 (C.A.2 2003). Justifying the decision to grant qualified immunity to the defendant without first resolving, under *Saucier*’s first prong, whether the defendant’s conduct violated the Constitution, these courts have observed that *Saucier*’s “underlying principle” of encouraging federal courts to decide unclear legal questions in order to clarify the law for the future “is not meaningfully advanced ...

when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law." *Egolf, supra*, at 110; accord, *Tremblay, supra*, at 200; *Ehrlich, supra*, at 58.

[23] When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify. Accordingly, several courts have recognized that the two-step inquiry "is an uncomfortable exercise where the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed" and have suggested that "[i]t may be that *Saucier* was not strictly intended to cover" this situation. *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 69-70 (C.A.1 2002)....

[24] There are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking. The lower courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate....

[25] Although the *Saucier* rule prescribes the sequence in which the issues must be discussed by a court in its opinion, the rule does not—and obviously cannot—specify the sequence in which judges reach their conclusions in their own internal thought processes. Thus, there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all. In such situations, there is a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue....

[26] Rigid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations. Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested. See *Bunting*, 541 U.S. at 1025, 124 S. Ct. 1750 (SCALIA, J., dissenting from denial of certiorari) ("The perception of unreviewability undermines adherence to the sequencing rule we ... created" in *Saucier*);^[9] see also *Kalka v. Hawk*, 215 F.3d 90, 96, n.9 (C.A.D.C. 2000) (noting that "[n]ormally, a party may not appeal from a favorable judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court"). In cases like *Bunting*, the "prevailing" defendant faces an unenviable choice: "compl[y] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "def[y] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential "punitive damages." *Horne, supra*, at 247-248.

[27] Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the "older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'" ...

[28] This flexibility properly reflects our respect for the lower federal courts that bear the brunt of adjudicating these cases. Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.

C

[29] Any misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted. Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases. Moreover, the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity. Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis*, 523 U.S., at 841, n.5, 118 S. Ct. 1708 (noting that qualified immunity is unavailable "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion").

[30] We also do not think that relaxation of *Saucier*'s mandate is likely to result in a proliferation of damages claims against local governments. Cf. Brief for Nat. Assn. of Counties et al. as *Amici Curiae* 29, 30 (“[T]o the extent that a rule permitting courts to bypass the merits makes it more difficult for civil rights plaintiffs to pursue novel claims, they will have greater reason to press custom, policy, or practice [damages] claims against local governments”). It is hard to see how the *Saucier* procedure could have a significant effect on a civil rights plaintiff's decision whether to seek damages only from a municipal employee or also from the municipality. Whether the *Saucier* procedure is mandatory or discretionary, the plaintiff will presumably take into account the possibility that the individual defendant will be held to have qualified immunity, and presumably the plaintiff will seek damages from the municipality as well as the individual employee if the benefits of doing so (any increase in the likelihood of recovery or collection of damages) outweigh the litigation costs.

[31] Nor do we think that allowing the lower courts to exercise their discretion with respect to the *Saucier* procedure will spawn “a new cottage industry of litigation ... over the standards for deciding whether to reach the merits in a given case.” Brief for Nat. Assn. of Counties, *supra*, at 29, 30. It does not appear that such a “cottage industry” developed prior to *Saucier*, and we see no reason why our decision today should produce such a result.

IV

[32] Turning to the conduct of the officers here, we hold that petitioners are entitled to qualified immunity because the entry did not violate clearly established law. An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment. See *Anderson*, 483 U.S. at 641, 107 S. Ct. 3034. This inquiry turns on the “objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.” ...

[33] When the entry at issue here occurred in 2002, the “consent-once-removed” doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. See, e.g., *United States v. Diaz*, 814 F.2d 454, 459 (CA7), *cert. denied*, 484 U.S. 857, 108 S. Ct. 166, 98 L. Ed.2d 120 (1987); *United States v. Bramble*, 103 F.3d 1475 (C.A.9 1996); *United States v. Pollard*, 215 F.3d 643, 648–649 (CA6), *cert. denied*, 531 U.S. 999, 121 S. Ct. 498, 148 L. Ed.2d 469 (2000); *State v. Henry*, 133 N.J. 104, 627 A.2d 125 (1993); *State v. Johnston*, 184 Wis.2d 794, 518 N.W.2d 759 (1994). It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul*, 808 F.2d 645, 648 (1986). The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon*, 398 F.3d 802, 806–808, *cert. denied*, 546 U.S. 977, 126 S. Ct. 548, 163 L. Ed.2d 460 (2005), and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision.

[34] The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on “consent-once-removed” entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that “[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.” 526 U.S., at 618. Likewise, here, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

[35] Because the unlawfulness of the officers' conduct in this case was not clearly established, petitioners are entitled to qualified immunity. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

↓ [Pearson v. Callahan – Audio and Transcript of Oral Argument](#)

D. Interlocutory Appeal of the Denial of Immunity

MITCHELL v. FORSYTH, 472 U.S. 511 (1985)

White, J., delivered the opinion of the Court, in which Blackmun, J., joined; in Parts I, III, and IV of which Burger, C.J., and O'Connor, J., joined; and in Parts I and II of which Brennan and Marshall, JJ., joined. Burger, C.J., filed an opinion concurring in part, O'Connor, J., filed an opinion concurring in part, in which Burger, C.J., joined. Stevens, J., filed an opinion concurring in the judgment. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Marshall, J., joined. Powell, J., took no part in the decision of this case. Rehnquist, J., took no part in the consideration or decision of this case.

Justice White delivered the opinion of the Court.

[1] This is a suit for damages stemming from a warrantless wiretap authorized by petitioner, a former Attorney General of the United States. The case presents three issues: whether the Attorney General is absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that petitioner is not immune from suit for his actions under the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is appealable; and, if so, whether the District Court's ruling on qualified immunity was correct.

I

[2] In 1970, the Federal Bureau of Investigation learned that members of an antiwar group known as the East Coast Conspiracy to Save Lives (ECCSL) had made plans to blow up heating tunnels linking federal office buildings in Washington, D.C., and had also discussed the possibility of kidnapping then National Security Adviser Henry Kissinger. On November 6, 1970, acting on the basis of this information, the then Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor who was a member of the group. According to the Attorney General, the purpose of the wiretap was the gathering of intelligence in the interest of national security.

[3] The FBI installed the tap in late November 1970, and it stayed in place until January 6, 1971. During that time, the Government intercepted three conversations between Davidon and respondent Keith Forsyth. The record before us does not suggest that the intercepted conversations, which appear to be innocuous, were ever used against Forsyth in any way. Forsyth learned of the wiretap in 1972, when, as a criminal defendant facing unrelated charges, he moved under 18 U.S.C. § 3504 for disclosure by the Government of any electronic surveillance to which he had been subjected.

[4] Shortly thereafter, this Court ruled that the Fourth Amendment does not permit the use of warrantless wiretaps in cases involving domestic threats to the national security. *United States v. United States District Court*, 407 U.S. 297 (1972) (*Keith*). In the wake of the *Keith* decision, Forsyth filed this lawsuit against John Mitchell and several other defendants in the United States District Court for the Eastern District of Pennsylvania. Forsyth alleged that the surveillance to which he had been subjected violated both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520, which sets forth comprehensive standards governing the use of wiretaps and electronic

surveillance by both governmental and private agents. He asserted that both the constitutional and statutory provisions provided him with a private right of action; he sought compensatory, statutory, and punitive damages.

[5] Discovery and related preliminary proceedings dragged on for the next five-and-a-half years. By early 1978, both Forsyth and Mitchell had submitted motions for summary judgment on which the District Court was prepared to rule. Forsyth contended that the uncontested facts established that the wiretap was illegal and that Mitchell and the other defendants were not immune from liability; Mitchell contended that the decision in *Keith* should not be applied retroactively to the wiretap authorized in 1970 and that he was entitled either to absolute prosecutorial immunity from suit under the rule of *Imbler v. Pachtman*, 424 U.S. 409 (1976), or to qualified or “good faith” immunity under the doctrine of *Wood v. Strickland*, 420 U.S. 308 (1975).

* * * * *

[6] [T]he District Court held a hearing on the question whether the wiretap served a prosecutorial purpose. On the basis of the hearing and the evidence in the record, the court concluded that Mitchell's authorization of the wiretap was not intended to facilitate any prosecutorial decision or further a criminal investigation. Mitchell himself had disavowed any such intention and insisted that the only reason for the wiretap was to gather intelligence needed for national security purposes. Taking Mitchell at his word in this regard, the court held to its conclusion that he was not entitled to absolute prosecutorial immunity.

* * * * *

[7] The District Court [also] rejected Mitchell's argument that under [the *Harlow v. Fitzgerald*] standard he should be held immune from suit for warrantless national security wiretaps authorized before this Court's decision in *Keith*: that decision was merely a logical extension of general Fourth Amendment principles and in particular of the ruling in *Katz v. United States*, 389 U.S. 347 (1967), in which the Court held for the first time that electronic surveillance unaccompanied by physical trespass constituted a search subject to the Fourth Amendment's warrant requirement. Mitchell and the Justice Department, the court suggested, had chosen to “gamble” on the possibility that this Court would create an exception to the warrant requirement if presented with a case involving national security. Having lost the gamble, Mitchell was not entitled to complain of the consequences.^[1] The court therefore denied Mitchell's motion for summary judgment, granted Forsyth's motion for summary judgment on the issue of liability, and scheduled further proceedings on the issue of damages. *Forsyth v. Kleindienst*, 551 F. Supp. 1247 (1982).

[8] Mitchell ... appealed, contending that the District Court had erred in its rulings on both absolute immunity and qualified immunity. Holding that it possessed jurisdiction to decide the denial of absolute immunity issue despite the fact that it was a pretrial order and arguably not a final judgment, the Court of Appeals rejected Mitchell's argument that the national security functions of the Attorney General entitled him to absolute immunity under *Imbler v. Pachtman* or otherwise. With respect to the denial of qualified immunity, the Court of Appeals held that the District Court's order was not appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

[9] The question whether the Attorney General is absolutely immune from suit for acts performed in the exercise of his national security functions is an important one that we have hitherto left unanswered. See *Halperin v. Kissinger*, 196 U.S. App. D.C. 285, 606 F.2d 1192 (1979), *aff'd* by an equally divided Court, 452 U.S. 713 (1981). Moreover, the issue of the appealability before final judgment of orders denying immunity under the objective standard of *Harlow v. Fitzgerald* is one that has divided the Courts of Appeals.^[2] Finally, the District Court's decision—left standing by the Court of Appeals—that Mitchell's actions violated clearly established law is contrary to the rulings of the District of Columbia Circuit in *Sinclair v. Kleindienst*, 207 U.S. App. D.C. 155, 645 F.2d 1080 (1981), and *Zweibon v. Mitchell*, 231 U.S. App. D.C. 398, 720 F.2d 162 (1983), *cert. denied*, 469 U.S. 880 (1984). We granted certiorari to address these issues, 469 U.S. 929 (1984).

[10] We first address Mitchell's claim that the Attorney General's actions in furtherance of the national security should be shielded from scrutiny in civil damages actions by an absolute immunity similar to that afforded the President, see *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), judges, prosecutors, witnesses, and officials performing "quasi-judicial" functions, see *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Butz v. Economou*, 438 U.S. 478, 508-517 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976), and legislators, see *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951). We conclude that the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.

[11] Our decisions in this area leave no doubt that the Attorney General's status as a Cabinet officer is not in itself sufficient to invest him with absolute immunity: the considerations of separation of powers that call for absolute immunity for state and federal legislators and for the President of the United States do not demand a similar immunity for Cabinet officers or other high executive officials. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, *supra*. Mitchell's claim, then, must rest not on the Attorney General's position within the Executive Branch, but on the nature of the functions he was performing in this case. See *Harlow v. Fitzgerald*, *supra*, at 810-811. Because Mitchell was not acting in a prosecutorial capacity in this case, the situations in which we have applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his performance of the "national security function."

[12] First, in deciding whether officials performing a particular function are entitled to absolute immunity, we have generally looked for a historical or common-law basis for the immunity in question. The legislative immunity recognized in *Tenney v. Brandhove*, *supra*, for example, was rooted in the long struggle in both England and America for legislative independence, a presupposition of our scheme of representative government. The immunities for judges, prosecutors, and witnesses established by our cases have firm roots in the common law. See *Briscoe v. LaHue*, *supra*, at 330-336. Mitchell points to no analogous historical or common-law basis for an absolute immunity for officers carrying out tasks essential to national security.

[13] Second, the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or "quasi-judicial" tasks that have been the primary wellsprings of absolute immunities. The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict. See *Bradley v. Fisher*, 13 Wall. 335, 348 (1872). National security tasks, by contrast, are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation. Whereas the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process, it is unlikely to have a similar effect on the Attorney General's performance of his national security tasks.

[14] Third, most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed. Legislators are accountable to their constituents, see *Tenney v. Brandhove*, *supra*, at 378, and the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results. Similar built-in restraints on the Attorney General's activities in the name of national security, however, do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary. As the Court observed in *Keith*, the label of "national security" may cover a multitude of sins:

"National security cases ... often reflect a convergence of First and Fourth Amendment values not present

in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.... History abundantly documents the tendency of Government—however, benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies.... The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." 407 U.S., at 313-314.

The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity. ^[3]

[15] We emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints. Under the standard of qualified immunity articulated in *Harlow v. Fitzgerald*, the Attorney General will be entitled to immunity so long as his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S., at 818. This standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the Harlow standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate...." *Id.*, at 819. This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

III

[16] Although 28 U.S.C. § 1291 vests the courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Thus, a decision of a district court is appealable if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S., at 546.

[17] A major characteristic of the denial or granting of a claim appealable under Cohen's "collateral order" doctrine is that "unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all." *Stack v. Boyle*, 342 U.S. 1, 12 (1952) (opinion of Jackson, J.); see also *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 266 (1982). When a district court has denied a defendant's claim of right not to stand trial, on double jeopardy grounds, for example, we have consistently held the court's decision appealable, for such a right cannot be effectively vindicated after the trial has occurred. *Abney v. United States*, 431 U.S. 651 (1977). Thus, the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); cf. *Helstoski v. Meanor*, 442 U.S. 500 (1979).

[18] At the heart of the issue before us is the question whether qualified immunity shares this essential attribute of absolute immunity—whether qualified immunity is in fact an entitlement not to stand trial under certain circumstances. The conception animating the qualified immunity doctrine as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.*, at 819, quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967). As the citation to *Pierson v. Ray* makes clear, the "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to

the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Harlow*, 457 U.S., at 816. Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as “[i]nquiries] of this kind can be peculiarly disruptive of effective government.” *Id.*, at 817.

[19] With these concerns in mind, the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to “permit the resolution of many insubstantial claims on summary judgment” and to avoid “[subjecting] government officials either to the costs of trial or to the burdens of broad-reaching discovery” in cases where the legal norms the officials are alleged to have violated were not clearly established at the time. *Id.*, at 817-818. Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. See *id.*, at 818. Even if the plaintiff’s complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court’s decision is effectively unreviewable on appeal from a final judgment.

[20] An appealable interlocutory decision must satisfy two additional criteria: it must “conclusively determine the disputed question,” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), and that question must involve a “[claim] of right separable from, and collateral to, rights asserted in the action,” *Cohen, supra*, at 546. The denial of a defendant’s motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements. Such a decision is “conclusive” in either of two respects. In some cases, it may represent the trial court’s conclusion that even if the facts are as asserted by the defendant, the defendant’s actions violated clearly established law and are therefore not within the scope of the qualified immunity. In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court’s conclusion that the defendant is not immune. Alternatively, the trial judge may rule only that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court’s denial of summary judgment finally and conclusively determines the defendant’s claim of right not to stand trial on the plaintiff’s allegations, and because “[there] are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,” it is apparent that “*Cohen*’s threshold requirement of a fully consummated decision is satisfied” in such a case. *Abney v. United States*, 431 U.S., at 659.

[21] Similarly, it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff’s claim that his rights have been violated. See *id.*, at 659-660. An appellate court reviewing the denial of the defendant’s claim of immunity need not consider the correctness of the plaintiff’s version of the facts, nor even determine whether the plaintiff’s allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant’s version of the facts the defendant’s conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.^[4] To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff’s claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely

immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause. In the case of a double jeopardy claim, the court must compare the facts alleged in the second indictment with those in the first to determine whether the prosecutions are for the same offense, while in evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct. In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, see *Abney v. United States*, *supra*; *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.

[22] Accordingly, we hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

IV

[23] The Court of Appeals thus had jurisdiction over Mitchell's claim of qualified immunity, and that question was one of the questions presented in the petition for certiorari which we granted without limitation. Moreover, the purely legal question on which Mitchell's claim of immunity turns is "appropriate for our immediate resolution" notwithstanding that it was not addressed by the Court of Appeals. *Nixon v. Fitzgerald*, *supra*, at 743, n.23. We therefore turn our attention to the merits of Mitchell's claim of immunity.

[24] Under *Harlow v. Fitzgerald*, Mitchell is immune unless his actions violated clearly established law. See 457 U.S., at 818-819; see also *Davis v. Scherer*, 468 U.S. 183, 197 (1984). Forsyth complains that in November 1970, Mitchell authorized a warrantless wiretap aimed at gathering intelligence regarding a domestic threat to national security—the kind of wiretap that the Court subsequently declared to be illegal. *Keith*, 407 U.S. 297 (1972). The question of Mitchell's immunity turns on whether it was clearly established in November 1970, well over a year before *Keith* was decided, that such wiretaps were unconstitutional. We conclude that it was not.

* * * * *

[25] As of 1970, the Justice Departments of six successive administrations had considered warrantless domestic security wiretaps constitutional. Only three years earlier, this Court had expressly left open the possibility that this view was correct. Two Federal District Courts had accepted the Justice Department's position, and although the Sixth Circuit later firmly rejected the notion that the Fourth Amendment countenanced warrantless domestic security wiretapping, this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction.

* * * * *

[26] Of course, *Keith* finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to the national security. But whatever the agreement with the Court's decision and reasoning in *Keith* may be, to say that the principle *Keith* affirmed had already been "clearly established" is to give that phrase a meaning that it cannot easily bear.^[5] The legality of the warrantless domestic security wiretap Mitchell authorized in November 1970, was, at that time, an open question, and *Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted. The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected. The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted. Hence, in the absence of contrary directions from Congress, Mitchell is immune from suit for his authorization of the David on wiretap notwithstanding that his actions violated the Fourth Amendment.^[6]

V

[27] We affirm the Court of Appeals' denial of Mitchell's claim to absolute immunity. The court erred, however, in declining to accept jurisdiction over the question of qualified immunity; and to the extent that the effect of the judgment of the Court of Appeals is to leave standing the District Court's erroneous decision that Mitchell is not entitled to summary judgment on the ground of qualified immunity, the judgment of the Court of Appeals is reversed.

It is so ordered.

Justice Powell took no part in the decision of this case.

Justice Rehnquist took no part in the consideration or decision of this case. Chief Justice Burger, concurring in part.

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Justice O'Connor, with whom the Chief Justice joins, concurring in part.

* * * * *

Justice Stevens, concurring in the judgment.

* * * * *

Justice Brennan, with whom Justice Marshall joins, concurring in part and dissenting in part.

[28] I join Parts I and II of the Court's opinion, for I agree that qualified immunity sufficiently protects the legitimate needs of public officials, while retaining a remedy for those whose rights have been violated. Because denial of absolute immunity is immediately appealable, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982), the issue is squarely before us and, in my view, rightly decided.

[29] I disagree, however, with the Court's holding that the qualified immunity issue is properly before us. For the purpose of applying the final judgment rule embodied in 28 U.S.C. § 1291, I see no justification for distinguishing between the denial of Mitchell's claim of qualified immunity and numerous other pretrial motions that may be reviewed only on appeal of the final judgment in the case. I therefore dissent from its holding that denials of qualified immunity, at least where they rest on undisputed facts, are generally appealable.

[30] We have always read the *Cohen* collateral order doctrine narrowly, in part because of the strong policies supporting the § 1291 final judgment rule. The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time-consuming appeals. Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants. As Justice Frankfurter, writing for the Court in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), noted, the rule “[avoids] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.”

A

[31] Although the qualified immunity question in this suit is not identical to the ultimate question on the merits, the two are quite closely related. The question on the merits is whether Mitchell violated the law when he authorized the wiretap of Davidon’s phone without a warrant. The immunity question is whether Mitchell violated clearly established law when he authorized the wiretap of Davidon’s phone without a warrant. Assuming with the Court that all relevant factual disputes in this case have been resolved, a necessary implication of a holding that Mitchell was not entitled to qualified immunity would be a holding that he is indeed liable. Moreover, a trial court seeking to answer either question would refer to the same or similar cases and statutes, would consult the same treatises and secondary materials, and would undertake a rather similar course of reasoning. At least in the circumstances presented here, the two questions are simply not completely separate.

[32] I thus find the application of the second prong of the *Cohen* test to result in a straightforward preclusion of interlocutory appeal.

[33] In an attempt to avoid the rigors of the second prong of the collateral order doctrine, the Court holds that “a claim of immunity is conceptually distinct from the merits of the plaintiff’s claim that his rights have been violated.” *Ante*, at 527-528. Our previous cases, especially those of recent vintage, have established a more exacting standard. The ordinary formulation is from *Coopers & Lybrand*; we stated there that an interlocutory order may be considered final for purposes of immediate appeal only if it “[resolves] an important issue completely separate from the merits of the action.” 437 U.S., at 468.

[34] Even if something less than complete separability were required, the Court’s toothless standard disserves the important purposes underlying the separability requirement. First, where a pretrial issue is entirely separate from the merits, interlocutory review may cause delay and be unjustified on various grounds, but it at least is unlikely to require repeated appellate review of the same or similar questions. In contrast, where a pretrial issue is closely related to the merits of a case and interlocutory review is permitted, post-

judgment appellate review is likely to require the appellate court to reexamine the same or similar legal issues. The Court's holding today has the effect of requiring precisely this kind of repetitious appellate review. In an interlocutory appeal on the qualified immunity issue, an appellate court must inquire into the legality of the defendant's underlying conduct. As the Court has recently noted, "[most] pretrial orders of district judges are ultimately affirmed by appellate courts." *Richardson-Merrell Inc. v. Koller*, ante, at 434. Thus, if the trial court is, as usual, affirmed, the appellate court must repeat the process on final judgment. Although I agree with the Court that the legal question in each review would be "conceptually" different, the connection between the research, analysis, and decision of each of the issues is apparent; much of the work in reviewing the final judgment would be duplicative.

* * * * *

B

[35] The Court states that "[at] the heart of the issue before us," *Ante*, at 525, is the third prong of the *Cohen* test: whether the order is effectively unreviewable upon ultimate termination of the proceedings. The Court holds that, because the right to qualified immunity includes a right not to stand trial unless the plaintiff can make a material issue of fact on the question of whether the defendant violated clearly established law, it cannot be effectively vindicated after trial. *Cf. Abney v. United States*, 431 U.S. 651 (1977).

* * * * *

[36] In my view, a sober assessment of the interests protected by the qualified immunity defense counsels against departing from normal procedural rules when the defense is asserted. The Court claims that subjecting officials to trial may lead to "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ante*, at 526, quoting *Harlow v. Fitzgerald*, supra, at 816. Even if I agreed with the Court that in the post-*Harlow* environment these evils were all real, I could not possibly agree that they justify the Court's conclusion. These same ill results would flow from an adverse decision on any dispositive preliminary issue in a lawsuit against an official defendant—whether based on a statute of limitations, collateral estoppel, lack of jurisdiction, or the like. A trial court is often able to resolve these issues with considerable finality, and the trial court's decision on such questions may often be far more separable from the merits than is a qualified immunity ruling. Yet I hardly think the Court is prepared to hold that a government official suffering an adverse ruling on any of these issues would be entitled to an immediate appeal.

[37] In any event, I do not think that the evils suggested by the Court pose a significant threat, given the liability standards established in *Harlow*. We held in *Harlow* that "government officials 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." 457 U.S. at 818. I have no doubt that trial judges employing this standard will have little difficulty in achieving *Harlow's* goal of early dismissal of frivolous or insubstantial lawsuits. The question is whether anything is to be gained by permitting interlocutory appeal in the remaining cases that would otherwise proceed to trial.

[38] Such cases will predictably be of two types. Some will be cases in which the official did violate a clearly established legal norm. In these cases, nothing is to be gained by permitting interlocutory appeal because they should proceed as expeditiously as possible to trial. The rest will be cases in which the official did not violate a clearly established legal norm. Given the nature of the qualified immunity determination, I would expect that these will tend to be quite close cases, in which the defendant violated a legal norm but in which it is questionable whether that norm was clearly established. Many of these cases may well be appealable as certified interlocutory appeals under 28 U.S.C. § 1292(b) or, less likely, on writ of mandamus. *Cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S., at 378, n.13; *Coopers & Lybrand v. Livesay*, 437 U.S. at 474-475.

It is only in the remaining cases that the Court's decision today offers the hope of an otherwise unavailable pretrial reversal. Out of this class of cases, interlocutory appeal is beneficial only in that still smaller subclass in which the trial court's judgment is reversed.

[39] The question is thus whether the possibly beneficial effects of avoiding trial in this small subset of cases justify the Court's declaration that the right to qualified immunity is a right not to stand trial at all. The benefits seem to me to be rather small. Most meritless cases will be dismissed at the early stages, thus minimizing the extent to which officials are distracted from their duties. Officials aware of the extensive protection offered by qualified immunity would be deterred only from activities in which there is at least a strong scent of illegality; deterrence from many such activities (those that are clearly unlawful) is precisely one of the goals of official liability. Finally, I cannot take seriously the Court's suggestion that officials who would otherwise be deterred from taking public office will have their confidence restored by the possibility that mistaken trial court qualified immunity rulings in some small class of cases that might be brought against them will be overturned on appeal before trial.

[40] Even if there were some benefits to be gained by granting officials a right to immediate appeal, a rule allowing immediate appeal imposes enormous costs on plaintiffs and on the judicial system as a whole.^[7]

[41] [T]he right to interlocutory appeal recognized today is generally available to (and can be expected to be widely pursued by) virtually any governmental official who is sued in his personal capacity, regardless of the merits of his claim to qualified immunity or the strength of the claim against him. As a result, I fear that today's decision will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals. The Court's decision today will result in denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of the appellate courts.



[Mitchell v. Forsyth – Audio and Transcript of Oral Argument](#)

Footnotes

1. The court also suggested that Mitchell should have been put on notice that his act was unlawful by Title III, which, in its view, clearly proscribed such warrantless wiretaps. ⁴
2. The First, Eighth, and District of Columbia Circuits have held such orders appealable, see *Krohn v. United States*, 742 F.2d 24 (CA1 1984); *Evans v. Dillahunty*, 711 F.2d 828 (CA8 1983); *McSurely v. McClellan*, 225 U.S. App. D.C. 67, 697 F.2d 309 (1982), while the Fifth and Seventh Circuits have joined the Third Circuit in holding that the courts of appeals lack jurisdiction over interlocutory appeals of qualified immunity rulings, see *Kenyatta v. Moore*, 744 F.2d 1179 (CA5 1984); *Lightner v. Jones*, 752 F.2d 1251 (CA7 1985). The Fourth Circuit has held that a district court's denial of qualified immunity is not appealable when the plaintiff's action involves claims for injunctive relief that will have to be adjudicated regardless of the resolution of any damages claims. *England v. Rockefeller*, 739 F.2d 140 (1984); *Bever v. Gilbertson*, 724 F.2d 1083, cert. denied, 469 U.S. 948 (1984). Because this case does not involve a claim for injunctive relief, the propriety of the Fourth Circuit's approach is not before us, and we express no opinion on the question. ⁵
3. It is true that damages actions are not the only conceivable deterrents to constitutional violations by the Attorney General. Mitchell suggests, for example, the possibility of declaratory or injunctive relief and the

use of the exclusionary rule to prevent the admission of illegally seized evidence in criminal proceedings. However, as Justice Harlan pointed out in his concurring opinion in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 398-411 (1971), such remedies are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation: in such cases, “it is damages or nothing.” *Id.* at 410. Other possibilities mentioned by Mitchell—including criminal prosecution and impeachment of the Attorney General—would be of dubious value for deterring all but the most flagrant constitutional violations. [↵](#)

4. We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law. [↵](#)
5. We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law. [↵](#)
6. Forsyth insists that even if the District Court was incorrect in concluding that warrantless national security wiretaps conducted in 1970-1971 violated clearly established law, Mitchell is not entitled to summary judgment because it has never been found that his actions were in fact motivated by a concern for national security. This submission is untenable. The District Court held a hearing on the purpose of the wiretap and took Mitchell at his word that the wiretap was a national security interception, under the Harlow standard. Had the court not concluded that the wiretap was indeed a national security wiretap, the qualified immunity question would never have been reached, for the tap would clearly have been illegal under Title III, and qualified immunity hence unavailable. In this light, the District Court's handling of the case precludes any suggestion that the wiretap was either (1) authorized for criminal investigatory purposes, or (2) authorized for some purpose unrelated to national security. [↵](#)
7. It also imposes costs on the defendant officials and the public. Those who pursue interlocutory appeals can be expected ordinarily to lose. See *Richardson-Merrell Inc. v. Koller*, ante, p. 424. Permitting an interlocutory appeal will thus in most cases merely divert officials from their duties for an even longer time than if no such appeals were available. [↵](#)

Notes on *Mitchell v. Forsyth*

1. May the defendant take an interlocutory appeal from the trial court's denial of a motion to dismiss on the ground of qualified immunity where the complaint includes not only a claim for damages, but also a demand for injunctive relief that will proceed to trial regardless of the outcome of the appeal? While the Court had no occasion to visit this issue in [Mitchell v. Forsyth](#), 472 U.S. at 519 n.5, in [Behrens v. Pelletier](#), 516 U.S. 299, 312 (1996), the Court ruled as follows:

Respondent ... argues that no appeal is available where, even if the District Court's qualified-immunity ruling is reversed, the defendant will be required to endure discovery and trial on matters separate from the claims against which immunity was asserted. Respondent reasons that a ruling

which does not reach all the claims does not “conclusively determin[e] the defendant’s claim of right not to *stand trial*,” *id.* at 527, and thus the order denying immunity cannot be said to be “final” within the meaning of *Cohen* ...

The *Harlow* right to immunity is a right to immunity *from certain claims*, not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit. Making appealability depend upon such a factor, particular to the case at hand, would violate the principle discussed above, that appealability determinations are made for classes of decisions, not individual orders in specific cases. Apart from these objections in principle, the practical effect of respondent’s proposal would be intolerable. If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one “clearly established” right; and both that and the further right not to be subjected to trial itself will be eliminated, so long as the complaint seeks injunctive relief (for which no “clearly established” right need be alleged).

2. Does *Mitchell* authorize an interlocutory appeal if the trial court denies the motion to dismiss or the motion for summary judgment because there are disputes of material fact that must be resolved in order to determine whether the right asserted was clearly established under the particular factual contours of the case? In [*Johnson v. Jones*](#), 515 U.S. 304 (1995), the Court held that the district court’s denial of police officers’ pretrial assertion of qualified immunity was not immediately appealable where there was a fact dispute over whether the officers were involved in the beating that gave rise to the complaint:

[T]he District Court’s determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioners’ involvement in the alleged beating of respondent was not a “final decision” within the meaning of the relevant statute. We so decide essentially for three reasons.

First, consider *Mitchell* itself, purely as precedent. The dispute underlying the *Mitchell* appeal involved the application of “clearly established” law to a given (for appellate purposes undisputed) set of facts. And, the Court, in its opinion, explicitly limited its holding to appeals challenging, not a district court’s determination about what factual issues are “genuine,” Fed. Rule Civ. Proc. 56(c), but the purely legal issue what law was “clearly established.”

Second ... *Mitchell* rested upon the view that “a claim of immunity is conceptually distinct from the merits of the plaintiff’s claim.”

Where, however, a defendant simply wants to appeal a district court’s determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such “separate” question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff’s claim on the merits.

It has been suggested that *Mitchell* implicitly recognized that “the need to protect officials against the burdens of further pretrial proceedings and trial” justifies a relaxation of the separability requirement.... To take what petitioners call a mere step beyond *Mitchell*, Brief for Petitioners 18, would more than relax the separability requirement—it would in many cases simply abandon it.

Finally, consider the competing considerations that underlie questions of finality.

For one thing, the issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no more comparative expertise in such matters.... And, to that

extent, interlocutory appeals are less likely to bring important error-correcting benefits here than where purely legal matters are at issue, as in *Mitchell*.

For another thing, questions about whether or not a record demonstrates a “genuine” issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases, unlike the simple “we didn’t do it” case before us, involve factual controversies about, for example, intent—controversies that, before trial, may seem nebulous. To resolve those controversies—to determine whether there is or is not a triable issue of fact about such a matter—may require reading a vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials. This fact means, compared with *Mitchell*, greater delay.

For a third thing, the close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court’s decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by trial testimony) to require it, once again, to canvass the record.

The upshot is that, compared with *Mitchell*, considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of “qualified immunity” matters to cases presenting more abstract issues of law.

515 U.S. at 313-17.

- a. Does *Johnson v. Jones* preclude interlocutory review in every case where the trial court finds there is a material dispute of fact? In [Behrens v. Pelletier](#), 516 U.S. 299, 312-13 (1996), the Court narrowed the scope of the *Johnson* holding:

[R]espondent asserts that appeal of denial of the summary-judgment motion is not available because the denial rested on the ground that “[m]aterial issues of fact remain.” This, he contends, renders the denial unappealable under last Term’s decision in *Johnson v. Jones*, 515 U.S. at 314. That is a misreading of the case. Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that every denial of summary judgment is nonappealable.

Here the District Court’s denial of petitioner’s summary-judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of “objective legal reasonableness.”

See also [Murphy v. State of Arkansas](#), 127 F.3d 750, 754 (8th Cir. 1997) (“[E]ven if the underlying claims raise genuine issues of material fact, we have interlocutory jurisdiction to consider the primary qualified immunity issue of law—‘whether, in view of the facts that the district court deemed sufficiently supported for summary judgment purposes, the individual defendants’ conduct was objectively reasonable given their knowledge and the clearly established law.’”); [Hart v. O’Brien](#), 127 F.3d 424, 436 (5th Cir. 1997) (“[T]he district court determined that there were sufficient uncontested facts to establish that the officers engaged in the conduct in question, but that there were insufficient uncontested facts to decide whether the officials enjoyed immunity as a matter of law. Hence, the officials may argue on interlocutory appeal (as they do here) that, contrary to the district court’s judgment, enough

uncontested facts exist to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune.”)

- b. How can the court of appeals determine if it has jurisdiction where the district court denies defendant’s pre-trial assertion of qualified immunity on the ground that there are disputes of material fact, but the court fails to make specific findings of fact upon which its analysis turns? The *Johnson* Court anticipated this problem and advised as follows:

When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason. Knowing that this is “extremely helpful to a reviewing court,” *Anderson*, 477 U.S., at 250, n.6, district courts presumably will often state those facts. But, if they do not, we concede that a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed. Regardless, this circumstance does not make a critical difference to our result, for a rule that occasionally requires a detailed evidence-based review of the record is still, from a practical point of view, more manageable than the rule that petitioners urge us to adopt. Petitioners’ approach would make that task, not the exception, but the rule.

515 U.S. at 319.

- c. In *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997) (en banc), the members of the court vigorously disagreed as to the scope of review of fact-findings in interlocutory appeals challenging a district court’s pre-trial ruling that a constitutional right was clearly established. Writing for the majority, Judge Wilkins offered the following perspective:

It appears that the principal source of disagreement offered by the dissent concerns our approach to determining the factual basis to which we must look in resolving the legal question over which we possess jurisdiction—perhaps the most difficult aspect of our review of denials of qualified immunity in an interlocutory appeal and one that has not yet been resolved conclusively by the Supreme Court.

The *Johnson* Court recognized that it will often be possible for an appellate court to utilize the facts that were assumed by the district court in denying the motion for summary judgment. *Id.* But, the Court also acknowledged that in some instances the district court will fail fully to set forth the facts on which its decision is based. *Id.* In that circumstance, the Court explained, “a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.” *Id.*; *Behrens*, 516 U.S. at 229. In our view, when a district court fails fully to set forth the facts supporting its legal conclusion that a government official is not entitled to qualified immunity, the court of appeals must review the materials submitted to the district court to determine what the record, viewed in the light most favorable to the nonmoving party, discloses in order to have a factual basis upon which to base its legal conclusion.

The dissent, however, opines that in directing the courts of appeals to determine the facts that district courts “likely assumed,” the Supreme Court indicated that our task is not to attempt to divine what the evidence viewed in the light most favorable to the plaintiff *actually* showed. Rather, the dissent suggests that we should construct from the record a set of facts that

supports the legal conclusion reached by the district court. See *infra* pp. 542-44. We cannot agree.

[T]he concerns of avoiding unnecessary delay and wise use of judicial resources that led the *Johnson* Court to its principal holding—that courts of appeals possess jurisdiction to decide only the abstract legal issues on interlocutory review—persuade us that in determining what facts the district court “likely assumed,” we must determine what the evidence actually shows when viewed in the light most favorable to the nonmoving party.

Moreover, the *Johnson* Court indicated that this was the proper course: In discussing the necessity of determining the factual basis upon which our legal ruling will be premised when a district court fails fully to set forth the factual basis for its legal conclusion, the *Johnson* Court noted that “a rule that occasionally requires a detailed evidence-based review of the record is still, from a practical point of view, more manageable than” a rule requiring courts of appeals to routinely conduct the same type of review. *Id.* at 319. Thus, the Court plainly envisioned that on those infrequent occasions when a district court does not supply the factual basis for its decision, we would be required to undertake the type of de novo review that generally would be prohibited.

Similarly, a question of the proper factual basis for our resolution of the purely legal question over which we possess jurisdiction may arise when a district court bases its decision on stated facts, but other, undisputed, material facts are present that dictate the conclusion that a government official is entitled to qualified immunity. For the same reasons that support our conclusion that this court must look to the actual evidence presented viewed in the light most favorable to the nonmoving party when a district court fails to supply the factual basis for its legal decision, we should not ignore other, undisputed, facts in rendering our decision on the legal question. Taking account of an undisputed fact in rendering a legal conclusion neither does violence to “*Cohen’s* conceptual theory of appealability” nor involves this court in the type of weighing of the record that the *Johnson* Court found unacceptable. *Johnson*, 515 U.S. at 304-314. Further, a district court does not possess any institutional advantage in the consideration of an undisputed fact, and the acceptance of such a fact does not consume significant appellate resources. See *id.* at 304-311. On the other hand, the failure to acknowledge an undisputed fact could result in considerable delay and inefficiency—for example, if the failure to do so results in the denial of qualified immunity in circumstances when the consideration of the undisputed fact would result in an official’s entitlement to it.

In sum, we conclude that when a district court fails to set forth fully the factual basis upon which its legal conclusion that a governmental official is not entitled to summary judgment on the basis of qualified immunity, this court reviews the evidence properly before the district court for purposes of considering the summary judgment question. It then determines what the evidence, viewed in the light most favorable to the nonmoving party, demonstrated. This is the factual basis that the district court “likely assumed” in rendering its legal conclusion and is the factual basis upon which this court must render its decision on the purely legal issues presented in the appeal. Furthermore, when undisputed material facts are present that the district court did not consider in ruling on the qualified immunity issue, this court need not ignore those facts in rendering its legal decision.

[106 F.3d at 533-35](#). Judge Phillips’ dissenting opinion construed *Johnson v. Jones* as mandating a far more deferential standard of review as to district court findings of fact.

[W]hen it appears from the record that a defendant-appellant is seeking review of a

determination that there are genuine issues of material fact respecting a factual ground of his qualified immunity defense (“didn’t do it”; “reasonably mistaken in doing it”) that require denial of his motion, the appellate court may not address to any extent the correctness of that determination.

Assuming, however, that a purely legal determination is properly presented for review, what exactly is reviewed? More specifically, does the court of appeals accept the district court’s identification of the factual predicate for that court’s legal determination and, accepting it, review only the resulting “purely” legal determination? Or may the court of appeals review for error in the district court’s identification of the factual predicate that it assumed for summary judgment purposes?

Though the consequence may seem severe, *Johnson’s* answer is plain. Review is confined to the “purely” legal issue whether, accepting the district court’s factual predicate, a violation of clearly established law would have occurred.

First off, the Court emphasized the jurisdictional compulsion to confine review in this way. Interlocutory appeals of qualified immunity/summary judgment denials, said the Court, best serve the final judgment rule, “if they [are] limited to cases presenting neat abstract issues of law.” *Id.* at 317, (quoting 15A Wright & Miller § 3914.10, at 664). As is evident, this legal issue can only be addressed as an “abstract” one if its resolution does not involve review by courts of appeals of the factual predicates upon which the district court made its determination. This is borne out in *Johnson’s* discussion of how courts of appeal are to identify the factual predicates for the district courts’ purely legal determinations when those courts “simply deny summary judgment without indicating their reasons for doing so.” *Id.* at 319. Easily done, said the *Johnson* Court, when the district court has expressly “stated” the facts it has assumed in denying the motion. In that situation, said the Court, “the court of appeals can simply take, as given, the facts that the district court assumed,” and assume the same “set of facts” “when it answers the purely legal question about ‘clearly established’ law.” *Id.* And, where the district court has not performed the helpful task of stating the facts it has assumed so that this must be sought by the court of appeals in “a cumbersome review of the record,” the search still is only for “what facts the district court, in the light most favorable to the nonmoving party *likely assumed*,” (emphasis supplied), not for what it *should have assumed*.

I read *Johnson* as having confined interlocutory appellate review of district court orders denying motions for summary judgment on qualified immunity grounds to a narrow, “abstract” issue of “pure” law: whether “tak[ing] as given” the facts assumed (rightly or wrongly) by the district court, *id.* at 314, those facts show a violation of clearly established law, etc. This means that interlocutory review is not available with respect either to (1) determinations by district courts that there are genuine issues of material fact respecting a factual ground for the defense which require the denial or (2) determinations by district courts of those facts that are to be assumed, for summary judgment purposes, in deciding whether they show a violation of clearly established right of which a reasonable official in defendant’s position would have known.

The more limited scope of review mandated by *Johnson* necessarily will allow district court errors in these fact-related determinations to go undetected at the summary judgment stage and so will deprive some public official defendants of the trial avoidance benefits to which qualified immunity entitled them. This, however, is a risk of which the *Johnson* Court was

expressly aware and which it thought nevertheless compelled by jurisdictional constraints on collateral order review and by considerations of prudent judicial administration. See *Johnson*, 515 U.S. at 314.

To put those risks in perspective, two points should be noted. (1) The practical effect is not to abrogate but only to allocate to the district courts final responsibility for two fact-related determinations in pre-trial qualified immunity applications; errors in those determinations will—as in all matters—be the rare exception rather than a frequent occurrence in those courts. (2) When occasional error does occur, its effect—of forcing unwarranted trial—is exhausted there; the error is not immunized and may yet be corrected at trial or on later appeal, with liability thereby avoided. In any event, as I understand *Johnson*, its fundamental point is that the game—of laborious interlocutory evidence review—is simply not worth the candle—of identifying and correcting the occasional district court error that will occur both in identifying genuine issues of fact respecting factual grounds of the defense and in identifying the factual predicates for denials of summary judgment on purely legal grounds.

[106 F.3d at 545-47.](#)

3. Can a plaintiff avoid the risk of an interlocutory appeal from denial of the immunity defense by filing a Section 1983 action in state court rather than in federal court? In [Johnson v. Fankell](#), 520 U.S. 911, 916-21 (1997), the defendants appealed the state trial court’s denial of a motion to dismiss raising the defense of qualified immunity. The Idaho Supreme Court dismissed the appeal on the ground that the trial court’s order was not a final judgment within the meaning of the Idaho Appellate Rules. Before the United States Supreme Court, defendants argued that because the claim and immunity defense arose under Section 1983, a federal statute, Idaho was required to recognize the same interlocutory appeal available in federal court. The Supreme Court disagreed:

We can easily dispense with petitioners’ first contention that Idaho must follow the federal construction of a “final decision.”...Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state...This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules. See *Wardius v. Oregon*, 412 U.S. 470, 477 (1973).

The definition of the term “final decision” that we adopted in *Mitchell* was construing the federal statutory language of 28 U.S.C. § 1291. Idaho could, of course, place the same construction on its Appellate Rule 11(a)(1) as we have placed on § 1291. But that is clearly a choice for that Court to make, not one that we have any authority to command.

Petitioners also contend that, to the extent that Idaho Appellate Rule 11(a)(1) does not allow an interlocutory appeal, it is pre-empted by § 1983. Relying heavily on *Felder v. Casey*, 487 U.S. 131 (1988), petitioners first assert that pre-emption is necessary to avoid “different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court,” *Id.*, at 138. Second, they argue that the state procedure “impermissibly burden[s]” the federal immunity from suit because it does not adequately protect their right to prevail on the immunity question in advance of trial.

Contrary to petitioners’ assertions, Idaho’s decision not to provide appellate review for the vast majority of interlocutory orders—including denials of qualified immunity in § 1983 cases—is not “outcome determinative” in the sense that we used that term when we held that Wisconsin’s notice-of-claim statute could not be applied to defeat a federal civil rights action brought in state courts under § 1983.

If petitioners' claim to qualified immunity is meritorious, there is no suggestion that the application of the Idaho rules of procedure will produce a final result different from what a federal ruling would produce. Petitioners were able to argue their immunity from suit claim to the trial court, just as they would to a federal court. And the claim will be reviewable by the Idaho Supreme Court after the trial court enters a final judgment, thus providing the petitioners with a further chance to urge their immunity. Consequently, the postponement of the appeal until after final judgment will not affect the ultimate outcome of the case.

Petitioners' second argument for pre-emption of the state procedural rule is that the rule does not adequately protect their right to prevail in advance of trial. In evaluating this contention, it is important to focus on the precise source and scope of the federal right at issue. The right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291. The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum.

4. May a defendant take an interlocutory appeal from denial of an immunity defense to state law claims filed in federal court pendent to a Section 1983 action? In [*Brown v. Grabowski*](#), 922 F.2d 1097, 1106-07 (3rd Cir. 1990), the court offered the analytical framework for resolving the issue:

The Supreme Court's decision in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) ... held that the procedural rule of finality of 28 U.S.C. § 1291—not rules of finality supplied by state law—should govern appealability even in diversity cases. One implication of the Court's decision in *Budinich* is that our decision on the appealability of the district court's denial of defendants' motion for summary judgment should be governed solely by section 1291 as interpreted in *Mitchell*.

The Fifth and Sixth Circuits have considered the possibility that *Mitchell's* doctrine of appealability should govern in federal cases, like this case, that involve denials of claims of qualified official immunity based upon state law. See *Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988); *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986). As both circuits noted, the parties in a diversity action, or in a federal action such as this one involving pendent state claims, are bound by federal procedural rules governing appeals, including the collateral order doctrine. *Sorey*, 849 F.2d at 962; *Marrical*, 805 F.2d at 172; see *Budinich*, 108 S. Ct. at 1717; *Cohen*, 337 U.S. at 541, 69 S. Ct. at 1224. However, we agree with each circuit that a *Mitchell* analysis, coupled with the teaching of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), dictates that:

The right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended an underlying substantive right to be free from the burdens of litigation arising from acts taken in the course of [official] duties.

Marrical, 805 F.2d at 172; see also *Sorey*, 849 F.2d at 962 (quoting and agreeing with above reasoning).

Our conclusion that the denial of a claim of qualified immunity premised upon state law is appealable only if the state has conferred an underlying substantive immunity from suits arising from the performance of official duties consequently necessitates an inquiry into whether New Jersey extends such an immunity to its officials. We must seek an answer to this question in New Jersey's Tort Claims Act and the cases that construe it. We think that we also may look to New Jersey's doctrine and procedural rules concerning interlocutory appeals in resolving this question.

Although, as we have emphasized, federal procedural rules govern appealability in federal cases such as this one, New Jersey law concerning interlocutory appeals is useful insofar as it sheds light on whether a substantive immunity from suit exists for officials under New Jersey statutory and common law. See *Sorey*, 849 F.2d at 962 (concluding that state procedural rules were useful for same purpose).

After reviewing New Jersey law, the *Brown* court held that it lacked appellate jurisdiction over the interlocutory appeal from the district court's refusal to grant defendants summary judgment on plaintiff's pendent state law claims.

5. In footnote 6 of [Anderson v. Creighton](#), the Court instructed that if the allegations of the complaint are sufficient to overcome the qualified immunity, the trial court should allow discovery limited to the qualified immunity issue. Following this limited discovery, defendant may file a motion for summary judgment on qualified immunity grounds. [Mitchell](#), 472 U.S. at 526. In [Behrens v. Pelletier](#), 516 U.S. 299, 307-10 (1996), the Court considered whether a defendant who had filed an interlocutory appeal from denial of its motion to dismiss was entitled to take a second interlocutory appeal from denial of its post-discovery motion for summary judgment.

Mitchell clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a "final" judgment subject to immediate appeal. Since an unsuccessful appeal from a denial of dismissal cannot possibly render the later denial of a motion from summary judgment any *less* "final," it follows that petitioner's appeal falls within § 1291.

[R]esolution of the immunity question may "require more than one judiciously timed appeal," because the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for "objective legal reasonableness." On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. Rule Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry. It is no more true that the defendant who has unsuccessfully appealed denial of a motion to dismiss has no need to appeal denial of a motion for summary judgment, than it is that the defendant who has unsuccessfully *made* a motion to dismiss has no need to *make* a motion for summary judgment.

The Court of Appeals expressed concern that a second appeal would tend to have the illegitimate purpose of delaying the proceedings. See 968 F.2d at 870-871. Undeniably, the availability of a second appeal affords an opportunity for abuse, but we have no reason to believe that abuse has often occurred. To the contrary, successive pretrial assertions of immunity seem to be a rare occurrence. Moreover, if and when abuse does occur, as we observed in the analogous context of interlocutory appeals on the issue of double jeopardy, "it is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims." *Abney*, 431 U.S. at 662, n.8.

- a. Was the *Behrens* Court's assertion that "successive pretrial assertions of immunity seem to be a rare occurrence" accurate? In *Fitzgerald v. Patrick*, 921 F.2d 758 (8th Cir. 1990), the court held that the defendant law enforcement officers were entitled to summary judgment on the basis of qualified immunity. However, the court assessed the costs of nine discovery depositions against the defendants because they had initiated discovery before filing the immunity motion. "All of this needless time and expense could have been avoided if the State would have filed its motion immediately because the whole purpose of an early summary judgment motion on the basis of qualified immunity is to avoid

having government officials subjected to the expense and delay of discovery.” 921 F.2d at 760; see also [Guzman-Rivera v. Rivera-Cruz](#), 98 F.3d 664, 668 (1st Cir. 1996) (“[D]istrict courts are encouraged to enter scheduling orders to prevent dilatory tactics on the part of defendants with qualified immunity defenses. Absent an abuse of discretion, this court will enforce those scheduling deadlines by affirming a finding of waiver and awarding double costs.”). Under this reasoning, is not the defendant obligated to take successive interlocutory appeals?

- b. Assume that defendant in a Section 1983 action has filed an unsuccessful interlocutory appeal following denial of her motion to dismiss. After discovery limited to the qualified immunity issue, defendant fails in her second interlocutory appeal from the trial court’s rejection of the motion for summary judgment. May defendant bring a third interlocutory appeal from denial of a motion for summary judgment following completion of all discovery? A fourth appeal following the trial of the case?
- c. In [Apostol v. Gallion](#), 870 F.2d 1335 (7th Cir. 1989), the court of appeals was called upon to decide whether the trial judge is empowered to hold a trial even though the defendant has filed a notice of appeal from a denial of a motion for summary judgment claiming qualified immunity. Although holding that the interlocutory appeal ordinarily divests the district court of jurisdiction to conduct the trial, the court identified limitations on this general rule.

Courts are not helpless in the face of manipulation. District judges lose power to proceed with trial because the defendant’s entitlement to block the trial is the focus of the appeal. If the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district courts in its tracks. A complaint invoking federal law may be so thin that it does not even create federal jurisdiction ... perhaps the district judge has not finally resolved the question of immunity; perhaps the disposition is so plainly correct that nothing can be said on the other side. Courts of appeals may dismiss the appeals and award sanctions, *Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988), but district courts have their own resources. In interlocutory double jeopardy cases—so closely parallel to *Forsyth* appeals that the principles are freely transferrable—a district court may certify to the court of appeals that the appeal is frivolous and get on with the trial.... Such a power must be used with restraint, just as the power to dismiss a complaint because it is frivolous is anomalous and must be used with restraint. But it is there, and it may be valuable in cutting short the deleterious effects of unfounded appeals.

Frivolousness is not the only reason a notice of appeal may be ineffectual. Defendants may waive or forfeit their right not to be tried. If they wait too long after the denial of summary judgment, or if they use claims of immunity in a manipulative fashion, they surrender any entitlement to obtain an appellate decision before trial.... We have no doubt ... that defendants who play games with the district court’s schedule forfeit their entitlement to a pretrial appeal. A district court may certify that a defendant has surrendered the entitlement to a pre-trial appeal and proceed with trial.

Id. at 1339.

- 6. In [Hunter v. Bryant](#), 502 U.S. 224 (1991) (per curiam), the district court denied the motion for summary judgment filed by Secret Service agents who asserted qualified immunity to Bryant’s claim that the agents had arrested him without probable cause for making threats against President Reagan. The Ninth Circuit affirmed the refusal to award summary judgment, finding the issue of whether a reasonable officer could have believed he had probable cause to be a question for the jury. The Supreme Court reversed, holding the

court of appeals' reasoning "routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial." 502 U.S. at 228. While *Hunter* urges that the judge "ordinarily" is to determine the viability of the immunity defense, how is qualified immunity to be resolved at trial if disputes of fact preclude disposition of the issue on a motion to dismiss or motion for summary judgment? Compare [*Oliveira v. Mayer*](#), 23 F.3d 642, 650 (2d Cir. 1994), *cert. denied*, 513 U.S. 1076 (1995) (jury to determine whether police officers had qualified immunity) with [*Stone v. Peacock*](#), 968 F.2d 1163, 1166 (11th Cir. 1992) ("the defense of qualified immunity should be decided by the court, and should not be submitted for decision by the jury."). Is there a way in which the judge can retain ultimate authority for determining the immunity without impinging upon the jury's traditional role as finder of fact? See [*Smith v. Mattox*](#), 127 F.3d 1416, 1420 (11th Cir. 1997); [*King v. Macri*](#), 993 F.2d 294, 299 (2d Cir. 1993).

IV. LIABILITY OF LOCAL GOVERNMENT ENTITIES

MONROE v. PAPE, 365 U.S. 167 (1961)

Parts I & II of the Court's opinion are set forth in Chapter II(A), *supra*.

III

[1] The City of Chicago asserts that it is not liable under 42 U.S.C. § 1983. We do not stop to explore the whole range of questions tendered us on this issue at oral argument and in the briefs. For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of § 1979.

[2] When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made "the inhabitants of the county, city, or parish" in which certain acts of violence occurred liable "to pay full compensation" to the person damaged or his widow or legal representative.^[1] The amendment was adopted by the Senate. The House, however, rejected it. The Conference Committee reported another version.^[2] The House rejected the Conference report. In a second conference the Sherman amendment was dropped and in its place § 6 of the Act of April 20, 1871, was substituted. This new section, which is now R.S. § 1981, 42 U.S.C. § 1986, dropped out all provision for municipal liability and extended liability in damages to "any person or persons, having knowledge that any" of the specified wrongs are being committed. Mr. Poland, speaking for the House Conferees about the Sherman proposal to make municipalities liable, said:

"We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree."

[3] The objection to the Sherman amendment stated by Mr. Poland was that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful arguments advanced in the affirmative.

[4] Much reliance is placed on the Act of February 25, 1871, 16 Stat. 431, entitled "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." Section 2 of this Act provides that "the word 'person' may extend and be applied to bodies politic and corporate."^[3] It should be noted, however, that this definition is merely an allowable, not a mandatory, one. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level. We do not reach those policy considerations. Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

[5] The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them. Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is

Reversed.

Footnotes

1. Cong. Globe, 42d Cong., 1st Sess., p. 663. The proposed amendment read: “That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.” [↗](#)
2. “That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff’s rights under such judgment.” *Id.* at 749. [↗](#)
3. This Act has been described as an instance where “Congress supplies its own dictionary.” Frankfurter,

Some Reflections on the Reading of Statutes, 47 COL. L. REV. 527, 536. The present code provision defining “person” (1 U.S.C. § 1) does not in terms apply to bodies politic. See Reviser’s Note, Vol. I, Rev. U.S. Stats. 1872, p. 19. [↩](#)

Notes on *Monroe v. Pape*: Municipal Liability

1. On what basis did the [Monroe](#) Court hold that the City of Chicago was not liable for damages under Section 1983?
2. What was the *Monroe* Court’s view of whether as a matter of policy, local governmental entities should be suable under Section 1983?
 - a. What are the policy reasons that support local governmental liability for constitutional violations?
 - b. What are the policy reasons that support the immunity of local governmental entities for constitutional violations?
3. Efforts to cabin the scope of the *Monroe* holding met with failure. In [Moor v. County of Alameda](#), 411 U.S. 693 (1973), the Court rejected the claim that municipalities could be held liable under Section 1983 where the municipality is subject to liability under state law. In [City of Kenosha v. Bruno](#), 412 U.S. 507 (1973), the Court held that its determination that municipalities are not “persons” within the meaning of Section 1983 applies to claims for equitable relief as well as to claims for damages.
4. Unable to sue local governmental entities under Section 1983, victims of unconstitutional municipal action attempted to bring actions against municipalities directly under the Constitution, with federal jurisdiction founded upon 28 U.S.C. § 1331. In *City of Kenosha v. Bruno*, *supra*, the Court, while rejecting the claim against the municipality under Section 1983, remanded the case to the district court to consider the availability of § 1331 jurisdiction. Justice Brennan, concurring in *Bruno*, stated:

[S]ince the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U.S.C. § 1343 ... Appellees did assert 28 U.S.C. § 1331 [28 USCS § 1331] as an alternative ground of jurisdiction, but I agree with the Court’s conclusion that existence of the requisite amount in controversy is not, on this record, clearly established. If appellees can prove their allegation that at least \$10,000 is in controversy, then § 1331 jurisdiction is available, *Bell v. Hood*, 327 U.S. 678, 90 L.Ed 939, 66 S. Ct. 773, 13 ALR.2d 383 (1946); *cf. Bivens v. Six Fed. Narcotic’s Agents*, 403 U.S. 388, 29 L Ed.2d 619, 91 S. Ct. 1999 (1971), and they are clearly entitled to relief.

412 U.S. at 516. See also [Mt. Healthy City School District v. Doyle](#), 429 U.S. 274, 278 (1977) (“The question of whether ... we should, by analogy to our decision in [Bivens](#) ... imply a cause of action directly from the Fourteenth Amendment ... is one which has never been decided by this Court.”). The lower federal courts divided over the viability of *Bivens* actions against municipalities. For a discussion of the arguments for and against recognition of a direct constitutional cause of action against municipalities, see [Turpin v. Mailet](#), 579 F.2d 152 (2d Cir.), *vacated and remanded sub nom. City of West Haven v. Turpin*, 439 U.S. 974 (1978).

MONELL v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, 436 U.S. 658 (1978)

Mr. Justice Brennan delivered the opinion of the Court.

[1] Petitioners, a class of female employees of the Department of Social Services and of the Board of Education of the city of New York, commenced this action under 42 U.S.C. § 1983 in July 1971. The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.^[1] Cf. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). The suit sought injunctive relief and backpay for periods of unlawful forced leave. Named as defendants in the action were the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor. In each case, the individual defendants were sued solely in their official capacities.

[2] On cross-motions for summary judgment, the District Court for the Southern District of New York held moot petitioners' claims for injunctive and declaratory relief since the city of New York and the Board, after the filing of the complaint, had changed their policies relating to maternity leaves so that no pregnant employee would have to take leave unless she was medically unable to continue to perform her job. 394 F. Supp. 853, 855 (1975). No one now challenges this conclusion. The court did conclude, however, that the acts complained of were unconstitutional under *LaFleur*, *supra*. 394 F. Supp., at 855. Nonetheless plaintiffs' prayers for backpay were denied because any such damages would come ultimately from the city of New York and, therefore, to hold otherwise would be to "[circumvent]" the immunity conferred on municipalities by *Monroe v. Pape*, 365 U.S. 167 (1961). See 394 F. Supp. at 855.

[3] On appeal, petitioners renewed their arguments that the Board of Education^[2] was not a "municipality" within the meaning of *Monroe v. Pape*, *supra*, and that, in any event, the District Court had erred in barring a damages award against the individual defendants. The Court of Appeals for the Second Circuit rejected both contentions. The court first held that the Board of Education was not a "person" under § 1983 because "it performs a vital governmental function ..., and, significantly, while it has the right to determine how the funds appropriated to it shall be spent ..., it has no final say in deciding what its appropriations shall be." 532 F.2d 259, 263 (1976). The individual defendants, however, were "persons" under § 1983, even when sued solely in their official capacities. 532 F.2d, at 264. Yet, because a damages award would "have to be paid by a city that was held not to be amenable to such an action in *Monroe v. Pape*," a damages action against officials sued in their official capacities could not proceed. *Id.*, at 265.

[4] We granted certiorari in this case, 429 U.S. 1071, to consider

"Whether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?" Pet. for Cert. 8.

[5] Although, after plenary consideration, we have decided the merits of over a score of cases brought under § 1983 in which the principal defendant was a school board—and, indeed, in some of which § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, provided the only basis for jurisdiction—we indicated in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 279 (1977), last Term that the question presented here was open and would be decided "another day." That other day has come and we now overrule *Monroe v. Pape*, *supra*, insofar as it holds that local governments are wholly immune from suit under § 1983.^[3]

[6] In *Monroe v. Pape*, we held that “Congress did not undertake to bring municipal corporations within the ambit of [§ 1983].” 365 U.S., at 187. The sole basis for this conclusion was an inference drawn from Congress’ rejection of the “Sherman amendment” to the bill which became the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The amendment would have held a municipal corporation liable for damage done to the person or property of its inhabitants by private persons “riotously and tumultuously assembled.”^[4] Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (hereinafter *Globe*). Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1 because “the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any *obligation* upon county and town organizations, the mere instrumentality for the administration of state law.” 365 U.S., at 190 (emphasis added), quoting *Globe* 804 (Rep. Poland). This statement, we thought, showed that Congress doubted its “constitutional power ... to impose *civil liability* on municipalities,” 365 U.S. at 190 (emphasis added), and that such doubt would have extended to any type of civil liability.^[5]

[7] A fresh analysis of the debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the “obligation” of which Representative Poland spoke with “civil liability.”

A. An Overview

[8] There are three distinct stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H.R. 320, a bill “to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes.” H.R. 320 contained four sections. Section 1, now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment. Sections 2 through 4 dealt primarily with the “other purpose” of suppressing Ku Klux Klan violence in the Southern States.^[6] The wisdom and constitutionality of these sections—not § 1, now § 1983—were the subject of almost all congressional debate and each of these sections was amended. The House finished its initial debates on H.R. 320 on April 7, 1871, and one week later the Senate also voted out a bill. Again, debate on § 1 of the bill was limited and that section was passed as introduced.

[9] Immediately prior to the vote on H.R. 320 in the Senate, Senator Sherman introduced his amendment. This was not an amendment to § 1 of the bill, but was to be added as § 7 at the end of the bill. Under the Senate rules, no discussion of the amendment was allowed and, although attempts were made to amend the amendment, it was passed as introduced. In this form, the amendment did not place liability on municipal corporations, but made any inhabitant of a municipality liable for damage inflicted by persons “riotously and tumultuously assembled.”^[7]

[10] The House refused to acquiesce in a number of amendments made by the Senate, including the Sherman amendment, and the respective versions of H.R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.

[11] On April 18, 1871, the first conference committee completed its work on H.R. 320. The main features of the conference committee draft of the Sherman amendment were these:

[12] First, a cause of action was given to persons injured by

“any persons riotously and tumultuously assembled together ... with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude “

[13] Second, the bill provided that the action would be against the county, city, or parish in which the riot had occurred and that it could be maintained by either the person injured or his legal representative. Third, unlike the amendment as proposed, the conference substitute made the government defendant liable on the judgment if it was not satisfied against individual defendants who had committed the violence. If a municipality were liable, the judgment against it could be collected

“by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment [would become] a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof.”

[14] In the ensuing debate on the first conference report, which was the first debate of any kind on the Sherman amendment, Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property “responsible” for Ku Klux Klan damage.^[8] Statutes drafted on a similar theory, he stated, had long been in force in England and were in force in 1871 in a number of States.^[9] Nonetheless there were critical differences between the conference substitute and extant state and English statutes: The conference substitute, unlike most state riot statutes, lacked a short statute of limitations and imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished.^[10]

[15] The first conference substitute passed the Senate but was rejected by the House. House opponents, within whose ranks were some who had supported § 1, thought the Federal Government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters. And, because of this constitutional objection, opponents of the Sherman amendment were unwilling to impose damages liability for nonperformance of a duty which Congress could not require municipalities to perform. This position is reflected in Representative Poland’s statement that is quoted in *Monroe*.

[16] Because the House rejected the first conference report a second conference was called and it duly issued its report. The second conference substitute for the Sherman amendment abandoned municipal liability and, instead, made “any person or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same,” who did not attempt to stop the same, liable to any person injured by the conspiracy. The amendment in this form was adopted by both Houses of Congress and is now codified as 42 U.S.C. § 1986.

[17] The meaning of the legislative history sketched above can most readily be developed by first considering the debate on the report of the first conference committee. This debate shows conclusively that the constitutional objections raised against the Sherman amendment—on which our holding in *Monroe* was based, see *supra*, at 664—would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights. Because § 1 of the Civil Rights Act does not state expressly that municipal corporations come within its ambit, it is finally necessary to interpret § 1 to confirm that such corporations were indeed intended to be included within the “persons” to whom that section applies.

B. Debate on the First Conference Report

[18] House opponents of the Sherman amendment—whose views are particularly important since only the House voted down the amendment—did not dispute Shellabarger’s claim that the Fourteenth Amendment created a federal right to protection, but they argued that the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities. The most complete statement of this position is that of Representative Blair:

“The proposition known as the Sherman amendment ... is entirely new. It is altogether without a precedent in this country.... That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone ...

“... [Here] it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to ...

“... [There] are certain rights and duties that belong to the States, ... there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, ... where [will] its power ... stop and what obligations ... might [it] not lay upon a municipality....

[19] Thus, there was ample support for Blair’s view that the Sherman amendment, by putting municipalities to the Hobson’s choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to “destroy the government of the States.” *Globe* 795.

[20] If municipal liability under § 1 of the Civil Rights Act of 1871 created a similar Hobson’s choice, we might conclude, as *Monroe* did, that Congress could not have intended municipalities to be among the “persons” to which that section applied. But this is not the case.

[21] First, opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment.

[22] Second, the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it. Under the theory of dual sovereignty set out in *Prigg*, this is quite understandable. So long as federal courts were vindicating the Federal Constitution, they were providing the “positive” government action required to protect federal constitutional rights and no question was raised of enlisting the States in “positive” action.

C. Debate on § 1 of the Civil Rights Bill

[23] From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own

violations of the Fourteenth Amendment. The question remains, however, whether the general language describing those to be liable under § 1—“any person”—covers more than natural persons. An examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover legal as well as natural persons.

[24] Representative Shellabarger was the first to explain the function of § 1:

“[Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.” Globe App. 68.

[25] By extending a remedy to all people, including whites, § 1 went beyond the mischief to which the remaining sections of the 1871 Act were addressed. Representative Shellabarger also stated without reservation that the constitutionality of § 2 of the Civil Rights Act of 1866 controlled the constitutionality of § 1 of the 1871 Act, and that the former had been approved by “the supreme courts of at least three States of this Union” and by Mr. Justice Swayne, sitting on circuit, who had concluded: “We have no doubt of the constitutionality of every provision of this act.” Globe App. 68. Representative Shellabarger then went on to describe how the courts would and should interpret § 1:

“This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. Chief Justice Jay and also Story say:

“Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.”—1 Story on Constitution, sec. 429.” Globe App., at 68.

[26] The sentiments expressed in Representative Shellabarger’s opening speech were echoed by Senator Edmunds, the manager of H.R. 320 in the Senate:

“The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution.” Globe 568.

“[Section 1 is] so very simple and really [reenacts] the Constitution.” *Id.* at 569.

And he agreed that the bill “[secured] the rights of white men as much as of colored men.” *Id.* at 696.

[27] In both Houses, statements of the supporters of § 1 corroborated that Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights.^[11] Moreover, since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1. *Cf., e. g., Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 286-287, 294-296 (1913). One need not rely on this inference alone, however, for the debates show that Members of Congress understood “persons” to include municipal corporations.

[28] Representative Bingham, for example, in discussing § 1 of the bill, explained that he had drafted § 1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind. “In [that] case the city had taken private property for public use, without compensation ..., and there was no redress for the wrong....” Globe App. 84 (emphasis added). Bingham’s further remarks clearly indicate his view that such takings by cities, as had occurred in *Barron*, would be redressable under § 1

of the bill. See *Globe App. 85*. More generally, and as Bingham's remarks confirm, §1 of the bill would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally prohibited uncompensated takings.^[12]

Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.^[13]

[29] In addition, by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations "as such" were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809).^[14] By 1844, however the *Deveaux* doctrine was unhesitatingly abandoned:

"[A] corporation created by and doing business in a particular state, is to be deemed *to all intents and purposes as a person*, although an artificial person, ... capable of being treated as a citizen of that state, as much as a natural person."

Louisville R. Co. v. Letson, 2 How. 497, 558 (1844) (emphasis added), discussed in *Globe* 752. And only two years before the debates on the Civil Rights Act, in *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress.

[30] That the "usual" meaning of the word "person" would extend to municipal corporations is also evidenced by an Act of Congress which had been passed only months before the Civil Rights Act was passed. This Act provided that

"in all acts hereafter passed ... the word 'person' may extend and be applied to bodies politic and corporate ... unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

Municipal corporations in 1871 were included within the phrase "bodies politic and corporate" and, accordingly, the "plain meaning" of §1 is that local government bodies were to be included within the ambit of the persons who could be sued under §1 of the Civil Rights Act. Indeed, a Circuit Judge, writing in 1873 in what is apparently the first reported case under §1, read the Dictionary Act in precisely this way in a case involving a corporate plaintiff and a municipal defendant.^[15]

See *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 394 (No. 10,336) (CC ND Ill. 1873).^[16]

II

[31] Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.^[17]

Local governing bodies,^[18] therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v. S.H. Kress & Co.*,

398 U.S. 144, 167-168 (1970): “Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials. Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.”

[32] On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.

[33] We begin with the language of § 1983 as originally passed:

“[Any] person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.” 17 Stat. 13 (emphasis added).

The italicized language plainly imposes liability on a government that, under color of some official policy, “causes” an employee to violate another’s constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A’s tort became B’s liability if B “caused” A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent.^[19] See *Rizzo v. Goode*, 423 U.S. 362, 370-371 (1976).

[34] Equally important, creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional. To this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship. See W. PROSSER, *LAW OF TORTS* § 69, p. 459 (4th ed. 1971). Nonetheless, two justifications tend to stand out. First is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the cost of accidents. See, e.g., *ibid.*; 2 F. HARPER & F. JAMES, *LAW OF TORTS*, § 26.3, pp. 1368-1369 (1956). Second is the argument that the cost of accidents should be spread to the community as a whole on an insurance theory. See, e.g., *id.* § 26.5; PROSSER, *supra*, at 459.^[20]

[35] The first justification is of the same sort that was offered for statutes like the Sherman amendment: “The obligation to make compensation for injury resulting from riot is, by arbitrary enactment of statutes, affirmatory law, and the reason of passing the statute is to secure a more perfect police regulation.” *Globe* 777 (Sen. Frelinghuysen). This justification was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable. The second justification was similarly put forward as a justification for the Sherman amendment: “we do not look upon [the Sherman amendment] as a punishment. It is a mutual insurance.” *Id.*, at 792 (Rep. Butler). Again, this justification was insufficient to sustain the amendment.

[36] We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see *supra*, at 660-662, and n.2, we must reverse the judgment below. In so doing, we have no occasion to address,

and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.

III

[37] Although we have stated that stare decisis has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, see, e.g., *Edelman v. Jordan*, 415 U.S. 651, 671, and n.14 (1974), we have never applied stare decisis mechanically to prohibit overruling our earlier decisions determining the meaning of statutes. See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-49 (1977); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 n.1 (1932) (Brandeis, J., dissenting) (collecting cases). Nor is this a case where we should “place on the shoulders of Congress the burden of the Court’s own error.” *Girouard v. United States*, 328 U.S. 61, 70 (1946).

IV

[38] Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 “be drained of meaning,” *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974). Cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397-398 (1971).

V

[39] For the reasons stated above, the judgment of the Court of Appeals is
Reversed.

Mr. Justice Powell, concurring.

[40] I join the opinion of the Court and express these additional views.

[41] Few cases in the history of the Court have been cited more frequently than *Monroe v. Pape*, 365 U.S. 167 (1961), decided less than two decades ago. Focusing new light on 42 U.S.C. § 1983, that decision widened access to the federal courts and permitted expansive interpretations of the reach of the 1871 measure. But *Monroe* exempted local governments from liability at the same time it opened wide the courthouse door to suits against officers and employees of those entities—even when they act pursuant to express authorization. The oddness of this result, and the weakness of the historical evidence relied on by the *Monroe* Court in support of it, are well demonstrated by the Court’s opinion today. Yet the gravity of overruling a part of so important a decision prompts me to write.

[42] In addressing a complaint alleging unconstitutional police conduct that probably was unauthorized and actionable under state law, the *Monroe* Court treated the 42d Congress' rejection of the Sherman amendment as conclusive evidence of an intention to immunize local governments from all liability under the statute for constitutional injury. That reading, in light of today's thorough canvass of the legislative history, clearly "misapprehended the meaning of the controlling provision," *Monroe, supra*, at 192 (Harlan, J., concurring). In this case, involving formal, written policies of the Department of Social Services and the Board of Education of the city of New York that are alleged to conflict with the command of the Due Process Clause, *cf. Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court decides "not to reject [wisdom] merely because it comes late," *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[43] As the Court demonstrates, the Sherman amendment presented an extreme example of "riot act" legislation that sought to impose vicarious liability on government subdivisions for the consequences of private lawlessness. As such, it implicated concerns that are of marginal pertinence to the operative principle of § 1 of the 1871 legislation—now § 1983—that "any person" acting "under color of" state law may be held liable for affirmative conduct that "subjects, or causes to be subjected, any person ... to the deprivation of any" federal constitutional or statutory right. Of the many reasons for the defeat of the Sherman proposal, none supports *Monroe's* observation that the 42d Congress was fundamentally "antagonistic," 365 U.S. at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation. Opponents in the Senate appear to have been troubled primarily by the proposal's unprecedented lien provision, which would have exposed even property held for public purposes to the demands of § 1983 judgment lienors. *Ante*, at 673-674, n.30. The opposition in the House of Representatives focused largely on the Sherman amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces. *Ante*, at 673-675, 679-682.^[21]

[44] The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.^[22]

[45] As elaborated in Part II of today's opinion, the rejection of the Sherman amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity but as a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of respondeat superior or any other principle of vicarious liability. *Cf. Levin, The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1531-1535 (1977). Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity, *see Wood v. Strickland*, 420 U.S. 308 (1975); *Procunier v. Navarette*, 434 U.S. 555 (1978). Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.

[46] This Court traditionally has been hesitant to overrule prior constructions of statutes or interpretations

of common-law rules. “Stare decisis is usually the wise policy,” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), but this cautionary principle must give way to countervailing considerations in appropriate circumstances. I concur in the Court’s view that this is not a case where we should “place on the shoulders of Congress the burden of the Court’s own error.” *Girouard v. United States*, 328 U.S. 61, 70 (1946).

[47] Finally, if we continued to adhere to a rule of absolute municipal immunity under § 1983, we could not long avoid the question whether “we should, by analogy to our decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983....” *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 278 (1977). One aspect of that inquiry would be whether there are any “special factors counselling hesitation in the absence of affirmative action by Congress,” *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971), such as an “explicit congressional declaration that persons injured by a [municipality] may not recover money damages ..., but must instead be remitted to another remedy, equally effective in the view of Congress,” *id.*, at 397. In light of the Court’s persuasive re-examination in today’s decision of the 1871 debates, I would have difficulty inferring from § 1983 “an explicit congressional declaration” against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today. [\[23\]](#)

Mr. Justice Stevens, concurring in part.

[48] Since Parts II and IV of the opinion of the Court are merely advisory and are not necessary to explain the Court’s decision, I join only Parts I, III, and V.

Mr. Justice Rehnquist, with whom the Chief Justice joins, dissenting.

[49] Seventeen years ago, in *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a “person” within the meaning of 42 U.S.C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at least three separate occasions. *Aldinger v. Howard*, 427 U.S. 1 (1976); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973). See also *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 277-279 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961. Because I cannot agree that this Court is “free to disregard these precedents,” which have been “considered maturely and recently” by this Court, *Runyon v. McCrary*, 427 U.S. 160, 186 (1976) (Powell, J., concurring), I am compelled to dissent.

I

[50] As this Court has repeatedly recognized, *id.*, at 175 n.12; *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974), considerations of stare decisis are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court’s settled construction of the

law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis:

“Stare decisis is usually wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true even when the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (dissenting opinion) (footnotes omitted).

[51] Only the most compelling circumstances can justify this Court’s abandonment of such firmly established statutory precedents. The best exposition of the proper burden of persuasion was delivered by Mr. Justice Harlan in *Monroe* itself:

“From my point of view, the policy of stare decisis, as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court’s earlier interpretation, require that it appear *beyond doubt* from the legislative history of the 1871 statute that [*United States v. Classic*, 313 U.S. 299 (1941)] and *Screws v. United States*, 325 U.S. 91 (1945)] misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified.” 365 U.S., at 192 (concurring opinion) (footnote omitted; emphasis added).

[52] The Court does not demonstrate that any exception to this general rule is properly applicable here.

[53] Thus, our only task is to discern the intent of the 42nd Congress. That intent was first expounded in *Monroe*, and it has been followed consistently ever since. This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference. Indeed, this very year, the Senate has been holding hearings on a bill, S. 35, 95th Cong., 1st Sess. (1977), which would remove the municipal immunity recognized by *Monroe*. 124 Cong. Rec. D117 (daily ed. Feb. 8, 1978). In these circumstances, it cannot be disputed that established principles of stare decisis require this Court to pay the highest degree of deference to its prior holdings. *Monroe* may not be overruled unless it has been demonstrated “beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision.” *Monroe*, 365 U.S. at 192 (Harlan, J., concurring). The Court must show not only that Congress, in rejecting the Sherman amendment, concluded that municipal liability was not unconstitutional, but also that, in enacting § 1, it intended to impose that liability. I am satisfied that no such showing has been made.

[54] Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented. Admittedly this fact is not conclusive as to whether Congress intended § 1 to embrace a municipal corporation within the meaning of “person,” and thus the reasoning of *Monroe* on this point is subject to challenge. The meaning of § 1 of the Act of 1871 has been subjected in this case to a more searching and careful analysis than it was in *Monroe*, and it may well be that on the basis of this closer analysis of the legislative debates a conclusion contrary to the *Monroe* holding could have been reached when that case was decided 17 years ago. But the rejection of the Sherman amendment remains instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected. Any inference which might be drawn from the Dictionary Act or from general expressions of benevolence in the debate on § 1 that the word “person” was intended to include municipal corporations falls far short of showing “beyond doubt” that this Court in *Monroe* “misapprehended the meaning of the controlling provision.” Errors such as the Court may have fallen into in *Monroe* do not end the inquiry as to

stare decisis; they merely begin it. I would adhere to the holding of *Monroe* as to the liability of a municipal corporation under § 1983.

III

[55] The decision in *Monroe v. Pape* was the fountainhead of the torrent of civil rights litigation of the last 17 years. Using § 1983 as a vehicle, the courts have articulated new and previously unforeseeable interpretations of the Fourteenth Amendment. At the same time, the doctrine of municipal immunity enunciated in *Monroe* has protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence. None of the Members of this Court can foresee the practical consequences of today's removal of that protection. Only the Congress, which has the benefit of the advice of every segment of this diverse Nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision.

I would affirm the judgment of the Court of Appeals.

↓ [Monell v. Department of Social Services of the City of New York – Audio and Transcript of Oral Argument](#)

Footnotes

1. The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint para. 28, App. 13-14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer para. 13, App. 32-33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher could remain through the end of the school term. Amended Complaint paras. 39, 42, 45, App. 18-19, 21. This allegation was denied. Answer paras. 18, 22, App. 35, 37. ↵
2. Petitioners conceded that the Department of Social Services enjoys the same status as New York City for *Monroe* purposes. See 532 F.2d, at 263. ↵
3. However, we do uphold *Monroe v. Pape* insofar as it holds that the doctrine of respondeat superior is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees. See Part II, *infra*. ↵
4. We expressly declined to consider "policy considerations" for or against municipal liability. See 365 U.S., at 191. ↵

5. Mr. Justice Douglas, the author of *Monroe*, has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities. See *City of Kenosha v. Bruno*, 412 U.S. 507, 517-520 (1973). However, this view has never been shared by the Court, see *Monroe v. Pape*, 365 U.S. at 190; *Moor v. County of Alameda*, 411 U.S. 693, 708 (1973), and the debates do not support this position. [↵](#)
6. Briefly, § 2 created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily those thought to obtain where Klan violence was rampant. See Cong. Globe, 42d Cong., 1st Sess., App. 335-336 (1871) (hereinafter Globe App.). [↵](#)
7. *Ibid.* An action for recovery of damages was to be in the federal courts and denominated as a suit against the county, city, or parish in which the damage had occurred. *Ibid.* Execution of the judgment was not to run against the property of the government unit, however, but against the private property of any inhabitant. *Ibid.* [↵](#)
8. “Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome.” Globe 761. Senator Sherman was apparently unconcerned that the conference committee substitute, unlike the original amendment, did not place liability for riot damage directly on the property of the well-to-do, but instead placed it on the local government. Presumably he assumed that taxes would be levied against the property of the inhabitants to make the locality whole. [↵](#)
9. According to Senator Sherman, the law had originally been adopted in England immediately after the Norman Conquest and had most recently been promulgated as the law of 7 & 8 Geo. 4, ch. 31 (1827). See Globe 760. During the course of the debates, it appeared that Kentucky, Maryland, Massachusetts, and New York had similar laws. See *id.*, at 751 (Rep. Shellabarger); *id.*, at 762 (Sen. Stevenson); *id.*, at 771 (Sen. Thurman); *id.*, at 792 (Rep. Butler). Such a municipal liability was apparently common throughout New England. See *id.*, at 761 (Sen. Sherman). [↵](#)
10. In the Senate, opponents, including a number of Senators who had voted for § 1 of the bill, criticized the Sherman amendment as an imperfect and impolitic rendering of the state statutes. Moreover, as drafted, the conference substitute could be construed to protect rights that were not protected by the Constitution. A complete critique was given by Senator Thurman. See Globe 770-772. [↵](#)
11. Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill’s purpose to be “the enforcement ... of the Constitution on behalf of every individual citizen of the Republic ... to the extent of the rights guarantied to him by the Constitution.” Globe App. 81. He continued: “The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws [And] the States did deny to citizens the equal protection of the laws, they did deny

the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy.... They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" *Id.* at 85. Representative Perry, commenting on Congress' action in passing the civil rights bill also stated: "Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate." *Globe* 800. See also *id.* at 376 (Rep. Lowe); *id.* at 428-429 (Rep. Beatty); *id.* at 448 (Rep. Butler); *id.* at 475-477 (Rep. Dawes); *id.* at 578-579 (Sen. Trumbull); *id.* at 609 (Sen. Pool); *Globe App.* 182 (Rep. Mercur). Other supporters were quite clear that § 1 of the Act extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of black citizens: "But the chief complaint is [that] by a systematic maladministration of [state law], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe [§ 5 of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.* at 153 (Rep. Garfield). See also *Monroe v. Pape*, 365 U.S. at 171-187. Importantly for our inquiry, even the opponents of § 1 agreed that it was constitutional and, further, that it swept very broadly. Thus, Senator Thurman, who gave the most exhaustive critique of § 1, said: "This section relates wholly to civil suits. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy.... "[There] is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used." *Globe App.* 216-217 (emphasis added). [↵](#)

12. See 2 J. Story, *Commentaries on the Constitution of the United States* § 1956 (T. Cooley ed. 1873). [↵](#)
13. Indeed the federal courts found no obstacle to awards of damages against municipalities for common-law takings. See *Sumner v. Philadelphia*, 23 F. Cas. 392 (No. 13,611) (CC ED Pa. 1873) (awarding damages of \$2,273.36 and costs of \$346.35 against the city of Philadelphia). [↵](#)
14. Nonetheless, suits could be brought in federal court if the natural persons who were members of the corporation were of diverse citizenship from the other parties to the litigation. See 5 Cranch, at 91. [↵](#)
15. The court also noted that there was no discernible reason why persons injured by municipal corporations should not be able to recover. See 18 F. Cas., at 394. [↵](#)
16. In considering the effect of the Act of Feb. 25, 1871, in *Monroe*, however, Mr. Justice Douglas, apparently focusing on the word "may," stated: "[This] definition [of person] is merely an allowable, not a mandatory, one." 365 U.S., at 191. A review of the legislative history of the Dictionary Act shows this conclusion to be incorrect.

There is no express reference in the legislative history to the definition of “person,” but Senator Trumbull, the Act’s sponsor, discussed the phrase “words importing the masculine gender *may* be applied to females,” (emphasis added), which immediately precedes the definition of “person,” and stated:

“The only object [of the Act] is to get rid of a great deal of verbosity in our statutes by providing that when the word ‘he’ is used it *shall* include females as well as males.” Cong. Globe, 41st Cong., 3d Sess., 775 (1871) (emphasis added).

Thus, in Trumbull’s view the word “may” meant “shall.” Such a mandatory use of the extended meanings of the words defined by the Act is also required for it to perform its intended function—to be a guide to “rules of construction” of Acts of Congress. See *ibid.* (remarks of Sen. Trumbull). Were the defined words “allowable, [but] not mandatory” constructions, as Monroe suggests, there would be no “rules” at all. Instead, Congress must have intended the definitions of the Act to apply across-the-board except where the Act by its terms called for a deviation from this practice— “[where] the context shows that [defined] words were to be used in a more limited sense.” Certainly this is how the Northwestern Fertilizing court viewed the matter. Since there is nothing in the “context” of § 1 of the Civil Rights Act calling for a restricted interpretation of the word “person,” the language of that section should *prima facie* be construed to include “bodies politic” among the entities that could be sued. [↵](#)

17. There is certainly no constitutional impediment to municipal liability. “The Tenth Amendment’s reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.” *Milliken v. Bradley*, 433 U.S. 267, 291 (1977); see *Ex parte Virginia*, 100 U.S. at 347-348. For this reason, *National League of Cities v. Usery*, 426 U.S. 833 (1976), is irrelevant to our consideration of this case. Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes. [↵](#)
18. Since official – capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent – – at least where Eleventh Amendment considerations do not control analysis– our holding that local governments can be sued under Section 1983 necessarily decides that local government officials sued in their official capacities are “persons” under §1983 in those cases where, as here, a local government would be suable in its own name. [↵](#)
19. Support for such a conclusion can be found in the legislative history. As we have indicated, there is virtually no discussion of § 1 of the Civil Rights Act. Again, however, Congress’ treatment of the Sherman amendment gives a clue to whether it would have desired to impose respondeat superior liability. The primary constitutional justification for the Sherman amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens as the Privileges or Immunities Clause of the Fourteenth Amendment required. See *supra*, at 670-673. And according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection. See Globe 761 (Sen. Sherman); *id.*, at 756 (Sen. Edmunds); *id.* at 751-752 (Rep. Shellabarger). But other proponents of the amendment apparently viewed it as a form of vicarious liability for the unlawful acts of the citizens of the locality. See *id.*, at 792 (Rep. Butler). And whether intended or not, the amendment as drafted did impose a species of vicarious liability on municipalities since it could be construed to impose liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it. Indeed, the amendment held a municipality liable even if it had done everything in its power to curb the riot. See *supra*, at 668; Globe 761 (Sen. Stevenson); *id.* at

771 (Sen. Thurman); *id.* at 788 (Rep. Kerr); *id.* at 791 (Rep. Willard). While the first conference substitute was rejected principally on constitutional grounds, see *id.* at 804 (Rep. Poland), it is plain from the text of the second conference substitute—which limited liability to those who, having the power to intervene against Ku Klux Klan violence, “[neglected] or [refused] so to do,” see Appendix to this opinion, *infra*, at 704, and which was enacted as § 6 of the 1871 Act and is now codified as 42 U.S.C. § 1986—that Congress also rejected those elements of vicarious liability contained in the first conference substitute even while accepting the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan. Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality’s employees. Nonetheless, when Congress’ rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can easily be construed to create respondeat superior liability, the inference that Congress did not intend to impose such liability is quite strong. [↵](#)

20. A third justification, often cited but which on examination is apparently insufficient to justify the doctrine of respondeat superior, see, e.g., 2 F. HARPER & F. JAMES, § 26.3, is that liability follows the right to control the actions of a tortfeasor. By our decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See 423 U.S. at 370-371. [↵](#)
21. If in the view of House opponents, such as Representatives Poland, Burchard, and Willard, see ante, at 679-680, a municipality obligated by state law to keep the peace could be held liable for a failure to provide equal protection against private violence, it seems improbable that they would have opposed imposition of liability on a municipality for the affirmative implementation of policies promulgated within its proper sphere of operation under state law. Such liability is premised not on a failure to take affirmative action in an area outside the contemplation of the state-law charter—the sort of liability that would have been imposed by the Sherman amendment—but on the consequences of activities actually undertaken within the scope of the powers conferred by state law. [↵](#)
22. The view taken today is consistent with the understanding of the 42d Congress that unless the context revealed a more limited definition, “the word ‘person’ may extend and be applied to bodies politic and corporate.” Act of Feb. 25, 1871, § 2, 16 Stat. 431. It also accords with the interpretation given the same word when it was used by Senator Sherman in the antitrust legislation of 1890 bearing his name. See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 396 (1906); cf. *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978). [↵](#)
23. Mr. Justice Rehnquist’s dissent makes a strong argument that “[since] Monroe, municipalities have had the right to expect that they would not be held liable retroactively for their officers’ failure to predict this Court’s recognition of new constitutional rights.” Post, at 717. But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members, and employees. In any event, the possibility of a qualified immunity, as to which the Court reserves decision, may remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication. [↵](#)

Notes on *Monell v. Department of Social Services of the City of New York*

1. On what basis does the Court reject the reasoning in [Monroe v. Pape](#)? Why did the Court find that the Sherman Amendment was not a blanket rejection of municipal liability?
 - a. For what conduct would local government entities be liable under the Sherman Amendment?
 - b. What constitutional problems were posed by the Sherman Amendment?
 - c. What forms of municipal liability would avoid the constitutional problems posed by the Sherman Amendment?
2. How does the Court find that Congress intended the word “person” in Section 1983 to include local governmental entities? What general rules of construction for Section 1983 does the Court employ?
3. On what basis does the Court find that Congress did not intend to hold municipalities vicariously liable for all constitutional violations caused by its employees in the scope of employment? Is the Court’s analysis of vicarious liability consistent with its analysis of whether municipalities are “persons” under Section 1983? See Note, [Section 1983 Municipal Liability and the Doctrine of Respondeat Superior](#), 46 U. CHIC. L. REV. 935 (1979).
 - a. Is the Court’s interpretation of the causation language of Section 1983 consistent with the general rules of construction of Section 1983 utilized in Part I of the *Monell* opinion?
 - b. Is the Court’s interpretation of the causation language of Section 1983 consistent with the common law treatment of vicarious liability? Does the Court find that municipalities were not vicariously liable at common law when Congress enacted Section 1983? See [Owen v. City of Independence, Missouri](#), 445 U.S. 622, 640-42 (1980), *infra*.
 - c. Is the Court’s reliance on the Sherman Amendment consonant with its analysis of the Sherman Amendment of Part I of the opinion? Would imposition of *respondeat superior* liability create the same constitutional problems which led to rejection of the Sherman Amendment?
 - d. Does the Court’s repudiation of vicarious individual liability in [Rizzo v. Goode](#), 423 U.S. 362 (1976) mandate that Congress rejected vicarious municipal liability under Section 1983?
4. In [City of Oklahoma v. Tuttle](#), 471 U.S. 808 (1985), the Court reversed a damage award against the City of Oklahoma in a Section 1983 action arising out of a low-level police officer’s fatal shooting of the plaintiff’s husband. The Court ruled that the trial judge erred by instructing the jury that it could hold the city liable if this single incident of shooting amounted to an extraordinary use of excessive force, without further requiring proof that the shooting was caused by a municipal policy. Justice Stevens dissented, offering that the city should be vicariously liable for the actions of its employee:

[Section] 1983 ... was an especially important, remedial measure, drafted in expansive language

At the time the statute was enacted the doctrine of *respondeat superior* was well recognized in the common law of the several states and in England. An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions, and the rule had been specifically applied to municipal corporations, and to wrongful acts of police officers. Because it “is always appropriate to assume that our elected representatives, like other citizens, know the law,” it is equally appropriate to assume that the authors of the Civil Rights Act recognized that the rule of *respondeat superior* would apply to “a species of tort liability that on its face admits of no immunities.” Indeed, we have repeatedly held that § 1983 should be construed to incorporate common-law doctrine “absent specific provisions to the contrary.”

The legislative history of the Ku Klux Act supports this conclusion for two reasons. First, the fact that “nobody” objected to § 1 is consistent with the view that Congress expected normal rules of tort law to be applied in enforcing it. Second, the debate on the Sherman Amendment—an amendment that would have imposed an extraordinary and novel form of absolute liability on municipalities—indicates that Congress seriously considered imposing *additional* responsibilities on municipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person. The rejection of the Sherman Amendment sheds no light on the meaning of the statute, but the fact that such an extreme measure was even considered indicates that Congress thought it appropriate to require municipal corporations to share the responsibility for carrying out the commands of the Fourteenth Amendment.

Of greatest importance, however, is the nature of the wrong for which § 1983 provides a remedy. The Act was primarily designed to provide a remedy for violations of the United States Constitution—wrongs of the most serious kind. As the Court recognizes, the individual officer in this case was engaged in “unconstitutional activity.” But the conduct of an individual can be characterized as “unconstitutional” only if it is attributed to his employer. The Fourteenth Amendment does not have any application to purely private conduct.

Unless an individual officer acts under the color of official authority, § 1983 does not authorize any recovery against him. But if his relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action.

In a number of decisions construing § 1983, the Court has considered whether its holding is supported by sound considerations of policy. In this case, all of the policy considerations that support the application of the doctrine of *respondeat superior* in normal tort litigation against municipal corporations apply with special force because of the special quality of the interests at stake. The interest in providing fair compensation to the victim, the interest in deterring future violations by formulating sound municipal policy, and the interest in fair treatment for individual officers who are performing difficult and dangerous work, all militate in favor of placing primary responsibility on the municipal corporation.

The Court’s contrary conclusion can only be explained by a concern about the danger of bankrupting municipal corporations. That concern is surely legitimate, but it is one that should be addressed by Congress—perhaps by imposing maximum limitations on the size of any potential recovery or by requiring the purchase of appropriate liability insurance—rather than by this Court. Moreover, it is a concern that is relevant to the law of damages rather than to the rules defining the substantive liability of “every person” covered by § 1983.

5. Is the Court's rejection of respondeat superior liability a holding of *Monell*?

- a. In their brief before the Supreme Court, plaintiffs made clear that they were not arguing a local government should be liable for every wrong of its employees. Rather, plaintiffs asserted, a court could require municipalities to expend public funds where the official who effected the constitutional violation was "the chief executive or policy making body of the city or county, or some other high ranking official authorized to direct the expenditure of funds." Brief for the Petitioners at 33, [Monell](#), 436 U.S. 658 (No. 75-1914). During oral argument, plaintiff's counsel specifically declaimed reliance on respondeat superior liability:

We are not saying that plaintiffs in *Monroe* could have sued Mayor Daley of Chicago and obtained a judgment because some police officer beat them up. Mayor Daley, in that case, did not wrongfully exercise his official powers Nor could, under our view, the plaintiff in *Monroe* sue the [City of Chicago] because the police officer ... has no authority to dispense public funds.

Transcript of Oral Argument 5 Tr. at 11-12, *Monell*, 436 U.S. 658 (1977) (No. 75-1914).

In response to the Court's questioning, counsel expressly abjured reliance on a theory of vicarious liability.

Question: In other words, as I understand it, your argument in this phase of the case is not at all dependent upon a respondeat superior theory?

Mr. Chase: No, Your Honor, We believe that –

Question: Not a bit?

Mr. Chase: Not at all.

Id. at 12.

- b. The word "policy" does not appear in the text of § 1983. Part II of *Monell* contains dicta of the least persuasive kind. As Justice Powell noted in his separate concurrence, language that is "not necessary to the holding may be accorded less weight in subsequent cases." Moreover, as he also pointed out, "we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." The commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party and was not even relevant to the Court's actual holding. Moreover, in the Court's earlier decision in *Monroe v. Pape*, although the petitioners had explained why it would be appropriate to apply the doctrine of *respondeat superior* in § 1983 litigation, no contrary argument had been advanced by the city. Thus, the views expressed in Part II of *Monell* constitute judicial legislation of the most blatant kind. Having overruled its earlier—and, ironically also volunteered—misconstruction of the word "person" in *Monroe v. Pape*, in my opinion, the Court in *Monell* should simply have held that municipalities are liable for the unconstitutional activities of their agents that are performed in the course of their official duties.

[City of Oklahoma v. Tuttle](#), 471 U.S. 808, 841-42 (1985) (Stevens, J. dissenting).

6. May a city be held liable for constitutional violations on a theory of respondeat superior where, under a state statute, municipalities are vicariously liable for actions of their employees in the scope of their employment? See [Medrano v. City of Los Angeles](#), 973 F.2d 1499, 1505 (9th Cir. 1992).
7. How does the *Monell* Court's repudiation of vicarious liability affect the allocation of the risk of loss from constitutional violations? Will the individual government employee always bear the loss from invasions of

constitutional rights that are not caused by municipal policy or custom? If not, where does the loss fall?

8. While rejecting absolute municipal immunity, the *Monell* Court did not address whether local government entities could assert a qualified immunity defense. This issue was presented to the Court two years later in [*Owen v. City of Independence, Missouri*](#), 445 U.S. 622 (1980).

OWEN v. CITY OF INDEPENDENCE, MISSOURI, 445 U.S. 622 (1980)

Mr. Justice Brennan delivered the opinion of the Court.

[1] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), overruled *Monroe v. Pape*, 365 U.S. 167 (1961), insofar as *Monroe* held that local governments were not among the “persons” to whom 42 U.S.C. § 1983 applies and were therefore wholly immune from suit under the statute. *Monell* reserved decision, however, on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. 436 U.S., at 701. In this action brought by petitioner in the District Court for the Western District of Missouri, the Court of Appeals for the Eighth Circuit held that respondent city of Independence, Mo., “is entitled to qualified immunity from liability” based on the good faith of its officials: “We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice.” 589 F.2d 335, 337-338 (1978). We granted certiorari. 444 U.S. 822 (1979). We reverse.

I

[2] The events giving rise to this suit are detailed in the District Court’s findings of fact, 421 F. Supp. 1110 (1976). On February 20, 1967, Robert L. Broucek, then City Manager of respondent city of Independence, Mo., appointed petitioner George D. Owen to an indefinite term as Chief of Police.^[1] In 1972, Owen and a new City Manager, Lyle W. Alberg, engaged in a dispute over petitioner’s administration of the Police Department’s property room. In March of that year, a handgun, which the records of the Department’s property room stated had been destroyed, turned up in Kansas City in the possession of a felon. This discovery prompted Alberg to initiate an investigation of the management of the property room.

* * * * *

[3] On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation. Among other allegations, Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had “mysteriously disappeared” from his office, that traffic tickets had been manipulated, that high ranking police officials had made “inappropriate” requests affecting the police court, and that “things have occurred causing the unusual release of felons.” At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager “take all direct and appropriate action” against those persons “involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports.” After some discussion, the City Council passed Roberts’ motion with no dissents and one abstention.^[2]

[4] City Manager Alberg discharged petitioner the very next day. Petitioner was not given any reason for his dismissal; he received only a written notice stating that his employment as Chief of Police was “[terminated] under the provisions of Section 3.3(1) of the City Charter.” Petitioner’s earlier demand for a specification of charges and a public hearing was ignored, and a subsequent request by his attorney for an appeal of the discharge decision was denied by the city on the grounds that “there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen.” App. 26-27.

[5] The local press gave prominent coverage both to the City Council’s action and petitioner’s dismissal, linking the discharge to the investigation.^[3] As instructed by the City Council, Alberg referred the investigative

reports and witness statements to the Prosecuting Attorney of Jackson County, Mo., for consideration by a grand jury. The results of the audit and investigation were never released to the public, however. The grand jury subsequently returned a “no true bill,” and no further action was taken by either the City Council or City Manager Alberg.

II

[6] Petitioner named the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities as defendants in this suit.^[4]

Alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, petitioner sought declaratory and injunctive relief, including a hearing on his discharge, backpay from the date of discharge, and attorney’s fees.

* * * * *

[7] *Monell* held that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” 436 U.S., at 694. The Court of Appeals held in the instant case that the municipality’s official policy was responsible for the deprivation of petitioner’s constitutional rights: “[The] stigma attached to [petitioner] in connection with his discharge was caused by the official conduct of the City’s lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of [petitioner’s] constitutional rights, in violation of section 1983.” 589 F.2d, at 337.^[5]

[8] Nevertheless, the Court of Appeals affirmed the judgment of the District Court denying petitioner any relief against the respondent city, stating:

“The Supreme Court’s decisions in *Board of Regents v. Roth*, 408 U.S. 564 ... (1972), and *Perry v. Sindermann*, 408 U.S. 593 ... (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of [petitioner’s] right to a name-clearing hearing in connection with the discharge. The City of Independence should not be charged with predicting the future course of constitutional law. We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated [petitioner’s] constitutional rights.” *Id.*, at 338 (footnote and citations omitted).

We turn now to the reasons for our disagreement with this holding.^[6]

III

[9] Because the question of the scope of a municipality’s immunity from liability under § 1983 is essentially one of statutory construction, see *Wood v. Strickland*, 420 U.S. 308, 314, 316 (1975); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), the starting point in our analysis must be the language of the statute itself. *Andrus v. Allard*, 444 U.S. 51, 56 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). By its terms, § 1983 “creates a species of tort liability that on its face admits of no immunities.” *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made

of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon “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.” And *Monell* held that these words were intended to encompass municipal corporations as well as natural “persons.”

[10] Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13—the forerunner of § 1983—confirm the expansive sweep of the statutory language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

“I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.” Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter *Globe App.*).

Similar views of the Act’s broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. See *Monell v. New York City Dept. of Social Services*, 436 U.S., at 683-687.^[7]

[11] However, notwithstanding § 1983’s expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that “Congress would have specifically so provided had it wished to abolish the doctrine.” *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

[12] In each of these cases, our finding of § 1983 immunity “was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.” *Imbler v. Pachtman*, *supra*, at 421. Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.^[8]

A

[13] Since colonial times, a distinct feature of our Nation’s system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern. As *Monell* recounted, by 1871, municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts. See 436 U.S., at 687-688. Cf. *Cowles v. Mercer County*, 7 Wall. 118 (1869). Local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, as well as for common-law actions for breach of contract.^[9] And although, as we discuss below, a municipality was not subject to suit for all manner of tortious conduct, it is clear that at the

time § 1983 was enacted, local governmental bodies did not enjoy the sort of “good-faith” qualified immunity extended to them by the Court of Appeals.

[14] As a general rule, it was understood that a municipality’s tort liability in damages was identical to that of private corporations and individuals.

* * * * *

[15] Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused by its trespasses and uncompensated takings.

[16] Yet in the hundreds of cases from that era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers. Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful.

* * * * *

[17] That municipal corporations were commonly held liable for damages in tort was also recognized by the 42d Congress. See *Monell v. New York City Dept. of Social Services*, 436 U.S., at 688. For example, Senator Stevenson, in opposing the Sherman amendment’s creation of a municipal liability for the riotous acts of its inhabitants, stated the prevailing law: “Numberless cases are to be found where a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty.” Cong. Globe, 42d Cong., 1st Sess., 762 (hereinafter *Globe*).^[10] Nowhere in the debates, however, is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the Civil Rights Act.^[11]

The absence of any allusion to a municipal immunity assumes added significance in light of the objections raised by the opponents of § 1 of the Act that its unqualified language could be interpreted to abolish the traditional good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officers.^[12] Had there been a similar common-law immunity for municipalities, the bill’s opponents doubtless would have raised the specter of its destruction, as well.

[18] To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality’s “governmental” and “proprietary” functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its “discretionary” or “legislative” activities, but not for those which were “ministerial” in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality’s liability under § 1983.

[19] The governmental-proprietary distinction^[13] owed its existence to the dual nature of the municipal corporation. On the one hand, the municipality was a corporate body, capable of performing the same “proprietary” functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that “governmental” or “public” capacity, it shared the immunity traditionally accorded the sovereign. But the principle of sovereign immunity—itsself a somewhat arid fountainhead for municipal immunity^[14]—is necessarily nullified when the State expressly or impliedly allows itself, or its creation, to be sued. Municipalities were therefore liable not only for their “proprietary” acts, but also for those “governmental” functions as to which the State had withdrawn their immunity. And, by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city’s immunity from liability for the nonperformance or misperformance of its obligation. See, e. g., *Weightman v. The Corporation of Washington*, 1 Black 39, 50-52 (1862); *Providence v. Clapp*, 17 How. 161, 167-169 (1855). See generally *Shearman & Redfield* §§ 122-126; Note, *Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents*, 30 Am. St. Rep. 376, 385 (1893). Thus,

despite the nominal existence of an immunity for “governmental” functions, municipalities were found liable in damages in a multitude of cases involving such activities.

[20] That the municipality’s common-law immunity for “governmental” functions derives from the principle of sovereign immunity also explains why that doctrine could not have served as the basis for the qualified privilege respondent city claims under § 1983. First, because sovereign immunity insulates the municipality from unconsented suits altogether, the presence or absence of good faith is simply irrelevant. The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations—not whether its agents reasonably believed they were acting lawfully in so conducting themselves.^[15] More fundamentally, however, the municipality’s “governmental” immunity is obviously abrogated by the sovereign’s enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of “persons” subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law^[16]—abolished whatever vestige of the State’s sovereign immunity the municipality possessed.

[21] The second common-law distinction between municipal functions—that protecting the city from suits challenging “discretionary” decisions—was grounded not on the principle of sovereign immunity, but on a concern for separation of powers. A large part of the municipality’s responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city’s judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government. See *Johnson v. State*, 69 Cal. 2d 782, 794, n.8, 447 P.2d 352, 361, n.8 (1968) (en banc) (“Immunity for ‘discretionary’ activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government”). In order to ensure against any invasion into the legitimate sphere of the municipality’s policymaking processes, courts therefore refused to entertain suits against the city “either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers* of a public or legislative character.” 2 Dillon § 753, at 862.^[17]

[22] Although many, if not all, of a municipality’s activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city’s liability was not as significant as might be expected. For just as the courts implied an exception to the municipality’s immunity for its “governmental” functions, here, too, a distinction was made that had the effect of subjecting the city to liability for much of its tortious conduct. While the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment. See, e.g., *Hill v. Boston*, 122 Mass. 344, 358-359 (1877) (dicta) (municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is ministerial in nature). See generally C. RHYNE, MUNICIPAL LAW § 30.4, pp. 736-737 (1957); Williams § 7. Thus municipalities remained liable in damages for a broad range of conduct implementing their discretionary decisions.

[23] Once again, an understanding of the rationale underlying the common-law immunity for “discretionary” functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no “discretion” to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality’s conduct in a § 1983 action, it does not seek to second-guess the “reasonableness” of the city’s decision nor to interfere with the local government’s resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling v. Constantin*, 287 U.S. 378, 398 (1932): “When there is a substantial showing that the exertion of state power has overridden private rights secured by that

Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.”

[24] In sum, we can discern no “tradition so well grounded in history and reason” that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress sub silentio extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a “broad remedy for violations of federally protected civil rights,” *Monell v. New York City Dept. of Social Services*, 436 U.S. at 685, we are unwilling to suppose that injuries occasioned by a municipality’s unconstitutional conduct were not also meant to be fully redressable through its sweep.^[18]

B

[25] Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the “[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Monroe v. Pape*, 365 U.S. at 184 (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to “enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” *Monroe v. Pape*, *supra*, at 172.

[26] How “uniquely amiss” it would be, therefore, if the government itself—“the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct”—were permitted to disavow liability for the injury it has begotten. See *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970) (opinion of Brennan, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer v. Rhodes*, 416 U.S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.^[19]

[27] Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. See *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey v. Piphus*, 435 U.S. 247, 256-257 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.^[20] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.^[21] Such procedures are particularly beneficial in preventing those “systemic” injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. Cf. Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1218-1219 (1977).^[22]

[28] Our previous decisions conferring qualified immunities on various government officials, see *supra*, at 637-638, are not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection

from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.^[23]

[29] In *Scheuer v. Rhodes*, *supra*, at 240, the Chief Justice identified the two “mutually dependent rationales” on which the doctrine of official immunity rested:

“(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion;

(2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.”^[24]

[30] The first consideration is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury. It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power. See *Monroe v. Pape*, 365 U.S. at 171-172. Elemental notions of fairness dictate that one who causes a loss should bear the loss.

[31] It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston*—“that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, in consequence of the acts thus done.” 36 Mass. at 515. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See *generally* 3 K. Davis, *Administrative Law Treatise* § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, *Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).^[25]

[32] The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decision making process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy.^[26] The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. See *Kostka v. Hogg*, 560 F.2d 37, 41 (CA1 1977). More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: “Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raison d'être*.”^[27]

IV

[33] In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own

pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual “blameworthiness” the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

[34] We believe that today’s decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.” *Monell v. New York City Dept. of Social Services*, 436 U.S. at 694.

Reversed.

Mr. Justice Powell, with whom the Chief Justice, Mr. Justice Stewart, and Mr. Justice Rehnquist join, dissenting.

[35] The Court today holds that the city of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred. It finds a denial of due process in the city’s failure to grant petitioner a hearing to clear his name after he was discharged. But his dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a “name clearing” hearing under the Due Process Clause.

[36] On the basis of this alleged deprivation of rights, the Court interprets 42 U.S.C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability approach inexplicably departs from this Court’s prior decisions under § 1983 and runs counter to the concerns of the 42d Congress when it enacted the statute. The Court’s ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision will hamper local governments unnecessarily, I dissent.

[37] Having constructed a constitutional deprivation from the valid exercise of governmental authority, the Court holds that municipalities are strictly liable for their constitutional torts.

[38] After today’s decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability unreasonably subjects local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.

[39] The Court’s decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action. Yet today’s decision is supported by nothing in the text of § 1983. Indeed, it conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

[40] Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review. Mr. Chief Justice Marshall wrote in *Marbury v. Madison*, 1 Cranch 137, 170 (1803), that “[the] province of the court is ... not to inquire how the executive, or executive officers, perform duties in which they have a discretion.” Marshall stressed the caution with which courts must approach “[questions], in their nature political, or which are, by the constitution and laws, submitted to the executive.” The allocation of public resources and the operational policies of the government itself are activities that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer’s possible liability under § 1983 if he incorrectly—though reasonably and in good faith—forecasts the course of constitutional law. Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for discretionary acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

[41] Because today’s decision will inject constant consideration of § 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the “point” of immunity under § 1983 “is to forestall an atmosphere of intimidation that would conflict with [officials’] resolve to perform their designated functions in a principled fashion.” *Ferri v. Ackerman*, 444 U.S. 193, 203-204 (1979).

[42] The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante*, at 655-656. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. *Cf. Wood v. Strickland*, 420 U.S. at 319-320; *Scheuer v. Rhodes*, 416 U.S. at 242.^[28]

[43] In addition, basic fairness requires a qualified immunity for municipalities. The good-faith defense recognized under § 1983 authorizes liability only when officials acted with malicious intent or when they “knew or should have known that their conduct violated the constitutional norm.” *Procunier v. Navarette*, 434 U.S. at 562. The standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike. Constitutional law is what the courts say it is, and—as demonstrated by today’s decision and its precursor, *Monell*—even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation.^[29]

[44] The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can “spread” the costs of any judgment across the local population. *Ante*, at 655. The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E.g.*, Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV L. REV. 922, 958 (1976).^[30] By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it.^[31] For some municipalities, the result could be a severe limitation on their ability to serve the public.

B

[45] The Court searches at length—and in vain—for legal authority to buttress its policy judgment. Despite its general statements to the contrary, the Court can find no support for its position in the debates on the civil rights legislation that included § 1983. Indeed, the legislative record suggests that the Members of the 42d Congress would have been dismayed by this ruling. Nor, despite its frequent citation of authorities that are only marginally relevant, can the Court rely on the traditional or current law of municipal tort liability. Both in the 19th century and now, courts and legislatures have recognized the importance of limiting the liability of local governments for official torts. Each of these conventional sources of law points to the need for qualified immunity for local governments.

1

[46] The modern dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act of 1871.

[47] Because Senator Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the Court. Much of the resistance to the measure flowed from doubts as to Congress' power to impose vicarious liability on local governments. *Monell v. New York City Dept. of Social Services*, 436 U.S. at 673-683; *id.* at 706 (Powell, J., concurring). But opponents of the amendment made additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

[48] First, several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments.

[49] Most significant, the opponents objected to liability imposed without any showing that a municipality knew of an impending constitutional deprivation.

[50] These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just as the 42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. The Court's approach today, like the Sherman amendment, could spawn onerous judgments against local governments and distort the decisions of officers who fear municipal liability for their actions. Congress' refusal to impose those burdens in 1871 surely undercuts any historical argument that federal judges should do so now.

[51] The Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions. *E. g.*, 2 J. DILLON, LAW OF MUNICIPAL CORPORATIONS §§ 753, 764, pp. 862-863, 875-876 (2d ed. 1873); W. WILLIAMS, LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT 9, 16 (1901). Nineteenth-century courts generally held that municipal corporations were not liable for acts undertaken in their "governmental," as opposed to their "proprietary," capacity. Most States now use other criteria for determining when a local government should be liable for damages. See *infra*, at 681-683. Still, the governmental/proprietary distinction retains significance because it was so widely accepted when § 1983 was enacted. It is inconceivable that a Congress thoroughly versed in current legal doctrines, see *Monell v. New York City Dept. of Social Services*, 436 U.S. at 669, would have intended through silence to create the strict liability regime now imagined by this Court.

[52] More directly relevant to this case is the common-law distinction between the “discretionary” and “ministerial” duties of local governments.

[53] This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. *Scheuer v. Rhodes* held that executive officials who have broad responsibilities must enjoy a “range of discretion [that is] comparably broad.” 416 U.S. at 247. Consequently, the immunity available under § 1983 varies directly with “the scope of discretion and responsibilities of the office.” 416 U.S. at 247. Strict municipal liability can only undermine that discretion.

[54] Today’s decision also conflicts with the current law in 44 States and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a “good faith” defense against liability for constitutional torts. Thus, for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts.



[Owen v. City of Independence, Missouri – Audio and Transcript of Oral Argument](#)

Footnotes

1. Under § 3.3(1) of the city’s charter, the City Manager has sole authority to “[appoint,] and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments and all other administrative officers and employees of the city.” [↗](#)
2. Ironically, the official minutes of the City Council meeting indicate that concern was expressed by some members about possible adverse legal consequences that could flow from their release of the reports to the media. The City Counselor assured the Council that although an action might be maintained against any witnesses who made unfounded accusations, “the City does have governmental immunity in this area ... and neither the Council nor the City as a municipal corporation can be held liable for libelous slander.” App. 20-23. [↗](#)
3. The investigation and its culmination in petitioner’s firing received front-page attention in the local press. See, e. g., “Lid Off Probe, Council Seeks Action,” *Independence Examiner*, Apr. 18, 1972, Tr. 24-25; “Independence Accusation. Police Probe Demanded,” *Kansas City Times*, Apr. 18, 1972, Tr. 25; “Probe Culminates in Chief’s Dismissal,” *Independence Examiner*, Apr. 19, 1972, Tr. 26; “Police Probe Continues; Chief Ousted,” *Community Observer*, Apr. 20, 1972, Tr. 26. [↗](#)
4. Petitioner did not join former Councilman Roberts in the instant litigation. A separate action seeking defamation damages was brought in state court against Roberts and Alberg in their individual capacities. Petitioner dismissed the state suit against Alberg and reached a financial settlement with Roberts. See 560 F.2d 925, 930 (CA8 1977). [↗](#)
5. Although respondents did not cross petition on this issue, they have raised a belated challenge to the Court of Appeals’ ruling that petitioner was deprived of a protected “liberty” interest. See Brief for Respondents

45-46. We find no merit in their contention, however, and decline to disturb the determination of the court below.

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), held that “[where] a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” In *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), we explained that the dismissal of a government employee accompanied by a “charge against him that might seriously damage his standing and associations in his community” would qualify as something “the government is doing to him,” so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner’s honesty and integrity. Petitioner was discharged the next day. The Council’s accusations received extensive coverage in the press, and even if they did not in point of fact “cause” petitioner’s discharge, the defamatory and stigmatizing charges certainly “[occurred] in the course of the termination of employment.” *Cf. Paul v. Davis*, 424 U.S. 693, 710 (1976). Yet the city twice refused petitioner’s request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city’s actions deprived petitioner of liberty without due process of law. [↵](#)

6. The Courts of Appeals are divided on the question whether local government units are entitled to a qualified immunity based on the good faith of their officials. Compare *Bertot v. School Dist. No. 1*, 613 F.2d 245 (CA10 1979) (en banc), *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (CA7 1975), and *Hander v. San Jacinto Jr. College*, 519 F.2d 273 (CA5), *rehearing denied*, 522 F.2d 204 (1975), all refusing to extend a qualified immunity to the governmental entity, with *Paxman v. Campbell*, 612 F.2d 848 (CA4 1980) (en banc), and *Sala v. County of Suffolk*, 604 F.2d 207 (CA2 1979), granting defendants a “good-faith” immunity. [↵](#)
7. As we noted in *Monell v. New York City Dept. of Social Services*, see 436 U.S., at 685-686, n.45, even the opponents of § 1 acknowledged that its language conferred upon the federal courts the entire power that Congress possessed to remedy constitutional violations. The remarks of Senator Thurman are illustrative:
“[This section’s] whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy... .
“That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used.” Globe App. 216-217. [↵](#)
8. The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities, and the immunity served to insulate them from personal liability for damages. Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers, and in the absence of an immunity, any recovery would come from public funds. [↵](#)
9. Primary among the constitutional suits heard in federal court were those based on a municipality’s violation

of the Contract Clause, and the courts' enforcement efforts often included "various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." *Monell v. New York City Dept. of Social Services*, 436 U.S., at 681. Damages actions against municipalities for federal statutory violations were also entertained. See, e. g., *Levy Court v. Coroner*, 2 Wall. 501 (1865); *Corporation of New York v. Ransom*, 23 How. 487 (1860); *Bliss v. Brooklyn*, 3 F. Cas. 706 (No. 1,544) (CC EDNY 1871). In addition, state constitutions and statutes, as well as municipal charters, imposed many obligations upon the local governments, the violation of which typically gave rise to damages actions against the city. See generally Note, Streets, Change of Grade, Liability of Cities for, 30 Am. St. Rep. 835 (1893), and cases cited therein. With respect to authorized contracts—and even unauthorized contracts that are later ratified by the corporation—municipalities were liable in the same manner as individuals for their breaches. See generally 1 J. DILLON, LAW OF MUNICIPAL CORPORATIONS §§ 385, 394 (2d ed. 1873) (hereinafter Dillon). Of particular relevance to the instant case, included within the class of contract actions brought against a city were those for the wrongful discharge of a municipal employee, and where the claim was adjudged meritorious, damages in the nature of backpay were regularly awarded. See, e.g., *Richardson v. School Dist. No. 10*, 38 Vt. 602 (1866); *Paul v. School Dist. No. 2*, 28 Vt. 575 (1856); *Inhabitants of Seasmont v. Farwell*, 3 Me. *450 (1825); see generally F. BURKE, A TREATISE ON THE LAW OF PUBLIC SCHOOLS 81-85 (1880). The most frequently litigated "breach of contract" suits, however, at least in federal court, were those for failure to pay interest on municipal bonds. See, e.g., *The Supervisors v. Durant*, 9 Wall. 415 (1870); *Commissioners of Knox County v. Aspinwall*, 21 How. 539 (1859). [↵](#)

10. Senator Stevenson proceeded to read from the decision in *Prather v. Lexington*, 52 Ky. 559, 560-562 (1852): "Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation, on the subject to which they relate. (*Thayer v. Boston*, 19 Pick., 511.) It has also been held that cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762. [↵](#)
11. At one point in the debates, Senator Stevenson did protest that the Sherman amendment would, for the first time, "create a corporate liability for personal injury which no prudence or foresight could have prevented." *Ibid.* As his later remarks made clear, however, Stevenson's objection went only to the novelty of the amendment's creation of vicarious municipal liability for the unlawful acts of private individuals, "even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." *Monell v. New York City Dept. of Social Services*, 436 U.S. at 692-693, n. 57. [↵](#)
12. See, e.g., Globe 365 (remarks of Rep. Arthur) ("But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment, they are liable ..."); *id.*, at 385 (remarks of Rep. Lewis); Globe App. 217 (remarks of Sen. Thurman). [↵](#)
13. In actuality, the distinction between a municipality's governmental and proprietary functions is better

characterized not as a line, but as a succession of points. In efforts to avoid the often-harsh results occasioned by a literal application of the test, courts frequently created highly artificial and elusive distinctions of their own. The result was that the very same activity might be considered “governmental” in one jurisdiction, and “proprietary” in another. See 18 McQuillin § 53.02, at 105. See also W. PROSSER, LAW OF TORTS § 131, p. 979 (4th ed. 1971) (hereinafter Prosser). As this Court stated, in reference to the “‘nongovernmental’–‘governmental’ quagmire that has long plagued the law of municipal corporations”:

“A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.” *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (on rehearing). [↵](#)

14. Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English Monarch as expressed in the maxim, “The King can do no wrong.” It has been suggested, however, that the meaning traditionally ascribed to this phrase is an ironic perversion of its original intent: “The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were injuriae (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong.” Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2, n. 2 (1924). See also Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 142 (1972). In this country, “[the] sovereign or governmental immunity doctrine, holding that the state, its subdivisions and municipal entities, may not be held liable for tortious acts, was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. As a result, the trend of judicial decisions was always to restrict, rather than to expand, the doctrine of municipal immunity.” 18 McQuillin § 53.02, at 104 (footnotes omitted). See also PROSSER § 131, at 984 (“For well over a century the immunity of both the state and the local governments for their torts has been subjected to vigorous criticism, which at length has begun to have its effect”). The seminal opinion of the Florida Supreme Court in *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (1957), has spawned “a minor avalanche of decisions repudiating municipal immunity,” PROSSER § 131, at 985, which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions. See K. Davis, *Administrative Law of the Seventies* § 25.00 (1976 and Supp. 1977) (only two States adhere to the traditional common-law immunity from torts in the exercise of governmental functions); Harley & Wasinger, *Government Immunity: Despotism or Creature of Necessity*, 16 WASHBURN L.J. 12, 34-53 (1976). [↵](#)
15. The common-law immunity for governmental functions is thus more comparable to an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset, than to a qualified immunity, which “depends upon the circumstances and motivations of [the official’s] actions, as established by the evidence at trial.” *Imbler v. Pachtman*, 424 U.S. 409, 419, n. 13 (1976). [↵](#)
16. Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-456 (1976); *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973) (Stevens, J.) (“Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic

guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced"). [↴](#)

17. See generally 18 McQuillin § 53.04a; Shearman & Redfield §§ 127-130; Williams § 6, at 15-16. Like the governmental/proprietary distinction, a clear line between the municipality's "discretionary" and "ministerial" functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U. S. C. § 2680(a). See generally 3 K. Davis, Administrative Law Treatise § 25.08 (1958 and Supp. 1970). [↴](#)
18. Cf. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 336 (2d ed. 1973) ("[Where] constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity ... in order to defeat them"). [↴](#)
19. The absence of any damages remedy for violations of all but the most "clearly established" constitutional rights, see *Woods v. Strickland*, 420 U.S., at 322, could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined. [↴](#)
20. For example, given the discussion that preceded the Independence City Council's adoption of the allegedly slanderous resolution impugning petitioner's integrity, see n. 6, *supra*, one must wonder whether this entire litigation would have been necessary had the Council members thought that the city might be liable for their misconduct. [↴](#)
21. Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975): "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that '[provides] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973)." [↴](#)
22. In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute systemwide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities. [↴](#)
23. On at least two previous occasions, this Court has expressly recognized that different considerations come into play when governmental rather than personal liability is threatened. *Hutto v. Finney*, 437 U.S. 678 (1978), affirmed an award of attorney's fees out of state funds for a deprivation of constitutional rights, holding that such an assessment would not contravene the Eleventh Amendment. In response to the suggestion, adopted by the dissent, that any award should be borne by the government officials personally, the Court

noted that such an allocation would not only be “manifestly unfair,” but would “[defy] this Court’s insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to ‘exercise their discretion with undue timidity.’ *Wood v. Strickland*, 420 U.S. 308, 321.” *Id.*, at 699, n.32. The Court thus acknowledged that imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds. Our decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), also recognized that the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself. Petitioners in that case had sought damages under § 1983 from a regional planning agency and the individual members of its governing agency. Relying on *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court concluded that “to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability.” 440 U.S., at 406. At the same time, however, we cautioned: “If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners’ interests. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658.” *Id.* at 405, n.29. [↵](#)

24. *Wood v. Strickland*, 420 U.S. 308 (1975), mentioned a third justification for extending a qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office. See *id.*, at 320 (“The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure”). Such fears are totally unwarranted, of course, once the threat of personal liability is eliminated. [↵](#)
25. *Monell v. New York City Dept. of Social Services* indicated that the principle of loss-spreading was an insufficient justification for holding the municipality liable under § 1983 on a respondeat superior theory. 436 U.S. at 693-694. Here, of course, quite a different situation is presented. Petitioner does not seek to hold the city responsible for the unconstitutional actions of an individual official “solely because it employs a tortfeasor.” *Id.* at 691. Rather, liability is predicated on a determination that “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” *Id.* at 690. In this circumstance—when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual. [↵](#)
26. “The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.” *Wood v. Strickland*, *supra*, at 319-320. [↵](#)
27. Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1224 (1977). See also *Johnson v. State*, 69 Cal.2d 782, 792-793, 447 P.2d 352, 359-360 (1968): “Nor do we deem an employee’s concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of ‘discretionary,’ and hence immune, acts. As a threshold matter, we consider it unlikely that the possibility of government liability will be a serious deterrent to the fearless exercise of judgment

by the employee. In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees.” (Citation and footnote omitted.) [↵](#)

28. The Court's argument is not only unpersuasive, but also is internally inconsistent. The Court contends that strict liability is necessary to “create an incentive for officials ... to err on the side of protecting citizens’ constitutional rights.” *Ante*, at 651-652. Yet the Court later assures us that such liability will not distort municipal decision making because “[the] inhibiting effect is significantly reduced, if not eliminated, ... when the threat of personal liability is removed.” *Ante*, at 656. Thus, the Court apparently believes that strict municipal liability is needed to modify public policies, but will not have any impact on those policies anyway. [↵](#)
29. The Court implies that unless municipalities are strictly liable under § 1983, constitutional law could be frozen “in its current state of development.” *Ante*, at 651, n.33. I find this a curious notion. This could be the first time that the period between 1961, when Monroe declared local governments absolutely immune from § 1983 suits, and 1978, when Monell overruled Monroe, has been described as one of static constitutional standards. [↵](#)
30. For example, in a recent case in Alaska, a jury awarded almost \$500,000 to a policeman who was accused of “racism and brutality” and removed from duty without notice and an opportunity to be heard. *Wayson v. City of Fairbanks*, 22 ATLA L. Rep. 222 (Alaska Fourth Dist. Super. Ct. 1979). [↵](#)
31. Ironically, the State and Federal Governments cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims, and the States are protected by the Eleventh Amendment. [↵](#)

Notes on *Owen v. City of Independence, Missouri*

1. The [Owen](#) Court noted that the enacting legislature will be deemed to have incorporated a common law immunity as a defense to a Section 1983 action only if the immunity was well established when Section 1983 was enacted *and* “where its rationale was compatible with the purposes of the Civil Rights Act.” *Owen* at 638. Is the rationale for absolute immunity for government officials compatible with the purposes of Section 1983? Qualified individual immunity?
2. On what basis does the Court hold that Congress did not intend to afford municipalities a qualified immunity defense to Section 1983 actions?
 - a. What general rules of statutory construction for Section 1983 does the *Owen* Court utilize?
 - b. What role does the common law of municipal liability play in the Court's analysis?

- c. What relevance does the majority attach to Congress' rejection of the Sherman Amendment?

Can the Court's analysis in *Owen* be reconciled with its analysis of vicarious liability in *Monell*? Under the analysis employed in *Owen*, should municipalities be held vicariously liable for all constitutional violations caused by municipal employees acting within the scope of their employment?

3. Why does the Court reject incorporation of the municipalities' common law "governmental function" immunity into Section 1983?
4. After *Owen*, may a local governmental entity assert immunity to a Section 1983 action brought in state, as opposed to federal, court if the governing state law confers immunity upon that entity? In [*Howlett v. Rose*](#), 496 U.S. 356 (1990), a student joined a Section 1983 claim with other state law claims filed in a Florida court against a school board arising out of the search of the student's car. The Florida Court of Appeals affirmed dismissal of the Section 1983 count. The Florida statutory waiver of sovereign immunity rendered the school board amenable to suit for state law claims; the waiver, however, did not extend to Section 1983 actions. In a unanimous opinion, the United States Supreme Court reversed:

If the District Court of Appeal meant to hold that governmental entities subject to § 1983 liability enjoy an immunity over and above those already provided in § 1983, that holding directly violates federal law. The elements of, and the defenses to, a federal cause of action are defined by federal law.

Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations.... To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law. "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269, 85 L. Ed.2d 254, 105 S. Ct. 1938 (1985).

If, on the other hand, the District Court of Appeal meant that § 1983 claims are excluded from the category of tort claims that the Circuit Court could hear against a school board, its holding was no less violative of federal law. *Cf. Atlantic Coast Line R. Co. v. Burnette*, 239 U.S. 199, 201, 60 L. Ed. 226, 36 S. Ct. 75 (1915). This case does not present the questions whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights or to authorize service of process on parties who would not otherwise be subject to the court's jurisdiction. The State of Florida has constituted the Circuit Court for Pinellas County as a court of general jurisdiction. It exercises jurisdiction over tort claims by private citizens against state entities (including school boards), of the size and type of petitioner's claim here, and it can enter judgment against them. That court also exercises jurisdiction over § 1983 actions against individual officers and is fully competent to provide the remedies the federal statute requires. *Cf. Sullivan v. Little Hunting Park, Inc.* 396 U.S. 229, 238, 24 L. Ed.2d 386, 90 S. Ct. 400 (1969). Petitioner has complied with all the state law procedures for invoking the jurisdiction of that court.

The mere facts, as argued by respondent's amici, that state common law and statutory law do not make unlawful the precise conduct that § 1983 addresses and that § 1983 actions "are more likely to be frivolous than are other suits," Brief for Washington Legal Foundation et. al. as Amici Curiae 17, clearly cannot provide sufficient justification for the State's refusal to entertain such actions. These reasons ... are not the kind of neutral policy that could be a "valid excuse" for the state court's refusal to entertain federal actions. To the extent that the Florida rule is based upon the judgment that

parties who are otherwise subject to the jurisdiction of the court should not be held liable for activity that would not subject them to liability under state law, we understand that to be only another way of saying that the court disagrees with the content of federal law.

The argument by amici that suits predicated on federal law are more likely to be frivolous and have less of an entitlement to the State's limited judicial resources warrants little response. A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proven that the claim has no merit, that judgment is not up to the States to make.

Respondent offers two final arguments in support of the judgment of the District Court of Appeal. First...it argued that a federal court has no power to compel a state court to entertain a claim over which the state court has no jurisdiction as a matter of state law. Second, respondent argues that sovereign immunity is not a creature of state law, but of long-established legal principles which have not been set aside by § 1983. We find no merit in these contentions.

The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect.... A State cannot "escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent." *Hughes*, 341 U.S. at 611, 95 L.Ed. 1212, 71 S. Ct. 980. Similarly, a State may not evade the strictures of the Privileges and Immunities Clause by denying jurisdiction to a court otherwise competent.... [T]he same is true with respect to a state court's obligations under the Supremacy Clause. The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction."

Respondent's argument that Congress did not intend to abrogate an immunity with an ancient common law heritage is the same argument, in slightly different dress, as the argument that we have already rejected that the States are free to redefine the federal cause of action. Congress did take common law principles into account in providing certain forms of absolute and qualified immunity.... But as to persons that Congress subjected to liability, individual states may not exempt such persons from federal liability by relying on their own common law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.

5. While *Owen* rejected blanket local governmental immunity, may a municipality assert immunity in a Section 1983 action arising out of its legislative activities? In [*Carver v. Foerster*](#), 102 F.3d 96 (3rd Cir. 1996), the United States Court of Appeals for the Third Circuit joined its sister circuits in refusing to carve an exception to the *Owen* Court's repudiation of immunity:

Local governments, unlike individual legislators, should be held liable for the losses they cause. Moreover, a doctrine of legislative immunity for local governments might have the undesirable effect of encouraging a county council to adopt all of its policies through a series of legislative actions passed by a newly created "Board" or "Council."

[B]ecause a legislator's own money is not at risk, county liability does not distract the legislator from his job of serving the community's interests. True, the legislator must contend with lawsuits brought against the county, but that distraction is borne equally by the local populace as a whole (at least in tax dollars) and not by any particular individual. If a county council forgoes enactment of legislation because it fears potential liability for the county under § 1983, its decision reflects a rational calculation that, whatever a given policy's benefits, its risk of liability outweighs its collective benefit to the community. This is *exactly* the type of reckoning we want to encourage our legislators to make.

Defendants argue, however, that legislative immunity for the county is necessary to protect legislators from judicial inquiry into their motives in enacting legislation. This argument lacks weight given the intent-based inquiry of certain doctrines of Constitutional law. "Developments in federal law over the last 30 years have tied the constitutionality of many types of municipal legislation directly to the purpose and motive of the legislation." *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 75 (2d Cir. 1992) (citing cases). For better or worse, lawsuits concerning constitutional matters such as equal protection, the First Amendment, and substantive due process all require judicial inquiry of the legislator's motive. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed.2d 450 (1977) (proof of discriminatory motive necessary to show violation of Equal Protection Clause); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *cert. denied*, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed.2d 107 (1988) (deliberate and arbitrary government decision, including one "tainted by improper motive," violated developer's substantive due process rights) and *Grant v. City of Pittsburgh*, 98 F.3d 116, 125 (3d Cir. 1996) (evidence of officer's intent admissible when intent is integral element of underlying constitutional violation). These cases illustrate that judicial inquiry of legislative motive is not per se forbidden. We therefore will not undercut core doctrines of Constitutional law by applying legislative immunity to municipalities under § 1983.

102 F.3d at 103-04.

6. *Owen* includes an extensive exposition of Congress' purposes in enacting Section 1983, as well as the system of risk allocation necessary to fulfill these purposes. As you examine the Court's municipal liability decisions, consider whether the current state of the law accomplishes this allocation.
7. [*Monell*](#) held that under Section 1983, a local government entity may be liable only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or where the constitutional deprivation is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell*, 436 U.S. at 690-91. The facts of *Monell* readily satisfied these requirements because defendants conceded that an *express* policy commanded the premature medical leaves that were found to be unconstitutional. The *Monell* Court therefore had "no occasion to address ... what the full contours of municipal liability under Section 1983 may be." *Monell*, 436 U.S. at 695. *Owen* similarly presented no dispute over whether the constitutional violation was caused by municipal policy. The City Council formally adopted the resolution that authorized dismissal of Chief of Police Owen. City Manager Alberg discharged Owen the day after the City Council's action. In addition, the city charter conferred sole authority upon the City Manager to fire the Chief of Police. Difficult questions of local governmental liability are posed where, unlike *Monell* and *Owen*, there is no express policy at issue. May actions of the municipality, that are not formally promulgated nonetheless constitute policy? Under what circumstances may constitutional deprivations be said to result from governmental custom? Additional complications arise where the conduct found to contravene constitutional norms is not mandated by the policy or custom. Must the plaintiff prove that the policy authorized the precise actions in

issue? Is the municipality liable if the policy increased the likelihood that the violation would occur? Can the municipality be found to have caused the deprivation where it failed to proscribe or prevent the conduct?

- a. The Supreme Court offered no further guidance as to the “contours of municipal liability” until almost seven years after *Monell* when, in [City of Oklahoma v. Tuttle](#), 471 U.S. 808, 810 (1985) it purported to “take a small but necessary step toward defining those contours.” In *Tuttle*, a jury returned a \$1,500,000 judgment against the city for the fatal shooting of plaintiff’s husband by an Oklahoma City police officer. The trial court had instructed the jury that it could find the city liable for a deficient policy of training and supervising police officers, and that this policy could be established by proof of a single, unusually excessive use of force. A majority of the Court agreed that the jury instruction was erroneous insofar as it permitted an inference of policy solely from the actions of a low-level police officer on a single occasion. However, no majority view emerged as to when a single instance of misconduct could constitute policy or whether a local governmental entity could be held liable for failure to train.
 - i. Justice Rehnquist, writing for the plurality, offered the following analysis of when municipal liability could be premised upon a single instance of misconduct:

Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the “policy” and the constitutional deprivation. 471 U.S. at 823-24.

Justice Rehnquist expressly declined to assess a) whether inadequate training ever could constitute policy, or b) assuming failure to train could satisfy *Monell*’s policy requirement, whether plaintiff would have to prove a conscious decision, beyond gross negligence, to prevail. 471 U.S. at 824, n.7.

- ii. Justice Brennan’s concurring opinion rejected the plurality’s “metaphysical distinction between policies that are of themselves unconstitutional and those that cause unconstitutional violations.” 471 U.S. at 833, n.8. Rather, to impose liability upon a municipality, Justice Brennan opined, plaintiff must prove two elements. First, plaintiff must prove action taken by the city, as opposed to unilateral conduct of a nonpolicymaking employee. Second, plaintiff must prove that the city’s policy or custom caused the deprivation of her constitutional rights. 471 U.S. at 829-30.
- b. Having failed to generate a majority opinion in *Tuttle*, the Court in [Pembaur v. City of Cincinnati](#) took another stab at defining when a “policy” may be deemed to exist in the absence of an express proclamation.

PEMBAUR v. CITY OF CINCINNATI, 475 U.S. 469 (1986)

Justice Brennan delivered the opinion of the Court, except as to Part II-B

[1] In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Court concluded that municipal liability under 42 U.S.C. § 1983 is limited to deprivations of federally protected rights caused by action taken “pursuant to official municipal policy of some nature” *Id.* at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

[2] Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur’s patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen. In April, the grand jury charged Pembaur in a six-count indictment.

[3] During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur’s employees. When these employees failed to appear as directed, the Prosecutor obtained capiases for their arrest and detention from the Court of Common Pleas of Hamilton County.^[1]

[4] On May 19, 1977, two Hamilton County Deputy Sheriffs attempted to serve the capiases at Pembaur’s clinic. Although the reception area is open to the public, the rest of the clinic may be entered only through a door next to the receptionist’s window. Upon arriving, the Deputy Sheriffs identified themselves to the receptionist and sought to pass through this door, which was apparently open. The receptionist blocked their way and asked them to wait for the doctor. When Pembaur appeared a moment later, he and the receptionist closed the door, which automatically locked from the inside, and wedged a piece of wood between it and the wall. Returning to the receptionist’s window, the Deputy Sheriffs identified themselves to Pembaur, showed him the capiases and explained why they were there. Pembaur refused to let them enter, claiming that the police had no legal authority to be there and requesting that they leave. He told them that he had called the Cincinnati police, the local media, and his lawyer. The Deputy Sheriffs decided not to take further action until the Cincinnati police arrived.

[5] Shortly thereafter, several Cincinnati police officers appeared. The Deputy Sheriffs explained the situation to them and asked that they speak to Pembaur. The Cincinnati police told Pembaur that the papers were lawful and that he should allow the Deputy Sheriffs to enter. When Pembaur refused, the Cincinnati police called for a superior officer. When he too failed to persuade Pembaur to open the door, the Deputy Sheriffs decided to call their supervisor for further instructions. Their supervisor told them to call Assistant Prosecutor Whalen and to follow his instructions. The Deputy Sheriffs then telephoned Whalen and informed him of the situation. Whalen conferred with County Prosecutor Leis, who told Whalen to instruct the Deputy Sheriffs to “go in and get [the witnesses].” Whalen in turn passed these instructions along to the Deputy Sheriffs.

[6] After a final attempt to persuade Pembaur voluntarily to allow them to enter, the Deputy Sheriffs tried unsuccessfully to force the door. City police officers, who had been advised of the County Prosecutor’s instructions to “go in and get” the witnesses, obtained an axe and chopped down the door. The Deputy

Sheriffs then entered and searched the clinic. Two individuals who fit descriptions of the witnesses sought were detained, but turned out not to be the right persons.

[7] After this incident, the Prosecutor obtained an additional indictment against Pembaur for obstructing police in the performance of an authorized act. Although acquitted of all other charges, Pembaur was convicted for this offense. The Ohio Court of Appeals reversed, reasoning that Pembaur was privileged under state law to exclude the deputies because the search of his office violated the Fourth Amendment. *State v. Pembaur*, No. C-790380 (Hamilton County Court of Appeals, Nov. 3, 1982). The Ohio Supreme Court reversed and reinstated the conviction. *State v. Pembaur*, 9 Ohio St.3d 136, 459 N.E.2d 217, *cert. denied*, 467 U.S. 1219 (1984). The Supreme Court held that the state-law privilege applied only to bad-faith conduct by law enforcement officials, and that, under the circumstances of this case, Pembaur was obliged to acquiesce to the search and seek redress later in a civil action for damages. 9 Ohio St.3d, at 138, 459 N.E.2d, at 219.

[8] On April 20, 1981, Pembaur filed the present action in the United States District Court for the Southern District of Ohio against the city of Cincinnati, the County of Hamilton, the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners (in their official capacities only), Assistant Prosecutor Whalen, and nine city and county police officers.^[2] Pembaur sought damages under 42 U.S.C. § 1983, alleging that the county and city police had violated his rights under the Fourth and Fourteenth Amendments. His theory was that, absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person. We agreed with that proposition in *Steagald v. United States*, 451 U.S. 204 (1981), decided the day after Pembaur filed this lawsuit. Pembaur sought \$10 million in actual and \$10 million in punitive damages, plus costs and attorney's fees.

[9] Much of the testimony at the 4-day trial concerned the practices of the Hamilton County Police in serving capiases. Frank Webb, one of the Deputy Sheriffs present at the clinic on May 19, testified that he had previously served capiases on the property of third persons without a search warrant, but had never been required to use force to gain access. Assistant Prosecutor Whalen was also unaware of a prior instance in which police had been denied access to a third person's property in serving a *capias* and had used force to gain entry. Lincoln Stokes, the County Sheriff, testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances. He too could not recall a specific instance in which entrance had been denied and forcibly gained. Sheriff Stokes did testify, however, that it was the practice in his Department to refer questions to the County Prosecutor for instructions under appropriate circumstances and that "it was the proper thing to do" in this case.

[10] The District Court awarded judgment to the defendants and dismissed the complaint in its entirety. The court agreed that the entry and search of Pembaur's clinic violated the Fourth Amendment under *Steagald, supra*, but held *Steagald* inapplicable since it was decided nearly four years after the incident occurred. Because it construed the law in the Sixth Circuit in 1977 to permit law enforcement officials to enter the premises of a third person to serve a *capias*, the District Court held that the individual municipal officials were all immune under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[11] The claims against the county and the city were dismissed on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell*. With respect to Hamilton County, the court explained that, even assuming that the entry and search were pursuant to a governmental policy, "it was not a policy of Hamilton County per se" because "[the] Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." With respect to the city of Cincinnati, the court found that "the only policy or custom followed ... was that of aiding County Sheriff's Deputies in the performance of their duties." The court found that any participation by city police in the entry and search of the clinic resulted from decisions by individual officers as to the permissible scope of assistance they could provide, and not from a city policy to provide this particular kind of assistance.

[12] On appeal, Pembaur challenged only the dismissal of his claims against Whalen, Hamilton County, and the city of Cincinnati. The Court of Appeals for the Sixth Circuit upheld the dismissal of Pembaur's claims against Whalen and Hamilton County, but reversed the dismissal of his claim against the city of Cincinnati on the ground that the District Court's findings concerning the policies followed by the Cincinnati police were clearly erroneous. 746 F.2d 337 (1984).^[3]

[13] The Court of Appeals affirmed the District Court's dismissal of Pembaur's claim against Hamilton County, but on different grounds. The court held that the County Board's lack of control over the Sheriff would not preclude county liability if "the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter." *Id.* at 340-341. Based upon its examination of Ohio law, the Court of Appeals found it "[clear]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement. *Id.* at 341. Notwithstanding these conclusions, however, the court found that Pembaur's claim against the county had been properly dismissed:

"We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office.... That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." *Ibid.* (footnote omitted) (emphasis in original).

[14] Pembaur petitioned for certiorari to review only the dismissal of his claim against Hamilton County. The decision of the Court of Appeals conflicts with holdings in several other Courts of Appeals, and we granted the petition to resolve the conflict. 472

U.S. 1016 (1985). We reverse.

II

A

[15] Our analysis must begin with the proposition that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. New York City Dept. of Social Services*, 436 U.S. at 691. As we read its opinion, the Court of Appeals held that a single decision to take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by *Monell* as a predicate to municipal liability under § 1983.^[4] The Court of Appeals reached this conclusion without referring to *Monell*—indeed, without any explanation at all. However, examination of the opinion in *Monell* clearly demonstrates that the Court of Appeals misinterpreted its holding.

[16] *Monell* is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape*, 365 U.S. 167 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of respondeat superior. See *Monell*, 436 U.S. at 691. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692. Primarily, however, our conclusion rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their own illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to

control the conduct of *others*. *Id.* at 665-683. We found that, because of these doubts, Congress chose not to create such obligations in § 1983. Recognizing that this would be the effect of a federal law of respondent superior, we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability. *Id.* at 692-694, and n.57.

[17] The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts of the municipality—"that is, acts" which the municipality has officially sanctioned or ordered.

[18] With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. See, e.g., *Owen v. City of Independence*, 445 U.S. 622 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (City Council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell, supra*, at 694, and whose decisions therefore may give rise to municipal liability under § 1983.

[19] Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport*, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

B

[20] Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered.^[5] The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See, e.g., *Oklahoma City v. Tuttle*, 471 U.S., at 822-824.^[6] The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.^[7] Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking

authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the City Councils in *Owen* and *Newport*. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See *Tuttle, supra*, at 823 (“‘policy’ generally implies a course of action consciously chosen from among various alternatives”).

C

[21] Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner’s claim against the county. The Deputy Sheriffs who attempted to serve the capias at petitioner’s clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner’s clinic. That decision directly caused the violation of petitioner’s Fourth Amendment rights.

[22] Respondent argues that the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices. Respondent suggests that the County Prosecutor was merely rendering “legal advice” when he ordered the Deputy Sheriffs to “go in and get” the witnesses. Consequently, the argument concludes, the action of the individual Deputy Sheriffs in following this advice and forcibly entering petitioner’s clinic was not pursuant to a properly established municipal policy.

[23] We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered “legal advice.” However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here. Ohio Rev. Code Ann. § 309.09(A) (1979) provides that county officers may “require ... instructions from [the County Prosecutor] in matters connected with their official duties.” Pursuant to standard office procedure, the Sheriff’s Office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was “the proper thing to do” in this case. We decline to accept respondent’s invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor’s clear command mere “legal advice.” In ordering the Deputy Sheriffs to enter petitioner’s clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983.

[24] The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice White, concurring.

[25] The forcible entry made in this case was not then illegal under federal, state, or local law. The city of

Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that respondent county would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

[26] This does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. It would be different if *Steagald v. United States*, 451 U.S. 204 (1981), had been decided when the events at issue here occurred, if the State Constitution or statutes had forbidden forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy. Had the Sheriff or Prosecutor in this case failed to follow an existing warrant requirement, it would be absurd to say that he was nevertheless executing county policy in authorizing the forceful entry in this case and even stranger to say that the county would be liable if the Sheriff had secured a warrant and it turned out that he and the Magistrate had mistakenly thought there was probable cause for the warrant. If deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of respondent superior and not because the officers' acts represent local policy.

[27] Such results would not conform to *Monell* and the cases following it. I do not understand the Court to hold otherwise in stating that municipal liability attaches where “a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.” *Ante*, at 483-484. A sheriff, for example, is not the final policymaker with respect to the probable-cause requirement for a valid arrest. He has no alternative but to act in accordance with the established standard; and his deliberate or mistaken departure from the controlling law of arrest would not represent municipal policy.

[28] In this case, however, the Sheriff and the Prosecutor chose a course that was not forbidden by any applicable law, a choice that they then had the authority to make. This was county policy, and it was no less so at the time because a later decision of this Court declared unwarranted forceful entry into third-party premises to be violation of the Fourth Amendment. Hence, I join the Court's opinion and judgment.

Justice Stevens, concurring in part and concurring in the judgment.

[29] This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word “policy”—a word that does not appear in the text of 42 U.S.C. § 1983, the statutory provision that we are supposed to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.

[30] With respect to both the merits of the constitutional claim and the county's liability for the unconstitutional activities of its agents performed in the course of their official duties, there can be no doubt that the Congress that enacted the Ku Klux Act in 1871 intended the statute to authorize a recovery in a case of this kind. When police officers chopped down the door to petitioner's premises in order to serve capiases on two witnesses, they violated petitioner's constitutional rights. *Steagald v. United States*, 451 U.S. 204 (1981), makes it perfectly clear that forcible entry to a third party's premises to execute an arrest warrant is unconstitutional if the entry is without a search warrant and in the absence of consent or exigent circumstances. In my view, it is not at all surprising that respondents have “conceded” the retroactivity of

Steagald. For *Steagald* plainly presented its holding as compelled by, and presaged in, well-established precedent.

[31] Similarly, if we view the question of municipal liability from the perspective of the Legislature that enacted the Ku Klux Act of 1871, the answer is clear. The legislative history indicating that Congress did not intend to impose civil liability on municipalities for the conduct of third parties, *ante*, at 478-479, and n.7, merely confirms the view that it did intend to impose liability for the governments' own illegal acts—including those acts performed by their agents in the course of their employment. In other words, as I explained in my dissent in *Oklahoma City v. Tuttle*, 471 U.S. 808, 835-840 (1985), both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common law doctrine, including respondeat superior, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.

[32] Finally, in construing the scope of § 1983, the Court has sometimes referred to “considerations of public policy.” To the extent that such “policy” concerns are relevant, they also support a finding of county liability. A contrary construction would produce a most anomalous result. The primary responsibility for protecting the constitutional rights of the residents of Hamilton County from the officers of Hamilton County should rest on the shoulders of the county itself, rather than on the several agents who were trying to perform their jobs. Although I recognize that the county may provide insurance protection for its agents, I believe that the primary party against whom the judgment should run is the county itself. The county has the resources and the authority that can best avoid future constitutional violations and provide a fair remedy for those that have occurred in the past. Thus, even if “public policy” concerns should inform the construction of § 1983, those considerations, like the statute’s remedial purpose and common-law background, support a conclusion of county liability for the unconstitutional, axeswinging entry in this case.

[33] Because I believe that Parts I, II-A, and II-C are consistent with the purpose and policy of § 1983, as well as with our precedents, I join those Parts of the Court’s opinion and concur in the judgment.

Justice O’Connor, concurring in part and concurring in the judgment.

[34] For the reasons stated by Justice White, I agree that the municipal officers here were acting as policymakers within the meaning of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). As the city of Cincinnati freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May 1977. Given that this procedure was consistent with federal, state, and local law at the time the case arose, it seems fair to infer that respondent county’s policy was no different. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry “had the authority to approve or disapprove such entries.” *Ante*, at 485 (White, J., concurring). Given this combination of circumstances, I agree with Justice White that the decision to break down the door “sufficiently manifested county policy to warrant reversal of the judgment below.” *Ibid*. Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I join only Parts I and II-A of the Court’s opinion and the judgment.

Justice Powell, with whom the Chief Justice and Justice Rehnquist join, dissenting.

[35] The Court today holds Hamilton County liable for the forcible entry in May 1977 by Deputy Sheriffs into

petitioner's office. The entry and subsequent search were pursuant to capiases for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the Sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently was in doubt as to what advice to give. He referred the question to the County Prosecutor, who advised the Deputy Sheriffs to "go in and get them [the witnesses]" pursuant to the capiases.

[36] This five-word response to a single question over the phone is now found by this Court to have created an official county policy for which Hamilton County is liable under § 1983. This holding is wrong for at least two reasons. First, the Prosecutor's response and the Deputies' subsequent actions did not violate any constitutional right that existed at the time of the forcible entry. Second, no official county policy could have been created solely by an offhand telephone response from a busy County Prosecutor.

* * * * *

A

[37] Under *Monell*, local government units may be liable only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. This case presents the opportunity to define further what was meant in *Monell* by "official policy." Proper resolution of the case calls for identification of the applicable principles for determining when policy is created. The Court today does not do this, but instead focuses almost exclusively on the status of the decisionmaker. Its reasoning is circular: it contends that policy is what policymakers make, and policymakers are those who have authority to make policy.

[38] The Court variously notes that if a decision "is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood," *ante*, at 481, and that "where action is directed by those who establish governmental policy, the municipality is equally responsible" *ibid*. Thus, the Court's test for determining the existence of policy focuses only on whether a decision was made "by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at 483-484.

[39] In my view, the question whether official policy—in any normal sense of the term—has been made in a particular case is not answered by explaining who has final authority to make policy. The question here is not "*could* the County Prosecutor make policy?" but rather, "*did* he make policy?" By focusing on the authority granted to the official under state law, the Court's test fails to answer the key federal question presented. The Court instead turns the question into one of state law. Under a test that focuses on the authority of the decisionmaker, the Court has only to look to state law for the resolution of this case. Here the Court of Appeals found that "both the County Sheriff and the County Prosecutor [had authority under Ohio law to] establish county policy under appropriate circumstances." *Ante*, at 484. Apparently that recitation of authority is all that is needed under the Court's test because no discussion is offered to demonstrate that the Sheriff or the Prosecutor actually used that authority to establish official county policy in this case.

[40] Moreover, the Court's reasoning is inconsistent with *Monell*. Today's decision finds that policy is established because a policymaking official made a decision on the telephone that was within the scope of his authority. The Court ignores the fact that no business organization or governmental unit makes binding policy decisions so cavalierly. The Court provides no mechanism for distinguishing those acts or decisions that cannot fairly be construed to create official policy from the normal process of establishing an official policy that would be followed by a responsible public entity. Thus, the Court has adopted in part what it rejected in *Monell*: local government units are now subject to respondeat superior liability, at least with respect to a certain category of employees, i.e., those with final authority to make policy. See *Monell*, 436 U.S. at 691; see

also *Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (rejecting theories akin to respondeat superior) (plurality opinion). The Court’s reliance on the status of the employee carries the concept of “policy” far beyond what was envisioned in *Monell*.

B

[41] In my view, proper resolution of the question whether official policy has been formed should focus on two factors: (i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was reached or the action was taken.

[42] Focusing on the nature of the decision distinguishes between policies and mere ad hoc decisions. Such a focus also reflects the fact that most policies embody a rule of general applicability. That is the tenor of the Court’s statement in *Monell* that local government units are liable under § 1983 when the action that is alleged to be unconstitutional “implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” 436 U.S. at 690. The clear implication is that policy is created when a rule is formed that applies to all similar situations—a “governing principle [or] plan.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 1392 (2d ed. 1979).^[8] When a rule of general applicability has been approved, the government has taken a position for which it can be held responsible.

[43] Another factor indicating that policy has been formed is the process by which the decision at issue was reached. Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation, or official records indicate that the resulting decisions taken “may fairly be said to represent official policy,” *Monell, supra*, at 694. *Owen v. City of Independence*, 445 U.S. 622 (1980), provides an example. The City Council met in a regularly scheduled meeting. One member of the Council made a motion to release to the press certain reports that cast an employee in a bad light. After deliberation, the Council passed the motion with no dissents and one abstention. *Id.* at 627-629. Although this official action did not establish a rule of general applicability, it is clear that policy was formed because of the process by which the decision was reached.

[44] Applying these factors to the instant case demonstrates that no official policy was formulated. Certainly, no rule of general applicability was adopted. The Court correctly notes that the Sheriff “testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances.” *Ante*, at 474. Nor could he recall a specific instance in which entrance had been denied and forcibly gained. The Court’s result today rests on the implicit conclusion that the Prosecutor’s response—“go in and get them”—altered the prior case-by-case approach of the Department and formed a new rule to apply in all similar cases. Nothing about the Prosecutor’s response to the inquiry over the phone, nor the circumstances surrounding the response, indicates that such a rule of general applicability was formed.

[45] Similarly, nothing about the way the decision was reached indicates that official policy was formed. The prosecutor, without time for thoughtful consideration or consultation, simply gave an off-the-cuff answer to a single question. There was no process at all. The Court’s holding undercuts the basic rationale of *Monell*, and unfairly increases the risk of liability on the level of government least able to bear it. I dissent.



[Pembaur v. City of Cincinnati – Audio and Transcript of Oral Argument](#)

Footnotes

1. A *capias* is a writ of attachment commanding a county official to bring a subpoenaed witness who has

failed to appear before the court to testify and to answer for civil contempt. See Ohio Rev. Code Ann. § 2317.21 (1981). [↗](#)

2. Hamilton County Prosecutor Leis was not made a defendant because counsel for petitioner believed that Leis was absolutely immune. Tr., Mar. 14-Mar. 17, p. 267. We express no view as to the correctness of this evaluation. Cf. *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976) (leaving open the question of a prosecutor's immunity when he acts "in the role of an administrator or investigative officer rather than that of an advocate"). [↗](#)
3. The court found that there was a city policy respecting the use of force in serving capiases as well as a policy of aiding county police. It based this conclusion on the testimony of Cincinnati Chief of Police Myron Leistler, who stated that it was the policy of his Department to take whatever steps were necessary, including the forcing of doors, to serve an arrest document. 746 F.2d at 341-342; see also, Tr., Mar. 14-Mar. 17, pp. 43-45, 46-47. The court remanded the case for a determination whether Pembaur's injury was incurred as a result of the execution of this policy. 746 F.2d at 342. [↗](#)
4. The opinion below also can be read as holding that municipal liability cannot be imposed for a single incident of unconstitutional conduct by municipal employees whether or not that conduct is pursuant to municipal policy. Such a conclusion is unsupported by either the language or reasoning of *Monell*, or by any of our subsequent decisions. As we explained last Term in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), once a municipal policy is established, "it requires only one application ... to satisfy fully *Monell's* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." *Id.* at 822 (plurality opinion); see also, *id.* at 831-832 (Brennan, J., concurring in part and concurring in judgment.). The only issue before us, then, is whether petitioner satisfied *Monell's* requirement that the tortious conduct be pursuant to "official municipal policy." [↗](#)
5. Section 1983 also refers to deprivations under color of a state "custom or usage," and the Court in *Monell* noted accordingly that "local governments, like every other § 1983 'person,' ... may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." 436 U.S. at 690-691. A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state "custom or usage." Because there is no allegation that the action challenged here was pursuant to a local "custom," this aspect of *Monell* is not at issue in this case. [↗](#)
6. Respondent argues that the holding in *Tuttle* is far broader than this. It relies on the statement near the end of Justice Rehnquist's plurality opinion that "[proof] of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." 471 U.S. at 823-824 (emphasis added). Respondent contends that a policy cannot be said to be "existing" unless similar action has been taken in the past. This reading of the *Tuttle* plurality is strained, and places far too much weight on a single word. The plaintiff in *Tuttle* alleged that a police officer's use of excessive force deprived her decedent of life without due process of law. The plaintiff proved only a single instance of unconstitutional action by a nonpolicymaking employee of the city. She argued that the city

had “caused” the constitutional deprivation by adopting a “policy” of inadequate training. The trial judge instructed the jury that a single, unusually excessive use of force may warrant an inference that it was attributable to grossly inadequate training, and that the municipality could be held liable on this basis. We reversed the judgment against the city. Although there was no opinion for the Court on this question, both the plurality and the opinion concurring in the judgment found plaintiff’s submission inadequate because she failed to establish that the unconstitutional act was taken pursuant to a municipal policy rather than simply resulting from such a policy in a “but for” sense. *Id.* at 822-824 (plurality opinion), 829-830 (Brennan, J., concurring in part and concurring in judgment). That conclusion is entirely consistent with our holding today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers. [↵](#)

7. Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff’s decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body’s decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff’s decisions would represent county policy and could give rise to municipal liability. [↵](#)
8. The focus on a general rule of applicability does not mean that more than one instance of its application is required. The local government unit may be liable for the first application of a duly constituted unconstitutional policy. [↵](#)

Notes on *Pembaur v. City of Cincinnati*

1. How does Justice Brennan’s opinion resolve the following issues:
 - a. Can a decision by a municipal policymaker on a single occasion give rise to municipal liability under Section 1983?
 - b. What actions of employees of local governmental entities constitute policy?
 - c. What sources are consulted to determine which actions of employees of local governmental entities constitute policy? Is this a question of law or a question of fact?
2. What is the significance of Justice Brennan’s statement that “municipal liability attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives.”? [Pembaur](#) at 483. Does *Pembaur* impose an additional standard of culpability to establish municipal policy?
3. How does Justice White’s concurring opinion differ from Justice Brennan’s opinion? Under Justice White’s analysis, would a municipality be liable under Section 1983 if its City Council enacted an ordinance that

violated constitutional rights which were clearly established at the time the ordinance was passed?

4. What test is proposed by Justice Powell to identify actions which constitute municipal policy? Can a single decision be deemed to be municipal policy?
5. Why does the Court have so much difficulty arriving at a common definition of the actions which constitute governmental “policy” within the meaning of Section 1983?
6. Justice Powell criticizes the Court’s holding because it “unfairly increases the risk of liability on the level of government least able to bear it.” *Pembaur* at 502. If Hamilton County were not liable, who would bear the loss from the constitutional deprivation suffered in *Pembaur*?

CITY OF ST. LOUIS v. PRAPROTNIK, 485 U.S. 112 (1988)

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which the Chief Justice Rehnquist, Justice White, and Justice Scalia join.

[1] This case calls upon us to define the proper legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U.S.C. § 1983.

I

[2] The principal facts are not in dispute. Respondent James H. Praprotnik is an architect who began working for petitioner city of St. Louis in 1968. For several years, respondent consistently received favorable evaluations of his job performance, uncommonly quick promotions, and significant increases in salary. By 1980, he was serving in a management-level city planning position at petitioner's Community Development Agency (CDA).

[3] The Director of CDA, Donald Spaid, had instituted a requirement that the agency's professional employees, including architects, obtain advance approval before taking on private clients. Respondent and other CDA employees objected to the requirement. In April 1980, respondent was suspended for 15 days by CDA's Director of Urban Design, Charles Kindleberger, for having accepted outside employment without prior approval. Respondent appealed to the city's Civil Service Commission, a body charged with reviewing employee grievances. Finding the penalty too harsh, the Commission reversed the suspension, awarded respondent back pay, and directed that he be reprimanded for having failed to secure a clear understanding of the rule.

[4] The Commission's decision was not well received by respondent's supervisors at CDA. Kindleberger later testified that he believed respondent had lied to the Commission, and that Spaid was angry with respondent.

[5] Respondent's next two annual job performance evaluations were markedly less favorable than those in previous years. In discussing one of these evaluations with respondent, Kindleberger apparently mentioned his displeasure with respondent's 1980 appeal to the Civil Service Commission. Respondent appealed both evaluations to the Department of Personnel. In each case, the Department ordered partial relief and was upheld by the city's Director of Personnel or the Civil Service Commission.

[6] In April 1981, a new mayor came into office, and Donald Spaid was replaced as Director of CDA by Frank Hamsher. As a result of budget cuts, a number of layoffs and transfers significantly reduced the size of CDA and of the planning section in which respondent worked. Respondent, however, was retained.

[7] In the spring of 1982, a second round of layoffs and transfers occurred at CDA. At that time, the city's Heritage and Urban Design Division (Heritage) was seeking approval to hire someone who was qualified in architecture and urban planning. Hamsher arranged with the Director of Heritage, Henry Jackson, for certain functions to be transferred from CDA to Heritage. This arrangement, which made it possible for Heritage to employ a relatively high-level "city planning manager," was approved by Jackson's supervisor, Thomas Nash. Hamsher then transferred respondent to Heritage to fill this position.

[8] Respondent objected to the transfer, and appealed to the Civil Service Commission. The Commission declined to hear the appeal because respondent had not suffered a reduction in his pay or grade. Respondent then filed suit in federal district court, alleging that the transfer was unconstitutional. The city

was named as a defendant, along with Kindleberger, Hamsher, Jackson (whom respondent deleted from the list before trial), and Deborah Patterson, who had succeeded Hamsher at CDA.

[9] At Heritage, respondent became embroiled in a series of disputes with Jackson and Jackson's successor, Robert Killen. Respondent was dissatisfied with the work he was assigned, which consisted of unchallenging clerical functions far below the level of responsibilities that he had previously enjoyed. At least one adverse personnel decision was taken against respondent, and he obtained partial relief after appealing that decision.

[10] In December 1983, respondent was laid off from Heritage. The layoff was attributed to a lack of funds, and this apparently meant that respondent's supervisors had concluded that they could create two lower-level positions with the funds that were being used to pay respondent's salary. Respondent then amended the complaint in his lawsuit to include a challenge to the layoff. He also appealed to the Civil Service Commission, but proceedings in that forum were postponed because of the pending lawsuit and have never been completed. Tr. Oral Arg. 31-32.

[11] The case went to trial on two theories: (1) that respondent's First Amendment rights had been violated through retaliatory actions taken in response to his appeal of his 1980 suspension; and (2) that respondent's layoff from Heritage was carried out for pretextual reasons in violation of due process. The jury returned special verdicts exonerating each of the three individual defendants, but finding the city liable under both theories. Judgment was entered on the verdicts, and the city appealed.

[12] A panel of the Court of Appeals for the Eighth Circuit found that the due process claim had been submitted to the jury on an erroneous legal theory and vacated that portion of the judgment. With one judge dissenting, however, the panel affirmed the verdict holding the city liable for violating respondent's First Amendment rights. 798 F.2d 1168 (1986). Only the second of these holdings is challenged here.

[13] The Court of Appeals found that the jury had implicitly determined that respondent's layoff from Heritage was brought about by an unconstitutional city policy. *Id.*, at 1173. Applying a test under which a "policymaker" is one whose employment decisions are "final" in the sense that they are not subjected to de novo review by higher-ranking officials, the Court of Appeals concluded that the city could be held liable for adverse personnel decisions taken by respondent's supervisors. *Id.*, at 1173-1175. In response to petitioner's contention that the city's personnel policies are actually set by the Civil Service Commission, the Court of Appeals concluded that the scope of review before that body was too "highly circumscribed" to allow it fairly to be said that the Commission, rather than the officials who initiated the actions leading to respondent's injury, were the "final authority" responsible for setting city policy. *Id.*, at 1175.

[14] Turning to the question of whether a rational jury could have concluded that respondent had been injured by an unconstitutional policy, the Court of Appeals found that respondent's transfer from CDA to Heritage had been "orchestrated" by Hamsher, that the transfer had amounted to a "constructive discharge," and that the injury had reached fruition when respondent was eventually laid off by Nash and Killen. *Id.* at 1175-1176, and n.8. The court held that the jury's verdict exonerating Hamsher and the other individual defendants could be reconciled with a finding of liability against the city because "the named defendants were not the supervisors directly causing the layoff, when the actual damages arose." *Id.* at 1173, n.3. *Cf. Los Angeles v. Heller*, 475 U.S. 796 (1986).

[15] The dissenting judge relied on our decision in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). He found that the power to set employment policy for petitioner city of St. Louis lay with the mayor and aldermen, who were authorized to enact ordinances, and with the Civil Service Commission, whose function was to hear appeals from city employees who believed that their rights under the city's Charter, or under applicable rules and ordinances, had not been properly respected. 798 F.2d at 1180. The dissent concluded that respondent had submitted no evidence proving that the mayor and aldermen, or the Commission, had established a policy of retaliating against employees for appealing from adverse personnel decisions. *Id.* at 1179-1181. The dissenting judge also concluded that, even if there were such a policy, the record evidence would not support a finding

that respondent was in fact transferred or laid off in retaliation for the 1980 appeal from his suspension. *Id.* at 1181-1182.

[16] We granted certiorari, 479 U.S. 1029 (1987), and we now reverse.

[17] Two terms ago, in *Pembaur*, *supra*, we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the Court was unable to settle on a general formulation, Justice Brennan's plurality opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." 475 U.S. at 480. Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Id.* at 483. Third, whether a particular official has "final policymaking authority" is a question of state law. *Ibid.* Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Id.* at 482-483, and n.12.

[18] The Courts of Appeals have already diverged in their interpretations of these principles. Compare, for example, *Williams v. Butler*, 802 F.2d 296, 299-302 (CA8 1986) (en banc), *cert. pending sub nom. City of Little Rock v. Williams*, No. 86-1049, with *Jett v. Dallas Independent School Dist.*, 798 F. 2d 748, 759-760 (CA5 1986) (dictum). Today, we set out again to clarify the issue that we last addressed in *Pembaur*.

B

[19] We begin by reiterating that the identification of policymaking officials is a question of state law. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." *Pembaur v. Cincinnati*, 475 U.S. at 483 (plurality opinion).^[1] Thus the identification of policymaking officials is not a question of federal law and it is not a question of fact in the usual sense. The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies. See *generally* C. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* §§ 1.3-1.7 (1980). Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business.^[2]

[20] We are not, of course, predicting that state law will always speak with perfect clarity. We have no reason to suppose, however, that federal courts will face greater difficulties here than those that they routinely address in other contexts. We are also aware that there will be cases in which policymaking responsibility is shared among more than one official or body. In the case before us, for example, it appears that the mayor and aldermen are authorized to adopt such ordinances relating to personnel administration as are compatible with the City Charter. See St. Louis City Charter, art. XVIII, § 7(b), App. 62-63. The Civil Service Commission, for its part, is required to "prescribe ... rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith." § 7(a), App. 62. Assuming that applicable law does not make the decisions of the Commission reviewable by the mayor and aldermen, or vice versa, one would have to conclude that policy decisions made either by the mayor and aldermen or by the Commission would be attributable to the city itself. In any event, however, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere

other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself.

[21] As the plurality in *Pembaur* recognized, special difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official. 475 U.S. at 482-483, and n.12. If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability. If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose. It may not be possible to draw an elegant line that will resolve this conundrum, but certain principles should provide useful guidance.

[22] First, whatever analysis is used to identify municipal policymakers, egregious attempts by local government to insulate themselves from liability for unconstitutional policies are precluded by a separate doctrine. Relying on the language of § 1983, the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a custom or usage' with the force of law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-168 (1970). That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited.

[23] Second, as the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U.S. at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

C

[24] Whatever refinements of these principles may be suggested in the future, we have little difficulty concluding that the Court of Appeals applied an incorrect legal standard in this case. In reaching this conclusion, we do not decide whether the First Amendment forbade the city from retaliating against respondent for having taken advantage of the grievance mechanism in 1980. Nor do we decide whether there was evidence in this record from which a rational jury could conclude either that such retaliation actually occurred or that respondent suffered any compensable injury from whatever retaliatory action may have been taken. Finally, we do not address petitioner's contention that the jury verdict exonerating the individual defendants cannot be reconciled with the verdict against the city. Even assuming that all these issues were properly resolved in respondent's favor, we would not be able to affirm the decision of the Court of Appeals.

[25] The city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipal policy. Respondent does not contend that anyone in city government ever promulgated, or even articulated, such a policy. Nor did he attempt to prove that such retaliation was ever directed against anyone other than himself. Respondent contends that the record can be read to establish that his supervisors were angered by his 1980 appeal to the Civil Service Commission; that new supervisors in a new administration chose, for reasons passed on through some informal means, to retaliate against respondent two years later by transferring him to another agency; and that this transfer was part of a scheme that led, another year and a half later, to his lay off. Even if one assumes that all this was true, it says nothing about the actions of those whom the law established as the makers of municipal policy in matters

of personnel administration. The mayor and aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees. On the contrary, the city established an independent Civil Service Commission and empowered it to review and correct improper personnel actions. Respondent does not deny that his repeated appeals from adverse personnel decisions repeatedly brought him at least partial relief, and the Civil Service Commission never so much as hinted that retaliatory transfers or layoffs were permissible. Respondent points to no evidence indicating that the Commission delegated to anyone its final authority to interpret and enforce the following policy set out in article XVIII of the city's Charter, § 2(a), App. 49:

"Merit and fitness. All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness...."

[26] The Court of Appeals concluded that "appointing authorities," like Hamsher and Killen, who had the authority to initiate transfers and layoffs, were municipal "policymakers." The court based this conclusion on its findings (1) that the decisions of these employees were not individually reviewed for "substantive propriety" by higher supervisory officials; and (2) that the Civil Service Commission decided appeals from such decisions, if at all, in a circumscribed manner that gave substantial deference to the original decisionmaker. 798 F.2d at 1174-1175. We find these propositions insufficient to support the conclusion that Hamsher and Killen were authorized to establish employment policy for the city with respect to transfers and layoffs. To the contrary, the City Charter expressly states that the Civil Service Commission has the power and the duty:

"To consider and determine any matter involved in the administration and enforcement of this [Civil Service] article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director [or personnel], or on appeal by any appointing authority, employee, or taxpayer of the city, from any act of the director or of any appointing authority. The decision of the commission in all such matters shall be final, subject, however, to any right of action under any law of the state or of the United States." St. Louis City Charter, art. XVIII, § 7(d), App. 63.

[27] This case therefore resembles the hypothetical example in *Pembaur*: "If [city] employment policy was set by the [Mayor and Aldermen and by the Civil Service Commission], only [those] bod[ies]' decisions would provide a basis for [city] liability. This would be true even if the [mayor and aldermen and the Commission] left the [appointing authorities] discretion to hire and fire employees and [they] exercised that discretion in an unconstitutional manner " 475 U.S. at 483, n. 12. A majority of the Court of Appeals panel determined that the Civil Service Commission's review of individual employment actions gave too much deference to the decisions of appointing authorities like Hamsher and Killen. Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. It is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them. It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. See *supra*, at 127. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official. But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. In such circumstances, the purposes of § 1983 would not be served by treating a subordinate employees' decision as if it were a reflection of municipal policy.

[28] Justice Brennan's opinion, concurring in the judgment, finds implications in our discussion that we do not think necessary or correct. See *post* at 142-147. We nowhere say or imply, for example, that "a

municipal charter’s precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts inconsistent with that policy.” *Post*, at 145, n.7. Rather, we would respect the decisions, embodied in state and local law, that allocated policymaking authority among particular individuals and bodies. Refusals to carry out stated policies could obviously help to show that a municipality’s actual policies were different from the ones that had been announced. If such a showing were made, we would be confronted with a different case than the one we decide today.

[29] Nor do we believe that we have left a “gaping hole” in § 1983 that needs to be filled with the vague concept of “de facto final policymaking authority.” *Post* at 144. Except perhaps as a step towards overruling *Monell* and adopting the doctrine of respondeat superior, ad hoc searches for officials possessing such “de facto” authority would serve primarily to foster needless unpredictability in the application of § 1983.

[30] Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy took no part in the consideration or decision of this case.

Justice Brennan, with whom Justice Marshall and Justice Blackmun join, concurring.

[31] Despite its somewhat confusing procedural background, this case at bottom presents a relatively straightforward question: whether respondent’s supervisor at the Community Development Agency, Frank Hamsher, possessed the authority to establish final employment policy for the city of St. Louis such that the city can be held liable under 42 U.S.C. § 1983 for Hamsher’s allegedly unlawful decision to transfer respondent to a dead-end job. Applying the test set out two Terms ago by the plurality in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), I conclude that Hamsher did not possess such authority and I therefore concur in the Court’s judgment reversing the decision below. I write separately, however, because I believe that the commendable desire of today’s plurality to “define more precisely when a decision on a single occasion may be enough” to subject a municipality to § 1983 liability, *ante*, at 123, has led it to embrace a theory of municipal liability that is both unduly narrow and unrealistic, and one that ultimately would permit municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers.

[32] In my view, *Pembaur* controls this case. As an “appointing authority,” Hamsher was empowered under the City Charter to initiate lateral transfers such as the one challenged here, subject to the approval of both the Director of Personnel and the appointing authority of the transferee agency. The Charter, however, nowhere confers upon agency heads any authority to establish city policy, final or otherwise, with respect to such transfers. Thus, for example, Hamsher was not authorized to promulgate binding guidelines or criteria governing how or when lateral transfers were to be accomplished. Nor does the record reveal that he in fact sought to exercise any such authority in these matters. There is no indication, for example, that Hamsher ever purported to institute or announce a practice of general applicability concerning transfers. Instead, the evidence discloses but one transfer decision—the one involving respondent—which Hamsher ostensibly undertook pursuant to a city-wide program of fiscal restraint and budgetary reductions. At most, then, the record demonstrates that Hamsher had the authority to determine how best to effectuate a policy announced by his superiors, rather than the power to establish that policy. Like the hypothetical

Sheriff in *Pembaur*'s footnote 12, Hamsher had discretionary authority to transfer CDA employees laterally; that he may have used this authority to punish respondent for the exercise of his First Amendment rights does not, without more, render the city liable for respondent's resulting constitutional injury. The court below did not suggest that either Killen or Nash, who together orchestrated respondent's ultimate layoff, shared Hamsher's constitutionally impermissible animus. Because the court identified only one unlawfully motivated municipal employee involved in respondent's transfer and layoff, and because that employee did not possess final policymaking authority with respect to the contested decision, the city may not be held accountable for any constitutional wrong respondent may have suffered.

III

[33] These determinations, it seems to me, are sufficient to dispose of this case, and I therefore think it unnecessary to decide, as the plurality does, who the actual policymakers in St. Louis are. I question more than the mere necessity of these determinations, however, for I believe that in the course of passing on issues not before us, the plurality announces legal principles that are inconsistent with our earlier cases and unduly restrict the reach of § 1983 in cases involving municipalities.

[34] The plurality begins its assessment of St. Louis' power structure by asserting that the identification of policymaking officials is a question of state law, by which it means that the question is neither one of federal law nor of fact, at least "not in the usual sense." See *ante*, at 124. Instead, the plurality explains, courts are to identify municipal policymakers by referring exclusively to applicable state statutory law. *Ante*, at 124. Not surprisingly, the plurality cites no authority for this startling proposition, nor could it, for we have never suggested that municipal liability should be determined in so formulaic and unrealistic a fashion. In any case in which the policymaking authority of a municipal tortfeasor is in doubt, state law will naturally be the appropriate starting point, but ultimately the factfinder must determine where such policymaking authority actually resides, and not simply "where the applicable law purports to put it." *Ante*, at 126. As the plurality itself acknowledges, local governing bodies may take myriad forms. We in no way slight the dignity of municipalities by recognizing that in not a few of them real and apparent authority may diverge, and that in still others state statutory law will simply fail to disclose where such authority ultimately rests. Indeed, in upholding the Court of Appeals' determination in *Pembaur* that the County Prosecutor was a policymaking official with respect to county law enforcement practices, a majority of this Court relied on testimony which revealed that the County Sheriff's office routinely forwarded certain matters to the Prosecutor and followed his instructions in those areas. See 475 U.S. at 485; *ibid.* (White, J., concurring); *id.* at 491 (O'Connor, J., concurring). While the majority splintered into three separate camps on the ultimate theory of municipal liability, and the case generated five opinions in all, not a single member of the Court suggested that reliance on such extra-statutory evidence of the county's actual allocation of policymaking authority was in any way improper. Thus, although I agree with the plurality that juries should not be given open-ended "*discretion* to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself," *ante*, at 126 (emphasis added), juries can and must find the predicate facts necessary to a determination of whether a given official possesses final policymaking authority. While the jury instructions in this case were regrettably vague, the plurality's solution tosses the baby out with the bath water. The identification of municipal policymakers is an essentially factual determination "in the usual sense," and is therefore rightly entrusted to a properly instructed jury.

[35] Nor does the "custom or usage" doctrine adequately compensate for the inherent inflexibility of a rule that leaves the identification of policymakers exclusively to state statutory law. That doctrine, under which municipalities and States can be held liable for unconstitutional practices so well settled and permanent that they have the force of law, see *Adickes v. Kress & Co.*, 398 U.S. at 167, has little if any bearing on the question whether a city has delegated de facto final policymaking authority to a given official. A city practice of

delegating final policymaking authority to a subordinate or mid-level official would not be unconstitutional in and of itself, and an isolated unconstitutional act by an official entrusted with such authority would obviously not amount to a municipal “custom or usage.” Under *Pembaur*, of course, such an isolated act *should* give rise to municipal liability. Yet a case such as this would fall through the gaping hole the plurality’s construction leaves in § 1983, because the state statutory law would not identify the municipal actor as a policymaking official, and a single constitutional deprivation, by definition, is not a well settled and permanent municipal practice carrying the force of law.^[3]

[36] For these same reasons, I cannot subscribe to the plurality’s narrow and overly rigid view of when a municipal official’s policymaking authority is “final.” Attempting to place a gloss on *Pembaur*’s finality requirement, the plurality suggests that whenever the decisions of an official are subject to some form or review—however limited—that official’s decisions are nonfinal. Under the plurality’s theory, therefore, even where an official wields policymaking authority with respect to a challenged decision, the city would not be liable for that official’s policy decision unless reviewing officials affirmatively approved both the “decision and the basis for it.” *Ante*, at 127. Reviewing officials, however, may as a matter of practice never invoke their plenary oversight authority, or their review powers may be highly circumscribed. See n.4 *supra*. Under such circumstances, the subordinate’s decision is in effect the final municipal pronouncement on the subject. Certainly a § 1983 plaintiff is entitled to place such considerations before the jury, for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality’s actual power structure is necessarily a factual and practical one.^[4]

[37] Accordingly, I cannot endorse the plurality’s determination, based on nothing more than its own review of the City Charter, that the mayor, the aldermen, and the CSC are the only policymakers for the city of St. Louis. While these officials may well have policymaking authority, that hardly ends the matter; the question before us is whether the officials responsible for respondent’s allegedly unlawful transfer were final policymakers. As I have previously indicated, I do not believe that CDA Director Frank Hamsher possessed any policymaking authority with respect to lateral transfers and thus I do not believe that his allegedly improper decision to transfer respondent could, without more, give rise to municipal liability. Although the plurality reaches the same result, it does so by reasoning that because others could have reviewed the decisions of Hamsher and Killen, the latter officials simply could not have been final policymakers.

[38] This analysis, however, turns a blind eye to reality, for it ignores not only the lower court’s determination, nowhere disputed, that CSC review was highly circumscribed and deferential, but that in this very case the Commission refused to judge a propriety of Hamsher’s transfer decision because a lateral transfer was not an “adverse” employment action falling within its jurisdiction. Nor does the plurality account for the fact that Hamsher’s predecessor, Donald Spaid, promulgated what the city readily acknowledges was a binding policy regarding secondary employment;^[5] although the CSC ultimately modified the sanctions respondent suffered as a result of his apparent failure to comply with that policy, the record is devoid of any suggestion that the Commission reviewed the substance or validity of the policy itself. Under the plurality’s analysis, therefore, even the hollowest promise of review is sufficient to divest all city officials save the mayor and governing legislative body of final policymaking authority. While clarity and ease of application may commend such a rule, we have remained steadfast in our conviction that Congress intended to hold municipalities accountable for those constitutional injuries inflicted not only by their lawmakers, but “by those whose edicts or acts may fairly be said to represent official policy.” *Monell*, 436 U. S., at 694. Because the plurality’s mechanical “finality” test is fundamentally at odds with the pragmatic and factual inquiry contemplated by *Monell*, I cannot join what I perceive to be its unwarranted abandonment of the traditional factfinding process in § 1983 actions involving municipalities.

Thus in this case, a policy prohibiting lateral transfers for unconstitutional or discriminatory reasons would not shield the city from liability if an official possessing final policymaking authority over such transfers acted in violation of the prohibition, because the CSC would lack jurisdiction to review the decision and thus could not enforce the city policy. Where as here, however, the official merely possesses

discretionary authority over transfers, the city policy is irrelevant, because the official's actions cannot subject the city to liability in any event.

[39] Finally, I think it necessary to emphasize that despite certain language in the plurality opinion suggesting otherwise, the Court today need not and therefore does not decide that a city can only be held liable under § 1983 where the plaintiff “prov[es] the existence of an unconstitutional municipal policy.” See *ante*, at 128. Just last Term, we left open for the second time the question whether a city can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations. See *Springfield v. Kibbe*, 480 U.S. 257 (1987); see also *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). That question is certainly not presented by this case, and nothing we say today forecloses its future consideration.

* * * * *

Justice Stevens, dissenting.

[40] If this case involved nothing more than a personal vendetta between a municipal employee and his superiors, it would be quite wrong to impose liability on the City of St. Louis. In fact, however, the jury found that top officials in the City administration, relying on pretextual grounds, had taken a series of retaliatory actions against respondent because he had testified truthfully on two occasions, one relating to personnel policy and the other involving a public controversy of importance to the Mayor and the members of his cabinet. No matter how narrowly the Court may define the standards for imposing liability upon municipalities in § 1983 litigation, the judgment entered by the District Court in this case should be affirmed.

* * * * *

[41] Both *Pembaur* and the plurality and concurring opinions today acknowledge that a high official who has ultimate control over a certain area of city government can bind the City through his unconstitutional actions even though those actions are not in the form of formal rules or regulations. See *Pembaur v. Cincinnati*, *supra*, at 479-481; *ante*, at 123 (plurality), at 139-140 (concurrence). Although the Court has explained its holdings by reference to the nonstatutory term “policy,” it plainly has not embraced the standard understanding of that word as covering a rule of general applicability. Instead it has used that term to include isolated acts not intended to be binding over a class of situations. But when one remembers that the real question in cases such as this is not “what constitutes City policy?” but rather “when should a City be liable for the acts of its agents?,” the inclusion of single acts by high officials make sense, for those acts bind a municipality in a way that the misdeeds of low officials do not.

[42] Every act of a high official constitutes a kind of “statement” about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decisionmaking; they are not perceived as the actions of the city itself. If a County police officer had broken down Dr. Pembaur’s door on the officer’s own initiative, this would have been seen as the action of an overanxious officer and would not have sent a message to other officers that similar actions would be countenanced. One reason for this is that the County Prosecutor himself could step forward and say “that was wrong”; when the County Prosecutor authorized the action himself, only a self-correction would accomplish the same task, and until such time his action would have County-wide ramifications. Here, the Mayor, those working for him, and the agency heads are high-ranking officials; accordingly, we must assume that their actions have City-wide ramifications, both through their similar response to a like class of situations, and through the response of subordinates who follow their lead.^[6]

[43] Just as the actions of high-ranking and low-ranking municipal employees differ in nature, so do constitutional torts differ. An illegal search (*Pembaur*) or seizure (*Tuttle*) is quite different from a firing

without due process (*Owen*); the retaliatory personnel action involved in today's case is in still another category. One thing that the torts in *Pembaur*, *Tuttle*, and *Owen* had in common is that they occurred “in the open”; in each of those cases, the ultimate judgment of unconstitutionality was based on whether undisputed events (the breaking-in in *Pembaur*, the shooting in *Tuttle*, the firing in *Owen*) comported with accepted constitutional norms. But the typical retaliatory personnel action claim pits one story against another; although everyone admits that the transfer and discharge of respondent occurred, there is sharp, and ultimately central, dispute over the reasons—the motivation—behind the actions. The very nature of the tort is to avoid a formal process. *Owens'* relevance should thus be clear. For if the Court is willing to recognize the existence of municipal policy in a non-rule case as long as high enough officials engaged in a formal enough process, it should not deny the existence of such a policy merely because those same officials act “underground,” as it were. It would be a truly remarkable doctrine for this Court to recognize municipal liability in an employee discharge case when high officials are foolish enough to act through a “formal process,” but not when similarly high officials attempt to avoid liability by acting on the pretext of budgetary concerns, which is what the jury found based on the evidence presented at trial.

[44] Thus, holding St. Louis liable in this case is supported by both *Pembaur* and *Owen*. We hold a municipality liable for the decisions of its high officials in large part because those decisions, by definition, would be applied across a class of cases. Just as we assume in *Pembaur* that the County Prosecutor (or his subordinates) would issue the same break-down-the-door order in similar cases, and just as we assume in *Owen* that the City Council (or those following its lead) would fire an employee without notice of reasons or opportunity to be heard in similar cases, so too must we assume that whistleblowers like respondent would be dealt with in similar retaliatory fashion if they offend the Mayor, his staff, and relevant agency heads, or if they offend those lower-ranking officials who follow the example of their superiors. Furthermore, just as we hold a municipality liable for discharging an employee without due process when its city council acts formally—for a due process violation is precisely the type of constitutional tort that a city council might commit when it acts formally—so too must we hold a municipality liable for discharging an employee in retaliation against his public speech when similarly high officials act informally—for a first amendment retaliation tort is precisely the *type* of constitutional tort that high officials might commit when they act in concert and informally.

[45] Whatever difficulties the Court may have with binding municipalities on the basis of the unconstitutional conduct of individuals, it should have no such difficulties binding a city when many of its high officials—including officials directly under the mayor, agency heads, and possibly the mayor himself—cooperate to retaliate against a whistleblower for the exercise of his First Amendment rights.^[7]

I would affirm the judgment of the Court of Appeals.



[City of St. Louis v. Praprotnik – Audio and Transcript of Oral Argument](#)

Footnotes

1. Unlike Justice Brennan, we would not replace this standard with a new approach in which state law becomes merely “an appropriate starting point” for an “assessment of a municipality’s actual power structure.” *Post*, at 143, 145. Municipalities cannot be expected to predict how courts or juries will assess their “actual power structures,” and this uncertainty could easily lead to results that would be hard in practice to distinguish from the results of a regime governed by the doctrine of respondeat superior. It is one thing

to charge a municipality with responsibility for the decisions of officials invested by law, or by a “custom or usage” having the force of law, with policymaking authority. It would be something else, and something inevitably more capricious, to hold a municipality responsible for every decision that is perceived as “final” through the lens of a particular factfinder’s evaluation of the city’s “actual power structure.” [↵](#)

2. Justice Stevens, who believes that Monell incorrectly rejected the doctrine of respondeat superior, suggests a new theory that reflects his perceptions of the congressional purposes underlying § 1983. See *post* at 148, n.1. This theory would apparently ignore state law and distinguish between “high” officials and “low” officials on the basis of an independent evaluation of the extent to which a particular official’s actions have “the potential of controlling governmental decisionmaking,” or are “perceived as the actions of the city itself.” *Post* at 171. Whether this evaluation would be conducted by judges or juries, we think, the legal test is too imprecise to hold much promise of consistent adjudication or principled analysis. We can see no reason, except perhaps a desire to come as close as possible to respondeat superior without expressly adopting that doctrine, that could justify introducing such unpredicatability into a body of law that is already so difficult. As Justice Stevens acknowledges, see *post* at 148, n.1, this Court has repeatedly rejected his interpretation of Congress’ intent. We have held that Congress intended to hold municipalities responsible under § 1983 only for the execution of official policies and customs, and not for injuries inflicted solely by employees or agents. See, e.g., *Monell v. New York City Dept. of Social Services*, 436 U.S. at 658, 694 (1978); *Pembaur v. Cincinnati*, 475 U.S. 469, 478-480 (1986). Like the Pembaur plurality, we think it is self-evident that official policies can only be adopted by those legally charged with doing so. See *supra*, at 124, and n.1. We are aware of nothing in § 1983 or its legislative history, and Justice Stevens points to nothing, that would support the notion that unauthorized acts of subordinate employees are official policies because they may have the “potential” to become official policies or may be “perceived as” official policies. Accordingly, we conclude that Justice Stevens’ proposal is without a basis in the law. [↵](#)
3. Indeed, the plurality appears to acknowledge as much when it explains that the “custom or usage” doctrine will forestall “egregious attempts by local government to insulate themselves from liability for unconstitutional policies,” and that “most deliberate municipal evasions of the Constitution will be sharply limited.” *Ante*, at 127 (emphases added). Congress, however, did not enact § 1983 simply to provide redress for “most” constitutional deprivations, nor did it limit the statute’s reach only to those deprivations that are truly “egregious.” [↵](#)
4. The plurality also asserts that “when an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departures from them, are the act of the municipality.” *Ante*, at 127. While I have no quarrel with such a proposition in the abstract, I cannot accept the plurality’s apparent view that a municipal charter’s precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts inconsistent with that policy. Again, the relevant inquiry is whether the policy in question is actually and effectively enforced through the city’s review mechanisms. [↵](#)
5. Although the plurality is careful in its discussion of the facts to label Director Spaid’s directive a “requirement” rather than a “policy,” the city itself draws no such fine semantic distinctions. Rather, it states plainly that Spaid “promulgated a secondary employment’ policy that sought to control outside employment by CDA architects,” and that “[respondent] resented the policy.” Brief for Petitioner 2-3 (emphasis added). [↵](#)

6. That high officials may bind a municipality in ways that low officials may not should not surprise, for the pyramidal structure of authority pervades the law. For instance, the law of agency distinguishes between a general agent and a special agent; the former is “authorized to conduct a series of transactions involving a continuity of service,” while the latter is “authorized to conduct a single transaction or a series of transactions not involving continuity of service.” RESTATEMENT (SECOND) OF AGENCY §§ 3(1), (2) (1958). The distinction matters because only a general agent “subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.” *Id.* § 161. A special agent, to the contrary, “has no power to bind his principal by contracts or conveyances which he is not authorized or apparently authorized to make,” with some exceptions. *Id.* § 161A. A general agent thus binds his principal even through unauthorized acts precisely because those dealing with him perceive him as possessing broad authority to act on behalf of his principal. A special agent, possessing and known to possess only limited authority, cannot bind his principal for unauthorized acts because those dealing with him are on notice that his authority extends only so far. Likewise, a high municipal official can bind his principal (the city) for unauthorized actions because others—both lower officials and members of the public with whom he deals—perceive him as acting with broad authority and rely upon his actions in organizing their own behavior. The distinction between general agents and special agents has a firm “basis in the law.” *See ante*, at 125, n.2 (plurality). [↗](#)
7. The plurality incorrectly claims that I have suggested “a new theory” for determining when a municipality should be bound by the acts of its agents. *Ante*, at 125, n.2. As both the plurality and the concurrence recognize, a municipality, like any institution, can only act through the agency of human beings. By holding that isolated actions of high officials may give rise to municipal liability, see, e.g., *Owenv. City of Independence*; *Pembaur v. Cincinnati*, the Court has indicated that the mere status of City officials matters in determining whether the City may be held liable for the officials’ actions. The argument of both the plurality and the concurrence that this principle should be applied only in the particular area of government that the erring official controls is unpersuasive, given the multifarious ways in which governmental agents may inflict constitutional harm. This case is a perfect example of why the “area-by-area” approach will not do; personnel actions may be taken in response to an employee’s protected speech by a number of high officials, none of whom possesses specific authority over “personnel” policy. Nevertheless, simply by virtue of their high rank, their actions may influence the actions of other municipal officials. It is that kind of influence that provides the common thread binding *Monell* and the later § 1983 municipal liability cases. In short, what the Court has characterized as “a new theory” is actually a way of understanding our precedents that will permit a judge to explain to a jury that “policy” means nothing if not “influence,” and that while the isolated gunshot of an errant police officer would not influence his colleagues, see *Oklahoma City v. Tuttle*, adverse personnel actions taken by a City’s highest officials in response to an employee’s Civil Service Commission appeals and his public testimony would set an example for other, lower officials to follow. [↗](#)

Notes on *City of St. Louis v. Praprotnik*

1. Do a majority of the Justices agree that a single decision by an official with “final authority” over the decision may render the municipality liable under Section 1983?

2. Do a majority of the Justices agree how to determine which officials have “final authority”?
3. May a municipality avoid liability by providing that no action by any local official is final until approved by the mayor, and then ensuring that the mayor does not actually review any decisions? Compare [Flanagan v. Munger](#), 890 F.2d 1557, 1568-69 (10th Cir. 1989) (Chief of Police is final policymaker where meaningful administrative review is illusory) with [Ware v. Unified School Dist. No. 492](#), 902 F.2d 815, 818-19 (10th Cir. 1990) (School Superintendent is not final policymaker where school board retained and exercised authority to review decisions of Superintendent). How does Justice O'Connor's approach in *Praprotnik* differ from Justice Brennan's opinion as to this scenario?
4. One year after *Praprotnik*, the Supreme Court issued its decision in [Jett v. Dallas Independent School District](#), 491 U.S. 701 (1989). *Jett* arose out of a suit by a white athletic director under [42 U.S.C. §§ 1981 and 1983](#) alleging discrimination in his reassignment to a position of lesser prestige. After holding that a municipality may not be held vicariously liable under § 1981, the Court remanded the case for a determination of whether the school district could be liable on the basis that the school Superintendent had final policymaking authority in the area of employee reassignments. The Court explained how the lower court was to resolve this issue:

As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury ... [after] reviewing the relevant legal materials, including state and local positive law, as well as “‘custom and usage’ having the force of law,” *Praprotnik, supra*, at 124, n.1, 108 S. Ct. at 924, n.1, the trial judge must identify those officials who speak with final policymaking authority for the local government action alleged to have caused the particular constitutional or statutory violation at issue.

Jett, 491 U.S. at 736. Did the *Jett* Court endorse the opinion of Justice O'Connor or the test proposed by Justice Brennan in *Praprotnik*? In [Worsham v. City of Pasadena](#), 881 F.2d 1336, 1343-44 (5th Cir. 1989), Judge Goldberg's dissenting opinion interpreted *Jett* as follows:

Jett clarifies that ... [b]y proving a “custom or usage,” a plaintiff may demonstrate as a matter of fact that an official is invested with final policymaking authority....

Jett also characterizes the “final policymaker” determination as a threshold question of law for the trial judge. Because facts concerning custom or usage may play a role in such a determination, the trial judge, after *Jett*, is empowered to resolve factual disputes in its threshold inquiry. *Jett* thus envisions a role for the trial judge in this context similar, for example, to the role a judge plays in determining admissibility of certain evidence, or whether a matter is of public concern in the First Amendment context. These issues may involve disputed factual issues that the judge is empowered to resolve.

5. The Supreme Court again granted certiorari to determine when a local government official is a policymaker in [Swint v. Chambers County Commission](#), 514 U.S. 35 (1995). *Swint* arose out of a Section 1983 action complaining of police raids on a nightclub. Under [Mitchell v. Forsyth](#), 472 U.S. 511 (1985), the court of appeals had jurisdiction over the individual police officers' interlocutory appeal from the district court's denial of their motion for summary judgment seeking qualified immunity. The appellate court also reviewed and reversed the denial of summary judgment to the County Commission, which had been based on the district court's finding that the sheriff was a policymaker for the county for the purpose of authorizing police

raids. The Supreme Court, however, never reached the issue of whether the sheriff was a policymaker for the county, for the Court held that the district court's denial of summary judgment to the County Commission was not an appealable order. First, unlike the rejection of the individual officers' claimed entitlement to qualified immunity, the district court's repudiation of the County Commission's contention that the sheriff was not a policymaker was not an immediately appealable collateral order under [28 U.S.C. § 1291](#):

The Commission's assertion that Sheriff Morgan is not its policymaker does not rank, under our decisions, as an immunity from suit. Instead, the plea ranks as a "mere defense to liability." *Mitchell*, 472 U.S. at 526. An erroneous ruling on liability may be reviewed effectively on appeal from final judgment. Therefore, the order denying the County Commission's summary judgment motion was not an appealable collateral order.

514 U.S. at 43. The Court likewise ruled that the court of appeals did not have pendent appellate jurisdiction to review denial of the county's summary judgment motion:

The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably entwined with the court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter.... Nor could the parties so argue. The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the County Commission's liability turns on the allocation of law enforcement power in Alabama.

514 U.S. at 51.

6. The Supreme Court took its next stab at resolving the policymaker debate in [McMillian v. Monroe County, Alabama](#), 520 U.S. 781 (1997), a Section 1983 action arising out of the Sheriff of Monroe County's concealment of exculpatory evidence. As a result of the sheriff's actions, the plaintiff served six years on death row before his murder conviction was reversed. The parties agreed that the sheriff had final policymaking authority in matters of law enforcement; they differed, however, as to whether the sheriff was a policymaker for the State of Alabama or for the county. In a 5-4 decision, the Court held that for purposes of the particularized activity of law enforcement, the sheriff represented the State rather than the county. Deeming the issue to rest upon "the definition of the official's function under relevant state law," 520 U.S. at 785, the majority observed that the Alabama Constitution had been amended to add sheriffs to the list of officials designated as members of the executive department and transferred the power to impeach sheriffs from county courts to the State Supreme Court. The Court also referenced provisions of the Alabama Code that conferred upon state judges the authority to supervise sheriffs and gave sheriffs the authority to enforce state criminal law in their counties. However, the Court also entertained the plaintiff's evidence that the county's insurance policy arguably covered some of the claims, but concluded that the insurance policy displayed uncertainty as to whether the courts would consider the sheriff a county policymaker. 520 U.S. at 792 n.7. Justice Ginsburg railed against the majority's reliance upon provisions of state law labeling sheriffs as officials of the executive department:

[D]esignations Alabama attaches to sheriffs in its laws and decisions are not dispositive of a court's assessment of Sheriff Tate's status for § 1983 purposes. *Cf. Regents of Univ. of Cal. v. Doe*, 519 U.S. n.5 (1997) (slip op., at 4-5, n.5); *Howlett v. Rose*, 496 U.S. 356, 376 (1990) (defenses to § 1983 actions are questions of federal law); *Martinez v. California*, 444 U.S. 277, 284 and n.8 (1980) (state law granting immunity to parole officials does not control question whether such officers have immunity under § 1983). If a State's designation sufficed to answer the federal question at issue, "States would then

be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.” *Howlett*, 496 U.S. at 383.

520 U.S. at 798-99. Justice Ginsburg noted that Alabama sheriffs are elected by residents of the county, have power to execute law enforcement policies only within the geographic boundaries of their respective counties, are paid by the county, and have their offices provided, furnished and equipped by the county, all of which is directly contrary to the categorization of sheriffs as members of the executive department.

7. Is every action by a local governmental official with final authority municipal “policy” within the meaning of Section 1983? In [Auriemma v. Rice](#), 957 F.2d 397 (7th Cir. 1992), the court of appeals held that even if the Superintendent of Police had final authority over promotion decisions, the alleged discriminatory actions of the Superintendent in promoting and demoting senior officials did not constitute city policy:

If it were enough to point to the agent whose act was the final one in a particular case, we would have vicarious liability ... That a particular agent is the apex of a bureaucracy makes the decision “final” but does not forge a link between “finality” and “policy.” Unless today’s decision ought to govern tomorrow’s case under a law or custom with the force of law, it cannot be said to carry out the municipality’s policy.

* * * * *

“[R]esponsibility for making law or setting policy”—the objective under *Praprotnik* of our search through local law—is authority to adopt rules for the conduct of government. Authority to make a final decision need not imply authority to establish rules. In Chicago, it does not. The Superintendent of Police in Chicago had no power to countermand the statutes regulating the operation of the department. The chief has “[c]omplete authority to administer the department in a manner consistent with the ordinances of the city, the laws of the state, and the rules and regulations of the police board.” If, in the course of selecting senior staff, Rice discriminated on account of race or policy, he violated rather than implemented the policy of Chicago.

Id. at 400-01. How is the court to determine which decisionmakers with final authority are policymakers? May a municipality shield itself from Section 1983 liability for constitutional violations by enacting an ordinance that prohibits all officials with final authority from taking any actions that contravene the Constitution? Compare [Greenboro Prof. Fire Fighters Ass’n v. Greensboro](#), 64 F.3d 962, 965 (4th Cir. 1995) (“When a final decision by an employee implements municipal policy, then municipal liability may follow. But if a final decision does not implement municipal policy, or is contrary to it, then it is not imputable to the municipality.”) with [Gonzalez v. Ysleta Independent School Dist.](#), 996 F.2d 745, 754 (5th Cir. 1993) (“[T]he existence of a well-established, officially adopted policy will not insulate the municipality from liability where the policy-maker herself departs from these formal rules.”).

8. Does a determination that a local government actor had final authority preclude the municipality from resorting to [Parratt v. Taylor](#), 451 U.S. 527 (1981) to argue that the existence of an adequate post-deprivation remedy affords due process? See [Wilson v. Civil Town of Clayton, Indiana](#), 839 F.2d 375, 380 (7th Cir. 1988) (“In a procedural due process case such as this, resolution of the *Monell* issue will also resolve the *Parratt* issue. Because a municipality may only be liable for ‘acts which the municipality has officially sanctioned or ordered,’ ... its liability can never be premised on the result of a random and unauthorized act.”).

CITY OF CANTON, OHIO v. HARRIS, 489 U.S. 378 (1989)

Justice White delivered the opinion of the Court.

[1] In this case, we are asked to determine if a municipality can ever be liable under 42 U.S.C. § 1983 for constitutional violations resulting from its failure to train municipal employees. We hold that, under certain circumstances, such liability is permitted by the statute.

I

[2] In April 1978, respondent Geraldine Harris was arrested by officers of the Canton Police Department. Mrs. Harris was brought to the police station in a patrol wagon.

[3] When she arrived at the station, Mrs. Harris was found sitting on the floor of the wagon. She was asked if she needed medical attention, and responded with an incoherent remark. After she was brought inside the station for processing, Mrs. Harris slumped to the floor on two occasions. Eventually, the police officers left Mrs. Harris lying on the floor to prevent her from falling again. No medical attention was ever summoned for Mrs. Harris. After about an hour, Mrs. Harris was released from custody, and taken by an ambulance (provided by her family) to a nearby hospital. There, Mrs. Harris was diagnosed as suffering from several emotional ailments; she was hospitalized for one week and received subsequent outpatient treatment for an additional year.

[4] Some time later, Mrs. Harris commenced this action alleging many state-law and constitutional claims against the city of Canton and its officials. Among these claims was one seeking to hold the city liable under 42 U.S.C. § 1983 for its violation of Mrs. Harris' right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody.

[5] A jury trial was held on Mrs. Harris' claims. Evidence was presented that indicated that, pursuant to a municipal regulation,^[1] shift commanders were authorized to determine, in their sole discretion, whether a detainee required medical care. Tr. 2-139 – 2-143. In addition, testimony also suggested that Canton shift commanders were not provided with any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured detainee. *Ibid.*; App. to Pet. for Cert. 4a.

[6] At the close of the evidence, the District Court submitted the case to the jury, which rejected all of Mrs. Harris' claims except one: her § 1983 claim against the city resulting from its failure to provide her with medical treatment while in custody. In rejecting the city's subsequent motion for judgment notwithstanding the verdict, the District Court explained the theory of liability as follows:

"The evidence construed in a manner most favorable to Mrs. Harris could be found by a jury to demonstrate that the City of Canton had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners. Further, the jury could find from the evidence that the vesting of such carte blanche authority with the police supervisor without adequate training to recognize when medical treatment is needed was grossly negligent or so reckless that future police misconduct was almost inevitable or substantially certain to result." *Id.*, at 16a.

[7] On appeal, the Sixth Circuit affirmed this aspect of the District Court's analysis, holding that "a municipality is liable for failure to train its police force, [where] the plaintiff ... prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." *Id.*, at 5a.^[2] The Court of Appeals also stated that an additional prerequisite of this theory of liability was that the plaintiff must prove "that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain

to result.” *Ibid.* Thus, the Court of Appeals found that there had been no error in submitting Mrs. Harris’ “failure to train” claim to the jury. However, the Court of Appeals reversed the judgment for respondent, and remanded this case for a new trial, because it found that certain aspects of the District Court’s jury instructions might have led the jury to believe that it could find against the city on a mere respondeat superior theory. Because the jury’s verdict did not state the basis on which it had ruled for Mrs. Harris on her § 1983 claim, a new trial was ordered.

[8] The city petitioned for certiorari, arguing that the Sixth Circuit’s holding represented an impermissible broadening of municipal liability under § 1983. We granted the petition. 485 U.S. 933 (1988).

[9] In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), we decided that a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue. Respondeat superior or vicarious liability will not attach under § 1983. *Id.* at 694-695. “It is only when the ‘execution of the government’s policy or custom ... inflicts the injury’ that the municipality may be held liable under § 1983.” *Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O’Connor, J., dissenting) (*quoting Monell, supra*, at 694).

[10] Thus, our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. The inquiry is a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*; one that is the principal focus of our decision again today.

A

[11] Based on the difficulty that this Court has had defining the contours of municipal liability in these circumstances, petitioner urges us to adopt the rule that a municipality can be found liable under § 1983 only where “the policy in question [is] itself unconstitutional.” Brief for Petitioner 15. Whether such a rule is a valid construction of § 1983 is a question the Court has left unresolved. *See, e. g., St. Louis v. Praprotnik, supra*, at 147 (Brennan, J., concurring in judgment); *Oklahoma City v. Tuttle, supra*, at 824, n. 7. Under such an approach, the outcome here would be rather clear: we would have to reverse and remand the case with instructions that judgment be entered for petitioner.^[3] There can be little doubt that on its face the city’s policy regarding medical treatment for detainees is constitutional. The policy states that the city jailer “shall ... have [a person needing medical care] taken to a hospital for medical treatment, with permission of his supervisor....” App. 33. It is difficult to see what constitutional guarantees are violated by such a policy.

[12] Nor, without more, would a city automatically be liable under § 1983 if one of its employees happened to apply the policy in an unconstitutional manner, for liability would then rest on respondeat superior. The claim in this case, however, is that if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train. For reasons explained below, we conclude, as have all the Courts of Appeals that have addressed this issue, that there are limited circumstances in which an allegation of a “failure to train” can be the basis for liability under § 1983. Thus, we reject petitioner’s contention that only unconstitutional policies are actionable under the statute.

B

[13] Though we agree with the court below that a city can be liable under § 1983 for inadequate training of its employees, we cannot agree that the District Court’s jury instructions on this issue were proper,

for we conclude that the Court of Appeals provided an overly broad rule for when a municipality can be held liable under the “failure to train” theory. Unlike the question whether a municipality’s failure to train employees can ever be a basis for § 1983 liability—on which the Courts of Appeals have all agreed, see n. 6, *supra*,—there is substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality’s inaction before liability will be permitted.^[4] We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.^[5] This rule is most consistent with our admonition in *Monell*, 436 U.S., at 694, and *Polk County v. Dodson*, 454 U.S. 312, 326 (1981), that a municipality can be liable under § 1983 only where its policies are the “moving force [behind] the constitutional violation.” Only where a municipality’s failure to train its employees in a relevant respect evidences a “deliberate indifference” to the rights of its inhabitants can such a shortcoming be properly thought of as a city “policy or custom” that is actionable under § 1983. As Justice Brennan’s opinion in *Pembaur v. Cincinnati*, 475 U.S. 469, 483–484 (1986) (plurality) put it: “[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives” by city policymakers. See also *Oklahoma City v. Tuttle*, 471 U.S. at 823 (opinion of Rehnquist, J.). Only where a failure to train reflects a “deliberate” or “conscious” choice by a municipality—a “policy” as defined by our prior cases—can a city be liable for such a failure under § 1983.

[14] *Monell*’s rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible.^[6] That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent “city policy.” It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.^[7] In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.^[8]

[15] In resolving the issue of a city’s liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer’s shortcomings may have resulted from factors other than a faulty training program. See *Springfield v. Kibbe*, 480 U.S., at 268 (O’Connor, J., dissenting); *Oklahoma City v. Tuttle*, *supra*, at 821 (opinion of Rehnquist, J.). It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

[16] Moreover, for liability to attach in this circumstance the identified deficiency in a city’s training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers’ indifference to her medical needs.^[9] Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much

like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

[17] To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city “could have done” to prevent the unfortunate incident. See *Oklahoma City v. Tuttle*, 471 U.S. at 823 (opinion of Rehnquist, J.). Thus, permitting cases against cities for their “failure to train” employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities—a result we rejected in *Monell*, 436 U.S. at 693-694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism. Cf. *Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976).

[18] Consequently, while claims such as respondent’s—alleging that the city’s failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city’s failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

IV

[19] The final question here is whether this case should be remanded for a new trial, or whether, as petitioner suggests, we should conclude that there are no possible grounds on which respondent can prevail. See Tr. of Oral Arg. 57-58. It is true that the evidence in the record now does not meet the standard of § 1983 liability we have set forth above. But the standard of proof the District Court ultimately imposed on respondent (which was consistent with Sixth Circuit precedent) was a lesser one than the one we adopt today, see Tr. 4-389 – 4-390. Whether respondent should have an opportunity to prove her case under the “deliberate indifference” rule we have adopted is a matter for the Court of Appeals to deal with on remand.

V

[20] Consequently, for the reasons given above, we vacate the judgment of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

It is so ordered.

Justice Brennan, concurring.

[21] The Court’s opinion, which I join, makes clear that the Court of Appeals is free to remand this case for a new trial.

Justice O’Connor, with whom Justice Scalia and Justice Kennedy join, concurring in part and dissenting in part.

[22] I join Parts I and II and all of Part III of the Court’s opinion except footnote 8, see *ante*, at 390, n.8. I

thus agree that where municipal policymakers are confronted with an obvious need to train city personnel to avoid the violation of constitutional rights and they are deliberately indifferent to that need, the lack of necessary training may be appropriately considered a city “policy” subjecting the city itself to liability under our decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). As the Court observes, “[o]nly where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a municipality—a ‘policy’ as defined by our prior cases—can a city be liable for such a failure under [42 U.S.C.] § 1983.” *Ante*, at 389. I further agree that a § 1983 plaintiff pressing a “failure to train” claim must prove that the lack of training was the “cause” of the constitutional injury at issue and that this entails more than simply showing “but for” causation. *Ante*, at 392. Lesser requirements of fault and causation in this context would “open municipalities to unprecedented liability under § 1983,” *ante*, at 391, and would pose serious federalism concerns. *Ante*, at 392.

[23] My single point of disagreement with the majority is thus a small one. Because I believe, as the majority strongly hints, see *ibid.*, that respondent has not and could not satisfy the fault and causation requirements we adopt today, I think it unnecessary to remand this case to the Court of Appeals for further proceedings. This case comes to us after a full trial during which respondent vigorously pursued numerous theories of municipal liability including an allegation that the city had a “custom” of not providing medical care to detainees suffering from emotional illnesses. Respondent thus had every opportunity and incentive to adduce the type of proof necessary to satisfy the deliberate indifference standard we adopt today. Rather than remand in this context, I would apply the deliberate indifference standard to the facts of this case. After undertaking that analysis below, I conclude that there is no evidence in the record indicating that the city of Canton has been deliberately indifferent to the constitutional rights of pretrial detainees.

I

[24] In *Monell*, the Court held that municipal liability can be imposed under § 1983 only where the municipality, as an entity, can be said to be “responsible” for a constitutional violation committed by one of its employees. “[T]he touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution.” 436 U.S. at 690. The Court found that the language of § 1983, and rejection of the “Sherman Amendment” by the 42d Congress, were both strong indicators that the framers of the Civil Rights Act of 1871 did not intend that municipal governments be held vicariously liable for the constitutional torts of their employees. Thus a § 1983 plaintiff seeking to attach liability to the city for the acts of one of its employees may not rest on the employment relationship alone; both fault and causation *as to the acts or omissions of the city itself* must be proved. The Court reaffirms these requirements today.

[25] Where, as here, a claim of municipal liability is predicated upon a failure to act, the requisite degree of fault must be shown by proof of a background of events and circumstances which establish that the “policy of inaction” is the functional equivalent of a decision by the city itself to violate the Constitution. Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault. Moreover, absent a requirement that the lack of training at issue bear a very close causal connection to the violation of constitutional rights, the failure to train theory of municipal liability could impose “prophylactic” duties on municipal governments only remotely connected to underlying constitutional requirements themselves.

[26] Such results would be directly contrary to the intent of the drafters of § 1983. The central vice of the Sherman Amendment, as noted by the Court’s opinion in *Monell*, was that it “impose[d] a species of vicarious liability on municipalities since it could be construed to impose liability even if the municipality *did not know* of an impending or ensuing riot or did not have the wherewithal to do anything about it.” 436 U.S. at 692, n.57

(emphasis added). Moreover, as noted in *Monell*, the authors of § 1 of the Ku Klux Act did not intend to create any new rights or duties beyond those contained in the Constitution. *Id.* at 684-685. Thus, § 1 was referred to as “reenacting the Constitution.” Cong. Globe, 42d Cong., 1st Sess., 569 (1871) (Rep. Edmunds). Representative Bingham, the author of § 1 of the Fourteenth Amendment, saw the purpose of § 1983 as “the enforcement ... of the Constitution on behalf of every individual citizen of the Republic ... to the extent of the rights guaranteed to him by the Constitution.” *Id.* at App. 81. See also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (“[Section] 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to insure that an individual had a cause of action for violations of the Constitution”). Thus § 1983 is not a “federal good government act” for municipalities. Rather it creates a federal cause of action against persons, including municipalities, who deprive citizens of the United States of their constitutional rights.

[27] Sensitive to these concerns, the Court’s opinion correctly requires a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy under *Monell*. As the Court indicates, “it may happen that ... the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.” *Ante*, at 390. Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made “a deliberate choice to follow a course of action ... from among various alternatives.” *Ante*, at 389, quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986).

[28] In my view, it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. As the majority notes, see *ante*, at 390, n.10, the constitutional limitations established by this Court on the use of deadly force by police officers present one such situation. The constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue.

[29] The claim in this case—that police officers were inadequately trained in diagnosing the symptoms of emotional illness—falls far short of the kind of “obvious” need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city. As the Court’s opinion observes, *ante*, at 388-389, n.8, this Court has not yet addressed the precise nature of the obligations that the Due Process Clause places upon the police to seek medical care for pretrial detainees who have been physically injured while being apprehended by the police. See *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 246 (1983) (Rehnquist, J., concurring). There are thus no clear constitutional guideposts for municipalities in this area, and the diagnosis of mental illness is not one of the “usual and recurring situations with which [the police] must deal.” *Ante*, at 391. The lack of training at issue here is not the kind of omission that can be characterized, in and of itself, as a “deliberate indifference” to constitutional rights.

[30] Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements. The lower courts that have applied the “deliberate indifference” standard we adopt today have required a showing of a pattern of violations from which a kind of “tacit authorization” by city policymakers can be inferred. See, e.g., *Fiacco v. Rensselaer*, 783 F. 2d 319, 327 (CA2 1986) (multiple incidents required for finding of deliberate indifference); *Patzner v. Burkett*, 779 F.2d 1363, 1367 (CA8 1985) (“[A] municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial steps amounting to deliberate indifference to the offensive acts”); *Languirand v. Hayden*, 717 F.2d 220, 227-228 (CA5 1983) (municipal liability

for failure to train requires “evidence at least of a pattern of similar incidents in which citizens were injured or endangered”); *Wellington v. Daniels*, 717 F.2d 932, 936 (CA4 1983) (“[A] failure to supervise gives rise to § 1983 liability, however, only in those situations where there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel”).

[31] The Court’s opinion recognizes this requirement, see *ante*, at 390, and n.10, but declines to evaluate the evidence presented in this case in light of the new legal standard. *Ante*, at 392. From the outset of this litigation, respondent has pressed a claim that the city of Canton had a custom of denying medical care to pretrial detainees with emotional disorders. See Amended Complaint para. 28, App. 27. Indeed, up to and including oral argument before this Court, counsel for respondent continued to assert that respondent was attempting to hinge municipal liability upon “both a custom of denying medical care to a certain class of prisoners, and a failure to train police that led to this particular violation.” Tr. of Oral Arg. 37-38. At the time respondent filed her complaint in 1980, it was clear that proof of the existence of a custom entailed a showing of “practices ... so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970); see also *Garner v. Memphis Police Department*, 600 F.2d 52, 54-55, and n.4 (CA6 1979) (discussing proof of custom in light of *Monell*).

[32] Whatever the prevailing standard at the time concerning liability for failure to train, respondent thus had every incentive to adduce proof at trial of a pattern of violations to support her claim that the city had an unwritten custom of denying medical care to emotionally ill detainees. In fact, respondent presented no testimony from any witness indicating that there had been past incidents of “deliberate indifference” to the medical needs of emotionally disturbed detainees or that any other circumstance had put the city on actual or constructive notice of a need for additional training in this regard. At trial, David Maser, who was Chief of Police of the city of Canton from 1971 to 1980, testified without contradiction that during his tenure he received no complaints that detainees in the Canton jails were not being accorded proper medical treatment. Tr. 4-347 – 4-348. Former Officer Cherry, who had served as a jailer for the Canton Police Department, indicated that he had never had to seek medical treatment for persons who were emotionally upset at the prospect of arrest, because they usually calmed down when a member of the department spoke with them or one of their family members arrived. *Id.* at 4-83 – 4-84. There is quite simply nothing in this record to indicate that the city of Canton had any reason to suspect that failing to provide this kind of training would lead to injuries of any kind, let alone violations of the Due Process Clause. None of the Courts of Appeals that already apply the standard we adopt today would allow respondent to take her claim to a jury based on the facts she adduced at trial. See *Patzner v. Burkett*, *supra*, at 1367 (summary judgment proper under “deliberate indifference” standard where evidence of only single incident adduced); *Languirand v. Hayden*, *supra*, at 229 (reversing jury verdict rendered under failure to train theory where there was no evidence of prior incidents to support a finding that municipal policymakers were “consciously indifferent” to constitutional rights); *Wellington v. Daniels*, *supra*, at 937 (affirming judgment notwithstanding verdict for municipality under “deliberate indifference” standard where evidence of only a single incident was presented at trial); cf. *Fiacco v. Rensselaer*, *supra*, at 328-332 (finding evidence of “deliberate indifference” sufficient to support jury verdict where a pattern of similar violations was shown at trial).

[33] Allowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*. “To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict respondeat superior liability rejected in *Monell*.” *Oklahoma City v. Tuttle*, 471 U.S. 808, 831 (1985) (Brennan, J., concurring in part and concurring in judgment). As the authors of the Ku Klux Act themselves realized, the resources of local government are not inexhaustible. The grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident. If § 1983 and the Constitution require the city of Canton to provide detailed medical and psychological training to its police officers, or to station paramedics at its jails, other city services will

necessarily suffer, including those with far more direct implications for the protection of constitutional rights. Because respondent's evidence falls far short of establishing the high degree of fault on the part of the city required by our decision today, and because there is no indication that respondent could produce any new proof in this regard, I would reverse the judgment of the Court of Appeals and order entry of judgment for the city.



[City of Canton, Ohio v. Harris – Audio and Transcript of Oral Argument](#)

Footnotes

1. The city regulation in question provides that a police officer assigned to act as “jailer” at the city police station “shall, when a prisoner is found to be unconscious or semi-unconscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to City Jail.” App. 33. [↗](#)
2. In upholding Mrs. Harris’ “failure to train” claim, the Sixth Circuit relied on two of its previous decisions which has approved such a theory of municipal liability under § 1983. See *Rymer v. Davis*, 754 F.2d 198, *vacated and remanded sub nom. Shepherdsville v. Rymer*, 473 U.S. 901, reinstated, 775 F.2d 756, 757 (1985); *Hays v. Jefferson County*, 668 F.2d 869, 874 (1982). [↗](#)
3. In this Court, in addition to suggesting that the city’s failure to train its officers amounted to a “policy” that resulted in the denial of medical care to detainees, respondent also contended the city had a “custom” of denying medical care to those detainees suffering from emotional or mental ailments. See Brief for Respondent 31-32; Tr. of Oral Arg. 38-39. As respondent described it in her brief, and at argument, this claim of an unconstitutional “custom” appears to be little more than a restatement of her “failure-to-train as policy” claim. See *ibid*. However, to the extent that this claim poses a distinct basis for the city’s liability under § 1983, we decline to determine whether respondent’s contention that such a “custom” existed is an alternative ground for affirmance. The “custom” claim was not passed on by the Court of Appeals—nor does it appear to have been presented to that court as a distinct ground for its decision. See Brief of Appellee in No. 85-3314 (CA6), pp. 4-9, 11. Thus, we will not consider it here. [↗](#)
4. Some courts have held that a showing of “gross negligence” in a city’s failure to train its employees is adequate to make out a claim under § 1983. See, e. g., *Bergquist v. County of Cochise*, *supra*, at 1370; *Herrera v. Valentine*, 653 F.2d 1220, 1224 (CA8 1981). But the more common rule is that a city must exhibit “deliberate indifference” towards the constitutional rights of persons in its domain before a § 1983 action for “failure to train” is permissible. See, e.g., *Fiacco v. Rensselaer*, *supra*, at 326; *Patzner v. Burkett*, 779 F.2d 1363, 1367 (CA8 1985); *Wellington v. Daniels*, 717 F.2d 932, 936 (CA4 1983); *Languirand v. Hayden*, *supra*, at 227. [↗](#)
5. The “deliberate indifference” standard we adopt for § 1983 “failure to train” claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation. For example, this Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case—a denial of the due process right to medical care while in detention—is established. Indeed, in *Revere v. Massachusetts General Hospital*, 463 U.S.

239, 243-245 (1983), we reserved decision on the question whether something less than the Eighth Amendment’s “deliberate indifference” test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody. We need not resolve here the question left open in *Revere* for two reasons. First, petitioner has conceded that, as the case comes to us, we must assume that respondent’s constitutional right to receive medical care was denied by city employees—whatever the nature of that right might be. See Tr. of Oral Arg. 8-9. Second, the proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred. Cf. Brief for Respondent 27. [↵](#)

6. The plurality opinion in *Tuttle* explained why this must be so: “Obviously, if one retreats far enough from a constitutional violation some municipal ‘policy’ can be identified behind almost any ... harm inflicted by a municipal official; for example, [a police officer] would never have killed Tuttle if Oklahoma City did not have a ‘policy’ of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was ‘caused’ by the municipal ‘policy.’” 471 U.S. at 823. Cf. also *id.* at 833, n.9 (opinion of Brennan, J.). [↵](#)
7. For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are “deliberately indifferent” to the need. [↵](#)
8. The record indicates that city did train its officers and that its training included first-aid instruction. See App. to Pet. for Cert. 4a. Petitioner argues that it could not have been obvious to the city that such training was insufficient to administer the written policy, which was itself constitutional. This is a question to be resolved on remand. See Part IV, *infra*. [↵](#)
9. Respondent conceded as much at argument. See Tr. of Oral Arg. 50-51; cf. also *Oklahoma City v. Tuttle*, *supra*, at 831 (opinion of Brennan, J.). [↵](#)

Notes on *City of Canton, Ohio v. Harris*

1. Should a plaintiff be required to prove deliberate indifference to hold a local governmental entity liable? What policy reasons support exonerating a municipality where the jury finds a) a violation of the Constitution, b) the violation was caused by the municipality’s failure to train its officials; and c) the municipality’s training failed to comport with training afforded by a reasonable governmental entity in the same circumstances? Is there any reason even to require proof of negligence if the jury finds the constitutional violation was caused by the municipality’s failure to train its employees?
2. What proof must be offered to establish deliberate indifference?

- a. Justice O'Connor proposed that deliberate indifference may be proven where a local government fails to train its employees "concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." [489 U.S. at 396](#). Does Justice O'Connor's approach in effect confer qualified immunity upon municipalities for failure to train whenever the constitutional right is not clearly established? See [Gonzalez v. Ysleta Independent School Dist.](#), 996 F.2d 745, 760-61 (5th Cir. 1993) ("There are some indications that *Canton* requires a showing of deliberate indifference to citizens' constitutional rights, not merely the harm inflicted by city employees that gives rise to constitutional claims. It therefore may well be, as several district courts have held, that "to be 'deliberately indifferent' to rights requires that those rights be clearly established."); [Cornfield by Lewis v. School Dist. No. 230](#), 991 F.2d 1316, 1327 (7th Cir. 1993) ("Given the nebulous standards governing student searches, school districts ... cannot be held accountable on this ground [failure to train] because the particular constitutional duty is not clear.").
- a. In [Collins v. City of Harker Heights](#), 503 U.S. 115 (1992), the plaintiff averred that the city's deliberate indifference to her husband's safety was arbitrary governmental action that shocked the conscience under the Due Process Clause. The Court upheld dismissal of plaintiff's complaint, concluding that the claimed failure to train the city's employees did not contravene the substantive due process protections of the Fourteenth Amendment:

Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests upon the presumption that the administration of government programs is based upon the rational decisionmaking process that takes account of competing social, political and economic forces. Decisions concerning the allocation of resources to ... the training of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.

Collins, 503 U.S. at 128-29. Should the same presumption and deference apply in assessing whether the plaintiff has proven deliberate indifference to the need to train to establish municipal policy under Section 1983?

- b. In [Walker v. City of New York](#), 974 F.2d 293, 297-98 (2nd Cir. 1992), the court of appeals offered that under *Canton*, three requirements must be satisfied to prove deliberate indifference:

First, the plaintiff must show that a policymaker knows "to a moral certainty" that her employees will confront a given situation. *Id.* Thus, a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.

Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. Whether to use deadly force in apprehending a fleeing suspect qualifies as a "difficult choice" because more than the application of common sense is required. Instead, police officers must adhere to the rule of *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985), that deadly force may constitutionally be applied to a fleeing suspect only when "the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm" and when, "where possible, some warning has been given." *Id.* at 11-12, 105 S. Ct. at 1701. A choice might also be difficult where, although the proper course is clear, the employee has powerful incentives to make the wrong choice.

Finally, the plaintiff must show that the wrong choice by the city employee will frequently

cause the deprivation of a citizens' constitutional rights. *City of Canton*, 489 U.S. at 390, 109 S. Ct. at 1205. Thus, municipal policymakers may appropriately concentrate training and supervision resources on those situations where employee misconduct is likely to deprive citizens of constitutional rights.

Where the plaintiff establishes all three elements, then we think it can be said with confidence that the policymaker should have known that inadequate training or supervision was “so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to need.”

- c. In [*Tittle v. Jefferson County Commission*](#), 10 F.3d 1535 (11th Cir. 1994) (en banc), the personal representatives of the estates of two inmates who committed suicide by hanging themselves by a strip of bed sheet tied to a bar across the cell window brought a Section 1983 action against the County. In sixteen months prior to the one inmate's suicide, there had been twenty-seven suicide attempts and two suicides in the Jefferson County Jail. The court of appeals, sitting en banc, overturned the panel's reversal of the district court's grant of summary judgment to the County on the claim that the County was deliberately indifferent to the risk of suicide at the jail:

[A] finding of deliberate indifference requires that officials have notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for then suicide of that individual. [D]eliberate indifference can only be established where a plaintiff demonstrates a “strong likelihood, rather than a mere possibility,” that suicide would result from a defendant's action or inaction.

The plaintiffs cite no authority that supports the argument that the occurrence of two suicides and twenty-seven attempted suicides in the jail requires County officials to conclude that all prisoners of the Jefferson County Jail are likely to attempt suicide. The fact that one suicide occurred before Tittle committed suicide and two suicides occurred before Harrell committed suicide, without more, did not increase the possibility of suicide to a strong likelihood.

10 F.3d at 1540-41.

- d. In [*Foley v. City of Lowell, Mass.*](#), 948 F.2d 10 (1st Cir. 1991), the First Circuit considered whether evidence of subsequent incidents of alleged violations can be used to establish a municipal policy of inadequate training. Plaintiff arrestee alleged: 1) that his Fourteenth Amendment due process rights had been violated when he was brutally beaten by police; and 2) the City of Lowell had inadequately trained and supervised its police force and had allowed its police force to enforce “constitutionally offensive policies.” *Id.* at 12. Plaintiff sought to admit evidence of a subsequent incident of police misconduct (which involved a police officer urinating on an individual) as evidence of a “municipal policy and custom of studied indifference to the violation of constitutional rights by police officers.” *Id.* at 13. Plaintiff further wished to include evidence of the individual officer's subsequent promotion as relevant to proving indifference to such misconduct. *Id.* In allowing evidence of the promotion to be introduced, the court reasoned,

[w]e think the actions taken subsequent to an event are admissible if, and to the extent that, they provide reliable insight into the policy in force at the time of the incident [w]e do not mean to imply that all post-event evidence is automatically admissible in a section 1983 “custom or policy” case. Rather, the question that must be asked when post-event evidence is proffered is whether the evidence is sufficiently related to the central occurrence....

Id. (italics added). See also [Henry v. County of Shasta](#), 132 F.3d 512, 519 (9th Cir. 1997) (“[P]ost-event evidence is not only admissible for purposes of proving the existence of a municipal defendant’s policy or custom, but is highly probative with respect to that inquiry.”)

3. If plaintiff has proven that a local governmental entity was deliberately indifferent to the need for training, must the plaintiff also prove that the failure to train was a proximate cause of the deprivation of constitutional rights in order to recover damages against the entity? See [Van Ort v. Estate of Stanewich](#), 92 F.3d 831 (9th Cir. 1996), [Searcy v. City of Dayton](#), 38 F.3d 282 (6th Cir. 1994), [Ricketts v. City of Columbia](#), 36 F.3d 775 (8th Cir. 1994) and [Fernandez v. Leonard](#), 963 F.2d 459 (1st Cir. 1992) (municipality not liable absent proof of causal link). In [City of Springfield, Mass. v. Kibbe](#), 475 U.S. 1064 (1986), the Supreme Court had granted certiorari to resolve whether a plaintiff is required to prove more than negligence to establish municipal liability for failure to train. The Court subsequently dismissed the writ of certiorari as improvidently granted because the city had not objected to the trial court’s instruction that the jury could award damages against the city for gross negligence in training. *City of Springfield v. Kibbe*, 480 U.S. 257 (1987). Justice O’Connor, joined by Chief Justice Rehnquist, Justice White and Justice Powell, dissented from dismissal of the writ and promoted the following view of the culpability issue:

In this case, the causal connection between the municipal policy and the constitutional violation is an inherently tenuous one. Respondent does not contend that the City’s police training program *authorizes* the use of deadly force in the apprehension of fleeing vehicles; rather, her argument is that the methods taught in the City’s training program were “inadequate,” and that if individual officers had received more complete training, they would have resorted to those alternative methods without engaging in the unconstitutional conduct. The difficulty with respondent’s argument is that at the time of the officer’s alleged misconduct, any number of other factors were also in operation that were equally likely to contribute or play a predominant part in bringing about the constitutional injury: the disposition of the individual officers, the extent of their experience with similar incidents, the actions of the other officers involved, and so forth. To conclude, in a particular instance, that omissions in a municipal training program constituted the “moving force” in bringing about the officer’s unconstitutional conduct, notwithstanding the large number of intervening causes also at work up to the time of the constitutional harm, appears to be largely a matter of speculation and conjecture.

Because of the remote causal connection between omissions in a police training program and affirmative misconduct by individual officers in a particular instance, in my view the “inadequacy” of police training may serve as a basis for § 1983 liability only where failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons with the city’s domain. The “causation” requirement of § 1983 is a matter of statutory interpretation rather than of common tort law. *Cf. Martinez v. California*, 444 U.S. 277, 285, 100 S. Ct. 553, 559, 62 L. Ed.2d 481 (1980) (injury “too remote a consequence” of official conduct to impose liability under § 1983, even if conduct “proximately caused” injury under state tort law). Analogy to traditional tort principles, however, shows that the law has been willing to trace more distant causation when there is a cognitive component to the defendant’s fault than when the defendant’s conduct results from simple or heightened negligence. See, e.g., RESTATEMENT (SECOND) OF TORTS § 501, Comment a, p.591 (1965) (“a jury may be permitted to find that a defendant’s reckless misconduct bears a sufficient causal relation to a plaintiff’s harm to make him liable, although were the defendant’s conduct merely negligent, no such finding would be permissible”). See *generally*, W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 34, p.213 (5th ed. 1984). Similarly, a jury should be permitted to find that the municipality’s inadequate training “caused” the plaintiff’s injury only if the inadequacy of the training amounts to deliberate indifference or reckless disregard for the

consequences. Negligence in training alone is not sufficient to satisfy the causation requirement of § 1983.

Kibbe, 480 U.S. at 268-69.

- a. Is Justice O'Connor's use of tort principles to guide the construction of the causation requirement of Section 1983 consistent with the Court's interpretation of causation in Part II of *Monell*? Would Justice O'Connor have reached the same conclusion if she had applied the general rules of construction for Section 1983 utilized in Part I of *Monell* and in *Owen*?
 - b. Accepting Justice O'Connor's analysis, is the need for evidence of causation obviated once the plaintiff has satisfied the policy requirement by establishing deliberate indifference to the need for training? See [Gentile v. City of Suffolk](#), 926 F.2d 142, 152-53 (2nd Cir. 1990) ("Plaintiffs were not obligated to produce specific evidence that defendants had knowledge of a declared policy of the County and acted on this knowledge in promoting the malicious prosecution of plaintiffs.... The critical question here is whether there is sufficient evidence in the record of municipal policy, custom or practice so that the jury could reasonably infer that the individual conduct in this case was causally connected to the policy....' [A] causal connection ... might permissibly be implied' from 'conduct' such as inadequate training.").
4. After *Canton*, must the plaintiff also prove deliberate indifference to impose liability upon the individual supervisory official for failure to train, even where plaintiff need not prove that degree of culpability to establish a constitutional violation? See S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, § 3:97 (4th ed 1997) ("*City of Canton v. Harris* indicates that henceforth, as a matter of § 1983 statutory interpretation, supervisory liability will require at least deliberate indifference (on the part of the supervisors) to the rights of persons with whom subordinates come into contact. Indeed, this is clearly the trend in the circuits."); [Doe v. Taylor Independent School District](#), 15 F.3d 443, 453 (5th Cir. 1994) (en banc) ("The legal elements of an individual's supervisory liability and a political subdivision's liability ... are similar enough that the same standards of fault and causation should govern."); [Walker v. Norris](#), 917 F.2d 1449 (6th Cir. 1990); [Greason v. Kemp](#), 891 F.2d 829 (11th Cir. 1990); [Sample v. Diecks](#), 855 F.2d 1099, 1118 (3rd Cir. 1989) ("the standard of individual liability for supervisory public officials will be found no less stringent than the standard of liability for the public entities that they serve.").
- a. What language in Section 1983 was the *Canton* Court interpreting? Does *Canton* have any relevance to the liability of individual supervisors?
 - b. As we learned earlier, in *Ashcroft v. Iqbal* the Court held that a plaintiff seeking to hold a supervisory official liable for deprivations of constitutional rights inflicted by their subordinates must prove that the supervisor acted with the requisite culpability to constitute a violation of the Constitution. Does *Iqbal* apply to Section 1983 actions seeking to impose liability on a local governmental entity for failure to train?
5. In [City of Los Angeles v. Heller](#), 475 U.S. 796 (1986), plaintiff sued the City of Los Angeles as well as police officer Bushey for allegedly using excessive force in the course of an arrest. The district court bifurcated the case and first heard the claim against Officer Bushey. Officer Bushey did not plead a qualified immunity defense. However, Bushey offered evidence that his conduct comported with official department policy, which was deemed relevant to plaintiff's allegation that the use of force was unreasonable under all the circumstances, and therefore unconstitutional. The jury returned a general verdict in favor of Officer Bushey. The district court then dismissed the action against the city. The court of appeals found that the

district court erred in dismissing the city, agreeing with plaintiff's argument that "the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury." [*Heller v. Bushey*](#), 759 F.2d 1371, 1373-74 (9th Cir. 1985). In a per curiam opinion, the Supreme Court reversed the judgment of the court of appeals, reasoning as follows:

[T]he jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer. Respondent contends in his brief in opposition to certiorari that even though no issue of qualified immunity was presented to the jury, the jury might nonetheless have considered evidence which would have supported a finding of such immunity. But the theory under which the jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them ... and that they do not consider and base their decisions on legal questions with respect to which they are not charged....

[N]either *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a defendant has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.

475 U.S. at 798-99.

Justice Stevens, joined by Justice Marshall, vigorously dissented:

If the Court's unprecedented, ill-considered, and far-reaching decision happens to be correct, defendants as a class have been presented with a tactical weapon of great value. By persuading trial judges to bifurcate trials in which both the principal and its agents are named as defendants, and to require the jury to bring in its verdict on the individual claim first, they may obtain the benefit of whatever intangible factors have prompted juries to bring in a multitude of inconsistent verdicts in past years; defendants will no longer have to abide the mechanisms that courts have used to mitigate and resolve apparent inconsistencies. Perhaps that is an appropriate response to the current widespread concern about the potential liabilities of our municipalities, but I doubt it.

Id. at 807-08.

Would the claim against the city have been dismissed if Officer Bushey had raised a qualified immunity defense? See *Dodd v. City of Norwich*, 815 F.2d 862, 868 (2d Cir. 1987) ("Where, as here, a police officer carries out municipal policy...there is a potential for municipal liability even though the police officer may be personally immune from liability for having executed the arrest in the manner in which he had been trained under the city's policy"). If Officer Bushey had pleaded the qualified immunity, should either party have sought to have the jury answer special interrogatories as part of its verdict? If so, what party?

- a. [I]n a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution. Unlike in *Heller*, the plaintiffs in this case brought separate, independent constitutional claims against the pursuing officers and the City. These claims are based on different theories and require proof of different actions and mental state. The pursuing officers are liable under § 1983 [only] if their conduct "shocks the conscience." The city is liable under § 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiff of life or liberty. [*Fagan v. City of Vineland*](#), 22 F.3d 1283, 1292 (3rd Cir. 1994); *contra* [*Evans v. Avery*](#), 100 F.3d 1033, 1039-40 (1st Cir. 1996).

- b. In [*Petition for Review of Opinion 552*](#), 507 A.2d 233 (N.J. 1986), the Supreme Court of New Jersey reviewed the Supreme Court's Advisory Committee on Professional Ethics ruling which barred an attorney from simultaneously representing a governmental entity and any of its officials when they are co-defendants in a Section 1983 action.

In a §1983 suit against both the governmental entity and individual government officials, the governmental entity, in an effort to shift liability, may claim that the assertedly wrongful conduct of the individuals was unauthorized and outside the scope of the employment. Conversely, in his or her defense, an employee-defendant may claim that the alleged offending conduct was taken pursuant to an official governmental policy or directive and that the government entity is the party properly responsible and ultimately liable. Thus, under the defenses asserted or available, one party-defendant may seek to avoid or lessen its exposure at the expense of the other.

The Committee in Opinion 552 recognized that where a governmental official or employee has been named as a co-defendant in a §1983 civil rights action against a municipality, the attorney who undertakes representation of both defendants may be in a situation of potential conflict. Indeed, the Committee was of the view that a potential conflict of interests was almost invariably present in these situations, and therefore such potential conflicts could be overcome effectively only by an absolute prohibition against multiple representations.

507 A.2d at 235.

The New Jersey Supreme Court agreed that a conflict could be presented by joint representation. The Court found, however, that in certain circumstances an attorney could represent both the governmental entity and its official without any conflict of interest problems. No conflict would exist where the government entity conceded that the official acted in furtherance of official policy or where the entity is obligated to indemnify its officials for any damages. The Court expressed concern with the financial burden that would be imposed on municipalities if they automatically were forced to obtain independent counsel for employees, a burden which would be aggravated by the possibility that the plaintiffs would sue numerous officials to induce municipalities to settle in order to avoid the costs of separate counsel. The Court, therefore, modified the ethics committee's opinion as follows:

In conclusion, we determine that the *per se* ban as formulated by the Committee, prohibiting joint representation of multiple defendants in all §1983 civil-rights actions, is too broad. We rule that in situations in which there is no actual conflict of interests, or the likelihood of an actual conflict of interests is remote and poses no realistic threat to the effective representation of such multiple defendants, an attorney should not be prohibited from representing both parties. We rule further that in cases where there is a potential conflict of interests joint representation may be allowed, provided the guidelines of our current Rules of Professional Conduct are followed by the attorney furnishing such joint representation. Stated somewhat differently, we rule that in a §1983 action, a government attorney is precluded from representing co-defendant government officers or employees only where the allegations or the facts as developed present an actual conflict of interests or the realistic possibility of such a conflict. If no such conflict is presented, then a government attorney may simultaneously represent as co-defendants governmental officers or employees and the government entity. The joint representation, however, is conditioned upon the continuing obligation of the attorney to ascertain whether there exist potential conflicts of interests among the defendants, and if, under the circumstances, such potential conflicting interests emerge that outweigh the mutuality or similarity of the interests among defendants, the attorney shall be obligated promptly to terminate such joint representation and initiate steps for the separate representation of the defendants.

507 A.2d at 240-41. See also M. Schwartz and J. Kirkland, Section 1983 Litigation: Claims, Defenses and Fees, § 4.13 (1986).

BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA v. BROWN, 520 U.S. 397 (1997)

Justice O'Connor delivered the opinion of the Court.

[1] Respondent Jill Brown brought a claim for damages against petitioner Bryan County under Rev. Stat. § 1979, 42 U.S.C. § 1983. She alleged that a county police officer used excessive force in arresting her, and that the county itself was liable for her injuries based on its sheriff's hiring and training decisions. She prevailed on her claims against the county following a jury trial, and the Court of Appeals for the Fifth Circuit affirmed the judgment against the county on the basis of the hiring claim alone. 67 F.3d 1174 (1995). We granted certiorari. We conclude that the Court of Appeals' decision cannot be squared with our recognition that, in enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the "moving force" behind the plaintiff's deprivation of federal rights. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694, 56 L. Ed.2d 611, 98 S. Ct. 2018 (1978).

I

[2] In the early morning hours of May 12, 1991, respondent Jill Brown and her husband were driving from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, they approached a police checkpoint. Mr. Brown, who was driving, decided to avoid the checkpoint and return to Texas. After seeing the Browns' truck turn away from the checkpoint, Bryan County Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns pursued the vehicle. Although the parties' versions of events differ, at trial both deputies claimed that their patrol car reached speeds in excess of 100 miles per hour. Mr. Brown testified that he was unaware of the deputies' attempts to overtake him. The chase finally ended four miles south of the police checkpoint.

[3] After he got out of the squad car, Deputy Sheriff Morrison pointed his gun toward the Browns' vehicle and ordered the Browns to raise their hands. Reserve Deputy Burns, who was unarmed, rounded the corner of the vehicle on the passenger's side. Burns twice ordered respondent Jill Brown from the vehicle. When she did not exit, he used an "arm bar" technique, grabbing respondent's arm at the wrist and elbow, pulling her from the vehicle, and spinning her to the ground. Respondent's knees were severely injured, and she later underwent corrective surgery. Ultimately, she may need knee replacements.

[4] Respondent sought compensation for her injuries under 42 U.S.C. § 1983 and state law from Burns, Bryan County Sheriff B.J. Moore, and the county itself. Respondent claimed, among other things, that Bryan County was liable for Burns' alleged use of excessive force based on Sheriff Moore's decision to hire Burns, the son of his nephew. Specifically, respondent claimed that Sheriff Moore had failed to adequately review Burns' background. Burns had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness. Oklahoma law does not preclude the hiring of an individual who has committed a misdemeanor to serve as a peace officer. See Okla. Stat., Tit. 70, § 3311(D)(2)(a) (1991) (requiring that the hiring agency certify that the prospective officer's records do not reflect a felony conviction). At trial, Sheriff Moore testified that he had obtained Burns' driving record and a report on Burns from the National Crime Information Center but had not closely reviewed either. Sheriff Moore authorized Burns to make arrests, but not to carry a weapon or to operate a patrol car.

[5] In a ruling not at issue here, the District Court dismissed respondent's § 1983 claim against Sheriff

Moore prior to trial. App. 28. Counsel for Bryan County stipulated that Sheriff Moore “was the policy maker for Bryan County regarding the Sheriff’s Department.” *Id.*, at 30. At the close of respondent’s case and again at the close of all of the evidence, Bryan County moved for judgment as a matter of law. As to respondent’s claim that Sheriff Moore’s decision to hire Burns triggered municipal liability, the county argued that a single hiring decision by a municipal policymaker could not give rise to municipal liability under § 1983. *Id.* at 59-60. The District Court denied the county’s motions. The court also overruled the county’s objections to jury instructions on the § 1983 claim against the county. *Id.* at 125-126, 132.

[6] To resolve respondent’s claims, the jury was asked to answer several interrogatories. The jury concluded that Stacy Burns had arrested respondent without probable cause and had used excessive force, and therefore found him liable for respondent’s injuries. It also found that the “hiring policy” and the “training policy” of Bryan County “in the case of Stacy Burns as instituted by its policymaker, B.J. Moore,” were each “so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff.” *Id.* at 135. The District Court entered judgment for respondent on the issue of Bryan County’s § 1983 liability. The county appealed on several grounds, and the Court of Appeals for the Fifth Circuit affirmed. 67 F.3d 1174 (1995). The court held, among other things, that Bryan County was properly found liable under § 1983 based on Sheriff Moore’s decision to hire Burns. *Id.*, at 1185. The court addressed only those points that it thought merited review; it did not address the jury’s determination of county liability based on inadequate training of Burns, *id.*, at 1178, nor do we. We granted certiorari, 517 U.S. (1996), to decide whether the county was properly held liable for respondent’s injuries based on Sheriff Moore’s single decision to hire Burns. We now reverse.

II

* * * * *

[7] The parties join issue on whether, under *Monell* and subsequent cases, a single hiring decision by a county sheriff can be a “policy” that triggers municipal liability. Relying on our decision in *Pembaur*, respondent claims that a single act by a decisionmaker with final authority in the relevant area constitutes a “policy” attributable to the municipality itself. So long as a § 1983 plaintiff identifies a decision properly attributable to the municipality, respondent argues, there is no risk of imposing *respondeat superior* liability. Whether that decision was intended to govern only the situation at hand or to serve as a rule to be applied over time is immaterial. Rather, under respondent’s theory, identification of an act of a proper municipal decisionmaker is all that is required to ensure that the municipality is held liable only for its own conduct. The Court of Appeals accepted respondent’s approach.

[8] As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

[9] Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. Section 1983 itself “contains no state-of-mind requirement independent of that necessary to state a violation” of the underlying federal right. *Daniels v. Williams*, 474 U.S. 327 (1986). In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality’s legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

[10] Sheriff Moore's hiring decision was itself legal, and Sheriff Moore did not authorize Burns to use excessive force. Respondent's claim, rather, is that a single facially lawful hiring decision can launch a series of events that ultimately cause a violation of federal rights. Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee. See *Canton*, 489 U.S. at 391-392; *Tuttle*, *supra*, at 824 (plurality opinion). See also *Springfield v. Kibbe*, 480 U.S. 257, 270-271 (1987) (dissent from dismissal of writ as improvidently granted).

[11] In relying heavily on *Pembaur*, respondent blurs the distinction between § 1983 cases that present no difficult questions of fault and causation and those that do. To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation. For example, *Owen v. Independence*, 445 U.S. 622 (1980), and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), involved formal decisions of municipal legislative bodies. In *Owen*, the city council allegedly censured and discharged an employee without a hearing. 445 U.S. at 627-629, 633, and n.13. In *Fact Concerts*, the city council canceled a license permitting a concert following a dispute over the performance's content. 453 U.S. at 252. Neither decision reflected implementation of a generally applicable rule. But we did not question that each decision, duly promulgated by city lawmakers, could trigger municipal liability if the decision itself were found to be unconstitutional. Because fault and causation were obvious in each case, proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury.

[12] Similarly, *Pembaur v. Cincinnati* concerned a decision by a county prosecutor, acting as the county's final decisionmaker, 475 U.S. at 485, to direct county deputies to forcibly enter petitioner's place of business to serve *capiases* upon third parties. Relying on *Owen* and *Newport*, we concluded that a final decisionmaker's adoption of a course of action "tailored to a particular situation and not intended to control decisions in later situations" may, in some circumstances, give rise to municipal liability under § 1983. 475 U.S. at 481. In *Pembaur*, it was not disputed that the prosecutor had specifically directed the action resulting in the deprivation of petitioner's rights. The conclusion that the decision was that of a final municipal decisionmaker and was therefore properly attributable to the municipality established municipal liability. No questions of fault or causation arose.

[13] Claims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof. That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably. We recognized these difficulties in *Canton v. Harris*, *supra*, where we considered a claim that inadequate training of shift supervisors at a city jail led to a deprivation of a detainee's constitutional rights. We held that, quite apart from the state of mind required to establish the underlying constitutional violation—in that case, a violation of due process, 489 U.S. at 388-389, n.8—a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. *Id.* at 388. A showing of simple or even heightened negligence will not suffice.

[14] We concluded in *Canton* that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." *Id.* at 387. We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. *Id.* at 390. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the

“deliberate indifference”—necessary to trigger municipal liability. *Id.* at 390, n.10 (“It could ... be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are ‘deliberately indifferent’ to the need”); *id.* at 397 (O’Connor, J., concurring in part and dissenting in part) (“Municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations....”). In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the “moving force” behind the plaintiff’s injury. See *id.* at 390-391.

[15] Before trial, counsel for Bryan County stipulated that Sheriff Moore “was the policy maker for Bryan County regarding the Sheriff’s Department.” App. 30. Indeed, the county sought to avoid liability by claiming that its Board of Commissioners participated in no policy decisions regarding the conduct and operation of the office of the Bryan County Sheriff. *Id.* at 32. Accepting the county’s representations below, then, this case presents no difficult questions concerning whether Sheriff Moore has final authority to act for the municipality in hiring matters. *Cf. Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Respondent does not claim that she can identify any pattern of injuries linked to Sheriff Moore’s hiring practices. Indeed, respondent does not contend that Sheriff Moore’s hiring practices are generally defective. The only evidence on this point at trial suggested that Sheriff Moore had adequately screened the backgrounds of all prior deputies he hired. App. 106-110. Respondent instead seeks to trace liability to what can only be described as a deviation from Sheriff Moore’s ordinary hiring practices. Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality’s action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the plaintiff’s own injury flows from the municipality’s action, rather than from some other intervening cause.

[16] In *Canton*, we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability. 489 U.S. at 390, and n.10 (“It may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious ... that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need”). Respondent purports to rely on *Canton*, arguing that Burns’ use of excessive force was the plainly obvious consequence of Sheriff Moore’s failure to screen Burns’ record. In essence, respondent claims that this showing of “obviousness” would demonstrate both that Sheriff Moore acted with conscious disregard for the consequences of his action and that the Sheriff’s action directly caused her injuries, and would thus substitute for the pattern of injuries ordinarily necessary to establish municipal culpability and causation.

[17] The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens’ rights could justify a finding that policymakers’ decision not to train the officer reflected “deliberate indifference” to the obvious consequence of the policymakers’ choice—namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation—that the municipality’s indifference led directly to the very consequence that was so predictable.

[18] Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

[19] In attempting to import the reasoning of *Canton* into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. As our decision in *Canton* makes clear, "deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant's background would make a violation of rights more *likely* cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation. After all, a full screening of an applicant's background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant's background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury.

[20] We assume that a jury could properly find in this case that Sheriff Moore's assessment of Burns' background was inadequate. Sheriff Moore's own testimony indicated that he did not inquire into the underlying conduct or the disposition of any of the misdemeanor charges reflected on Burns' record before hiring him. But this showing of an instance of inadequate screening is not enough to establish "deliberate indifference." In layman's terms, inadequate screening of an applicant's record may reflect "indifference" to the applicant's background. For purposes of a legal inquiry into municipal liability under § 1983, however, that is not the *relevant* "indifference." A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

[21] Neither the District Court nor the Court of Appeals directly tested the link between Burns' actual background and the risk that, if hired, he would use excessive force. The District Court instructed the jury on a theory analogous to that reserved in *Canton*. The court required respondent to prove that Sheriff Moore's inadequate screening of Burns' background was "so likely to result in *violations of constitutional rights*" that the Sheriff could "reasonably [be] said to have been deliberately indifferent to the *constitutional needs* of the Plaintiff." App. 123 (emphasis added). The court also instructed the jury, without elaboration, that respondent was required to prove that the "inadequate hiring ... policy directly caused the Plaintiff's injury." *Ibid*.

[22] As discussed above, a finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong. What the District Court's instructions on culpability, and therefore the jury's finding of municipal liability, failed to capture is whether Burns' background made his use of excessive force in making an arrest

a plainly obvious consequence of the hiring decision. The Court of Appeals' affirmance of the jury's finding of municipal liability depended on its view that the jury could have found that "inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights." 67 F.3d at 1185 (emphasis added). Beyond relying on a risk of violations of unspecified constitutional rights, the Court of Appeals also posited that Sheriff Moore's decision reflected indifference to "the public's welfare." *Id.* at 1184.

[23] Even assuming without deciding that proof of a single instance of inadequate screening could ever trigger municipal liability, the evidence in this case was insufficient to support a finding that, in hiring Burns, Sheriff Moore disregarded a known or obvious risk of injury. To test the link between Sheriff Moore's hiring decision and respondent's injury, we must ask whether a full review of Burns' record reveals that Sheriff Moore should have concluded that Burns' use of excessive force would be a plainly obvious consequence of the hiring decision.¹¹ On this point, respondent's showing was inadequate. To be sure, Burns' record reflected various misdemeanor infractions. Respondent claims that the record demonstrated such a strong propensity for violence that Burns' application of excessive force was highly likely. The primary charges on which respondent relies, however, are those arising from a fight on a college campus where Burns was a student. In connection with this single incident, Burns was charged with assault and battery, resisting arrest, and public drunkenness. In January 1990, when he pleaded guilty to those charges, Burns also pleaded guilty to various driving-related offenses, including nine moving violations and a charge of driving with a suspended license. In addition, Burns had previously pleaded guilty to being in actual physical control of a vehicle while intoxicated.

[24] The fact that Burns had pleaded guilty to traffic offenses and other misdemeanors may well have made him an extremely poor candidate for reserve deputy. Had Sheriff Moore fully reviewed Burns' record, he might have come to precisely that conclusion. But unless he would necessarily have reached that decision because Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore's inadequate scrutiny of Burns' record cannot constitute "deliberate indifference" to respondent's federally protected right to be free from a use of excessive force.

[25] Justice Souter's reading of the case is that the jury believed that Sheriff Moore in fact read Burns' entire record. *Post*, at 12-13. That is plausible, but it is also irrelevant. It is not sufficient for respondent to show that Sheriff Moore read Burns' record and therefore hired Burns with knowledge of his background. Such a decision may reflect indifference to Burns' record, but what is required is deliberate indifference to a plaintiff's constitutional right. That is, whether Sheriff Moore failed to examine Burns' record, partially examined it, or fully examined it, Sheriff Moore's hiring decision could not have been "deliberately indifferent" unless in light of that record Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision. Because there was insufficient evidence on which a jury could base a finding that Sheriff Moore's decision to hire Burns reflected conscious disregard of an obvious risk that a use of excessive force would follow, the District Court erred in submitting respondent's inadequate screening claim to the jury.

III

[26] Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause. In the broadest sense, every injury is traceable to a hiring decision. Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose. *Cf. Canton v. Harris*, 489 U.S. at 392. Bryan County is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated that his decision reflected a

conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right. We therefore vacate the judgment of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

It is so ordered.

Justice Souter, with whom Justice Stevens and Justice Breyer join, dissenting.

[27] In *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986), we held a municipality liable under 42 U.S.C. § 1983 for harm caused by the single act of a policymaking officer in a matter within his authority but not covered by a policy previously identified. The central question presented here is whether that rule applies to a single act that itself neither violates nor commands a violation of federal [*35] law. The answer is yes if the single act amounts to deliberate indifference to a substantial risk that a violation of federal law will result. With significant qualifications, the Court assumes so, too, in theory, but it raises such skeptical hurdles to reaching any such conclusion in practice that it virtually guarantees its disposition of this case: it holds as a matter of law that the sheriff's act could not be thought to reflect deliberate indifference to the risk that his subordinate would violate the Constitution by using excessive force. I respectfully dissent as much from the level of the Court's skepticism as from its reversal of the judgment.

I

[28] While ... the policy requirement may be satisfied in more than one way, there are in fact three alternatives discernible in our prior cases. It is certainly met when the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy. *Monell* exemplified these circumstances, where city agencies had issued a rule requiring pregnant employees to take unpaid leaves of absence before any medical need arose. *Monell*, 436 U.S. at 660-661.

[29] We have also held the policy requirement satisfied where no rule has been announced as "policy" but federal law has been violated by an act of the policymaker itself. In this situation, the choice of policy and its implementation are one, and the first or only action will suffice to ground municipal liability simply because it is the very policymaker who is acting. See *Pembaur*, 475 U.S. at 480-481; cf. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 250-252, 69 L. Ed.2d 616, 101 S. Ct. 2748 (1981) (implicitly assuming that a policymaker's single act can sustain § 1983 action); *Owen v. Independence*, 445 U.S. 622, 625-630, 63 L. Ed.2d 673, 100 S. Ct. 1398 (1980) (same). It does not matter that the policymaker may have chosen "a course of action tailored [only] to a particular situation and not intended to control decisions in later situations," *Pembaur*, 475 U.S. at 481; if the decision to adopt that particular course of action is intentionally made by the authorized policymaker, "it surely represents an act of official government 'policy'" and "the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Ibid*.

[30] We have, finally, identified a municipal policy in a third situation, even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the Government "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker ... can reasonably be said to have been deliberately indifferent to the need." *Canton v. Harris*, 489 U.S. 378, 390, 103 L. Ed.2d 412, 109 S. Ct. 1197 (1989). Where, in the most obvious example, the policymaker sits on his hands after repeated, unlawful acts of subordinate officers

and that failure “evidences a ‘deliberate indifference’ to the rights of [the municipality’s] inhabitants,” *Id.*, at 389, the policymaker’s toleration of the subordinates’ behavior establishes a policy-in-practice just as readily attributable to the municipality as the one-act policy-in-practice described above. Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference. *Id.*, at 390, n.10.

[31] Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes.

* * * * *

[32] Under this prior law, Sheriff Moore’s failure to screen out his 21-year-old great-nephew Burns on the basis of his criminal record, and the decision instead to authorize Burns to act as a deputy sheriff, constitutes a policy choice attributable to Bryan County under § 1983. There is no serious dispute that Sheriff Moore is the designated policymaker for implementing the sheriff’s law enforcement powers and recruiting officers to exercise them, or that he “has final authority to act for the municipality in hiring matters.” *Ante*, at 10. As the authorized policymaker, Sheriff Moore is the county for purposes of § 1983 municipal liability arising from the sheriff’s department’s exercise of law enforcement authority. As I explain in greater detail below, it was open to the jury to find that the sheriff knew of the record of his nephew’s violent propensity, but hired him in deliberate indifference to the risk that he would use excessive force on the job, as in fact he later did. That the sheriff’s act did not itself command or require commission of a constitutional violation (like the order to perform an unlawful entry and search in *Pembaur*) is not dispositive under § 1983, for we have expressly rejected the contention that “only unconstitutional policies are actionable” under § 1983, *see Canton*, 489 U.S. at 387, and have never suggested that liability under the statute is otherwise limited to policies that facially violate other federal law. The sheriff’s policy choice creating a substantial risk of a constitutional violation therefore could subject the county to liability under existing precedent.^[2]

II

[33] At the level of theory, at least, the Court does not disagree, and it assumes for the sake of deciding the case that a single, facially neutral act of deliberate indifference by a policymaker could be a predicate to municipal liability if it led to an unconstitutional injury inflicted by subordinate officers. *See ante*, at 14. At the level of practice, however, the tenor of the Court’s opinion is decidedly different: it suggests that the trial court insufficiently appreciated the specificity of the risk to which such indifference must be deliberate in order to be actionable; it expresses deep skepticism that such appreciation of risk could ever reasonably be attributed to the policymaker who has performed only a single unsatisfactory, but not facially unconstitutional, act; and it finds the record insufficient to make any such showing in this case. The Court is serially mistaken. This case presents no occasion to correct or refine the District Court’s jury instructions on the degree of risk required for deliberate indifference; the Court’s skepticism converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this; and the record in this case is perfectly sufficient to support the jury’s verdict even on the Court’s formulation of the high degree of risk that must be shown.

A

[34] The Court is certainly correct in emphasizing the need to show more than mere negligence on the part of the policymaker, for at the least the element of deliberateness requires both subjective appreciation

of a risk of unconstitutional harm, and a risk substantial enough to justify the heightened responsibility that deliberate indifference generally entails. The Court goes a step further, however, in requiring that the “particular” harmful consequence be “plainly obvious” to the policymaker, *ante*, at 13, a characterization of deliberate indifference adapted from dicta set forth in a footnote in *Canton*, see 489 U.S. at 390, n.10. *Canton*, as mentioned above, held that a municipal policy giving rise to liability under § 1983 may be inferred even when the policymaker has failed to act affirmatively at all, so long as a need to control the agents of the Government “is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker ... can reasonably be said to have been deliberately indifferent to the need.” *Id.*, at 390. While we speculated in *Canton* that “it could ... be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are ‘deliberately indifferent’ to the need,” see *id.*, at 390, n.10, we did not purport to be defining the fault of deliberate indifference universally as the failure to act in relation to a “plainly obvious consequence” of harm. Nor did we, in addressing the requisite risk that constitutional violations will occur, suggest that the deliberate indifference necessary to establish municipal liability must be, as the Court says today, indifference to the particular constitutional violation that in fact occurred.

[35] The Court’s formulation that deliberate indifference exists only when the risk of the subsequent, particular constitutional violation is a plainly obvious consequence of the hiring decision, see *ante*, at 13, while derived from *Canton*, is thus without doubt a new standard. See *post*, at 4-5 (Breyer, J., dissenting). As to the “particular” violation, the Court alters the understanding of deliberate indifference as set forth in *Canton*, where we spoke of constitutional violations generally. As to “plainly obvious consequence,” the Court’s standard appears to be somewhat higher, for example, than the standard for “reckless” fault in the criminal law, where the requisite indifference to risk is defined as that which “consciously disregards a substantial and unjustifiable risk that the material element exists or will result ... [and] involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” See American Law Institute, Model Penal Code § 2.02(2)(c) (1985).

[36] That said, it is just possible that our prior understanding of the requisite degree of fault and the standard as the Court now states it may in practice turn out to amount to much the same thing, but I would have preferred an argument addressing the point before ruling on it. There was, however, no such argument here for the simple reason that petitioner never asked that deliberate indifference be defined to occur only when the particular constitutional injury was the plainly obvious consequence of the policymaker’s act. Petitioner merely asked the District Court to instruct the jury to determine whether Sheriff Moore acted with “conscious indifference,” see 2 Record 342, and made no objection to the District Court’s charge that “Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer scrutiny of Stacy Burns’ background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff.” 10 Record 800-801. If, as it appears, today’s standard does raise the threshold of municipal liability, it does so quite independently of any issue posed or decided in the trial court.

* * * * *

C

[37] For demonstrating the extreme degree of the Court’s inhospitality to single-act municipal liability, this is a case on point, for even under the “plainly obvious consequence” rule the evidence here would support the verdict. There is no dispute that before the incident in question the sheriff ordered a copy of his nephew’s criminal record. While the sheriff spoke euphemistically on the witness stand of a “driving record,”

the scope of the requested documentation included crimes beyond motor vehicle violations and the sheriff never denied that he knew this. He admitted that he read some of that record; he said he knew it was “long”; he said he was sure he had noticed charges of driving with a suspended license; and he said that he had taken the trouble to make an independent search for any outstanding warrant for Burns’s arrest. As he put it, however, he somehow failed to “notice” charges of assault and battery or the list of offenses so long as to point either to contempt for law or to incapacity to obey it. Although the jury might have accepted the sheriff’s disclaimer, no one who has read the transcript would assume that the jurors gave any credit to that testimony, and it was open to them to find that the sheriff was simply lying under oath about his limited perusal. The Court of Appeals noted this possibility, see 67 F.3d 1174, 1184 (CA5 1995), which is more likely than any other reading of the evidence. Law enforcement officers, after all, are not characteristically so devoid of curiosity as to lose interest part way through the criminal record of a subject of personal investigation.

[38] If, as is likely, the jurors did disbelieve the sheriff and concluded he had read the whole record, they certainly could have eliminated any possibility that the sheriff’s decision to employ his relative was an act of mere negligence or poor judgment. He did not even claim, for example, that he thought any assault must have been just a youthful peccadillo magnified out of proportion by the criminal charge, or that he had evaluated the assault as merely eccentric behavior in a young man of sound character, or that he was convinced that wild youth had given way to discretion. There being no such evidence of reasonable but mistaken judgment, the jury could readily have found that the sheriff knew his nephew’s proven propensities, that he thought the thrust of the evidence was so damaging that he would lie to protect his reputation and the county treasury, and that he simply chose to put a family member on the payroll (the third relative, in fact) disregarding the risk to the public.

[39] At trial, petitioner’s expert witness stated during cross-examination that Burns’s rap sheet listed repeated traffic violations, including driving while intoxicated and driving with a suspended license, resisting arrest, and more than one charge of assault and battery. The witness further testified that Burns pleaded guilty to assault and battery and other charges 16 months before he was hired by Sheriff Moore. Respondent’s expert witness testified that Burns’s arrest record showed a “blatant disregard for the law and problems that may show themselves in abusing the public or using excessive force,” 7 Record 316, and petitioner’s own expert agreed that Burns’s criminal history should have caused concern. When asked if he would have hired Burns, he replied that it was “doubtful.” 9 Record 537. On this evidence, the jury could have found that the string of arrests and convictions revealed “that Burns had [such] a propensity for violence and a disregard for the law,” see 67 F.3d at 1184, n.20, that his subsequent resort to excessive force was the plainly obvious consequence of hiring him as a law enforcement officer authorized to employ force in performing his duties.

III

[40] The county escapes from liability through the Court’s untoward application of an enhanced fault standard to a record of inculpatory evidence showing a contempt for constitutional obligations as blatant as the nepotism that apparently occasioned it. The novelty of this escape shows something unsuspected (by me, at least) until today. Despite arguments that *Monell*’s policy requirement was an erroneous reading of § 1983, see *Oklahoma City v. Tuttle*, 471 U.S. at 834 (Stevens, J., dissenting), I had not previously thought that there was sufficient reason to unsettle the precedent of *Monell*. Now it turns out, however, that *Monell* is hardly settled. That being so, Justice Breyer’s powerful call to reexamine § 1983 municipal liability afresh finds support in the Court’s own readiness to rethink the matter.

I respectfully dissent.

Justice Breyer, with whom Justice Stevens and Justice Ginsberg join, dissenting.

[41] In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), this Court said that municipalities cannot be held liable for constitutional torts under 42 U.S.C. § 1983 “on a *respondeat superior* theory,” but they can be held liable “when execution of” a municipality’s “policy or custom ... inflicts the injury.” 436 U.S. at 691, 694. That statement has produced a highly complex body of interpretive law. Today’s decision exemplifies the law’s complexity, for it distinguishes among a municipal action that “*itself* violates federal law,” *ante*, at 6, an action that “intentionally deprives a plaintiff of a federally protected right,” *ibid.*, and one that “has caused an employee to do so,” *ante*, at 11. It then elaborates this Court’s requirement that a consequence be “*so likely*” to occur that a policymaker could “*reasonably be said to have been deliberately indifferent*” with respect to it, *Canton v. Harris*, 489 U.S. 378, 390 (1989) (emphasis added), with an admonition that the unconstitutional consequence must be “plainly obvious.” *Ante*, at 13. The majority fears that a contrary view of prior precedent would undermine *Monell*’s basic distinction. That concern, however, rather than leading us to spin ever finer distinctions as we try to apply *Monell*’s basic distinction between liability that rests upon policy and liability that is vicarious, suggests that we should reexamine the legal soundness of that basic distinction itself.

[42] I believe that the legal prerequisites for reexamination of an interpretation of an important statute are present here. The soundness of the original principle is doubtful. The original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply. Factual and legal changes have divorced the law from the distinction’s apparent original purposes. And there may be only a handful of individuals or groups that have significantly relied upon perpetuation of the original distinction. If all this is so, later law has made the original distinction, not simply wrong, but obsolete and a potential source of confusion.

[43] First, consider *Monell*’s original reasoning. The *Monell* “no vicarious liability” principle rested upon a historical analysis of § 1983 and upon § 1983’s literal language—language that imposes liability upon (but only upon) any “person.” Justice Stevens has clearly explained why neither of these rationales is sound. Essentially, the history on which *Monell* relied consists almost exclusively of the fact that the Congress that enacted § 1983 rejected an amendment (called the Sherman amendment) that would have made municipalities vicariously liable for the marauding acts of *private citizens*.... That fact, as Justice Stevens and others have pointed out, does not argue against vicarious liability for the act of municipal *employees*—particularly since municipalities, at the time, were vicariously liable for many of the acts of their employees.

[44] Without supporting history, it is difficult to find § 1983’s words “every person” inconsistent with *respondeat superior* liability. In 1871 “bodies politic and corporate,” such as municipalities were “persons.” See Act of Feb. 25, ch. 71, § 2, 16 Stat. 431 (repealed 1939); *Monell*, 436 U.S. at 688-689. Section 1983 requires that the “person” either “subject” or “cause” a different person “to be subjected” to a “deprivation” of a right. As a purely linguistic matter, a municipality, which can act only through its employees, might be said to have “subjected” a person or to have “caused” that person to have been “subjected” to a loss of rights when a municipality’s employee acts within the scope of his or her employment. See Restatement (Second) of Agency § 219 (1957); W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 120-121 (1987). Federal courts on occasion have interpreted the word “person” or the equivalent in other statutes as authorizing forms of vicarious liability.

[45] Second, *Monell*’s basic effort to distinguish between vicarious liability and liability derived from “policy or custom” has produced a body of law that is neither readily understandable nor easy to apply. Today’s case provides a good example. The District Court in this case told the jury it must find (1) Sheriff

Moore's screening "so likely to result in violations of constitutional rights" that he could "*reasonably [be] said to have been deliberately indifferent* to the constitutional needs of the Plaintiff" and (2) that the "inadequate hiring ... policy *directly caused* the Plaintiff's injury." App. 123a (emphasis added). This instruction comes close to repeating this Court's language in *Canton v. Harris*. In *Canton*, the Court said (of the city's failure to train officers in the use of deadly force):

"In light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy *so likely* to result in the violation of constitutional rights, that the policymakers of the city can *reasonably be said to have been deliberately indifferent* to the need." 489 U.S. at 390 (emphasis added).

The majority says that the District Court and the Court of Appeals did not look closely enough at the specific facts of this case. It also adds that the harm must be a "*plainly obvious consequence*" of the "decision to hire" Burns. *Ante*, at 13. But why elaborate *Canton's* instruction in this way? The Court's verbal formulation is slightly different; and that being so, a lawyer or judge will ignore the Court's precise words at his or her peril. Yet those words, while adding complexity, do not seem to reflect a difference that significantly helps one understand the difference between "vicarious" liability and "policy." *Cf. ante*, at 7-8 (Souter, J., dissenting). Even if the Court means only that the record evidence does not meet *Canton's* standard, it will be difficult for juries, and for judges, to understand just why that is so. It will be difficult for them to apply today's elaboration of *Canton*—except perhaps in the limited context of police force hiring decisions that are followed by a recruit's unconstitutional conduct.

[46] Consider some of the other distinctions that this Court has had to make as it has sought to distinguish liability based upon policymaking from liability that is "vicarious." It has proved necessary, for example, to distinguish further, between an exercise of *policymaking authority* and an exercise of *delegated discretionary policy-implementing authority*. See *St. Louis v. Praprotnik*, 485 U.S. 112, 126-127 (1988) (plurality opinion). Compare *Tuttle*, 471 U.S. at 817 (plurality opinion), with *Canton*, 489 U.S. at 389-390. Without some such distinction, "municipal liability [might] collapse into *respondeat superior*," *ante*, at 12, for the law would treat similarly (and hold municipalities responsible for) both a police officer's decision about how much force to use when making a particular arrest and a police chief's decision about how much force to use when making a particular kind of arrest. But the distinction is not a clear one. It requires federal courts to explore state and municipal law that distributes different state powers among different local officials and local entities. *Praprotnik*, 485 U.S. at 125-126, 127-131 (plurality opinion); *Jett*, 491 U.S. at 737-738. That law is highly specialized; it may or may not say just where policymaking authority lies, and it can prove particularly difficult to apply in light of the Court's determination that a decision can be "policymaking" even though it applies only to a single instance. *Pembaur*, 475 U.S. at 481.

* * * * *

[47] Nor does the location of "policymaking" authority pose the only conceptually difficult problem. Lower courts must also ask decide whether a failure to make policy was "deliberately indifferent," rather than "grossly negligent." *Canton*, 489 U.S. at 388, n.7. And they must decide, for example, whether it matters that some such failure occurred in the officer-training, rather than the officer-hiring, process. *Ante*, at 11-12.

[48] Given the basic *Monell* principle, these distinctions may be necessary, for without them, the Court cannot easily avoid a "municipal liability" that "collapses into *respondeat superior*." *Ante*, at 12. But a basic legal principle that requires so many such distinctions to maintain its legal life may not deserve such longevity.

* * * * *

[49] Finally, relevant legal and factual circumstances may have changed in a way that affects likely reliance upon *Monell's* liability limitation. The legal complexity just described makes it difficult for municipalities to predict just when they will be held liable based upon "policy or custom." Moreover, their potential liability is, in a sense, greater than that of individuals, for they cannot assert the "qualified immunity" defenses that individuals may raise. *Owen v. Independence*, 445 U.S. 622 (1980). Further, many States have

statutes that appear to, in effect, mimic *respondeat superior* by authorizing indemnification of employees found liable under § 1983 for actions within the scope of their employment. See, e.g., Conn. Gen. Stat. § 7-465 (1997); Idaho Code § 6-903 (1990); Ill. Comp. Stat., ch. 745, § 10/2-302 (1994); Kan. Stat. Ann. § 75-6109 (1989); Minn. Stat. § 466.07 (1994); Mont. Code Ann. § 2-9-305 (1994); Nev. Rev. Stat. § 41.0349 (1989); N.H. Rev. Stat. Ann. § 29-A:2 (1988); N.D. Cent. Code § 32-12.1-04(4) (Supp. 1993); Okla. Stat., Tit. 51, § 162 (Supp. 1995); 42 Pa. Cons. Stat. § 8548 (1982); S. D. Codified Laws § 3-19-1 (1994); Utah Code Ann. § 63-30-36 (1993); W. Va. Code § 29-112A-11 (1992); Wis. Stat. § 895.46 (1993-1994). These statutes—valuable to government employees as well as to civil rights victims—can provide for payments from the government that are similar to those that would take place in the absence of Monell’s limitations. To the extent that they do so, municipal reliance upon the continuation of Monell’s “policy” limitation loses much of its significance.

[50] Any statement about reliance, of course, must be tentative, as we have not heard argument on the matter. We do not know the pattern of indemnification: how often, and to what extent, States now indemnify their employees, and which of their employees they indemnify. I also realize that there may be other reasons, constitutional and otherwise, that I have not discussed that argue strongly for reaffirmation of *Monell*’s holding.

* * * * *

[51] Nonetheless, for the reasons I have set forth, I believe the case for reexamination is a strong one. Today’s decision underscores this need. Consequently, I would ask for further argument that would focus upon the continued viability of *Monell*’s distinction between vicarious municipal liability and municipal liability based upon policy and custom.

↓ [Board of the County Commissioners of Bryan County, Oklahoma v. Brown – Audio and Transcript of Oral Argument](#)

Footnotes

1. In suggesting that our decision complicates this Court’s § 1983 municipal liability jurisprudence by altering the understanding of culpability, Justice Souter and Justice Breyer misunderstand our approach. *Post*, at 8; *post* at 1, 5. We do not suggest that a plaintiff in an inadequate screening case must show a higher degree of culpability than the “deliberate indifference” required in *Canton v. Harris*, 489 U.S. 378 (1989); we need not do so, because, as discussed below, respondent has not made a showing of deliberate indifference here. See *infra*, at 15-16. Furthermore, in assessing the risks of a decision to hire a particular individual, we draw no distinction between what is “so obvious” or “so likely to occur” and what is “plainly obvious.” The difficulty with the lower courts’ approach is that it fails to connect the background of the particular officer hired in this case to the particular constitutional violation the respondent suffered. *Supra*, at 13-14. Ensuring that lower courts link the background of the officer to the constitutional violation alleged does not complicate our municipal liability jurisprudence with degrees of “obviousness,” but seeks to ensure that a plaintiff in an inadequate screening case establishes a policymaker’s deliberate indifference—that is, conscious disregard for the known and obvious consequences of his actions. [↴](#)
2. Given the sheriff’s position as law enforcement policymaker, it is simply off the point to suggest, as the Court does, that there is some significance in either the fact that Sheriff Moore’s failure to screen may have been a “deviation” from his ordinary hiring practices or that a pattern of injuries resulting from his past practices is absent. See *ante*, at 10. *Pembaur* made clear that a single act by a designated policymaker is sufficient to establish a municipal policy, see *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81, 89 L. Ed.2d 452, 106 S. Ct. 1292

(1986), and Canton explained, as the Court recognizes, see ante, at 10-11, that evidence of a single violation of federal rights can trigger municipal liability under § 1983, see *Canton v. Harris*, 489 U.S. 378, 390, n.10, 103 L. Ed.2d 412, 109 S. Ct. 1197 (1989). See *infra*, Part II-B. [↴](#)

Notes on *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*

1. Why did the majority find it proper to hold the municipality liable for the single act of the policymaker with final authority in [Pembaur](#) but inappropriate to hold the municipality liable for the act of the policymaker with final authority in [Brown](#)?
2. Is there any reason to exonerate the local governmental entity where the jury finds that the actions of its policymaker with final authority caused, but did not command or direct, the invasion of the plaintiff's constitutional rights? Were the district court's instructions to the jury flawed? If so, how should the jury be instructed after *Brown*?
3. May the jury ever hold a municipality liable for a single hiring decision? If so, how close must the injury suffered by the plaintiff be to past harms inflicted by the hired officer? If a Sheriff hires a police officer who has a record of beating citizens with his fists, may the municipality be held liable if the officer shoots a fleeing felon in violation of constitutional standards?
4. Is a municipality sheltered from liability for all actions of a policymaker with final authority where the policymaker has not acted with deliberate indifference? Why should the municipality not be held accountable if the conduct of the policymaker with final authority is found to have caused the constitutional violation but the policymaker has not acted with deliberate indifference?
5. While the Supreme Court has had several occasions to construe the "policy" requirement for municipal liability, it has not reviewed a claim that the municipality is liable for constitutional harm inflicted pursuant to a "custom." In [Doe v. Claiborne County, Tenn.](#), 103 F.3d 495 (6th Cir. 1996), the court of appeals detailed its interpretation of what is necessary to establish "custom:"

A "custom" for purposes of *Monell* liability must "be so permanent and well settled as to constitute a custom or usage with the force of law." In turn, the notion of "law" must include "[d]eeply embedded traditional ways of carrying out state policy." It must reflect a course of action deliberately chosen from among various alternatives. In short, a "custom" is a "legal institution" not memorialized by written law.

To state a municipal liability claim under an "inaction" theory, Doe must establish:

1. the existence of a clear and persistent pattern of sexual abuse by school employees;
2. notice or constructive notice on the part of a School Board;
3. the School Board's tacit approval of the unconstitutional conduct, such that their deliberate

indifference in their failure to act can be said to amount to an official policy of inaction; and

4. that the School Board's custom was the "moving force" or direct causal link in the constitutional deprivation.
6. In order for a custom to be established, is it necessary that policymakers with final authority have knowledge of the unconstitutional activities? In [Silva v. Worden](#), 130 F.3d 26 (1st Cir. 1997), the court of appeals held that the City of New Bedford did not have a custom of banning cars carrying political roof rack signs:

There is no evidence that Mayor Tierney or other high ranking city officials, or prior policymakers, were even aware of the practice, much less that they did nothing to end it.... In order to show that City officials had constructive knowledge of the practice, the plaintiff must show that "[t]he practices have been so widespread or flagrant that in the proper exercise of their official responsibilities the municipal policymakers should have known of them." *Bordanaro*, 871 F.2d at 1157.... In *Bordanaro* ... the evidence demonstrated the existence of a widespread practice of which the defendant's policymaking officials should have been aware. See *id.* at 1159-61. In contrast, the evidence in this case at best suggests a practice, sporadic at most, of which only some lower-level managerial employees were aware. This evidence is insufficient to show that the City's policymaking officials had constructive notice of the practice.

Id. at 32. See also [McNabola v. CTA](#), 10 F.3d 501, 511 (10th Cir. 1993) (custom may be established "by proof of knowledge of policymaking officials and their acquiescence in the established practice.").

CONNICK v. THOMPSON, 563 U.S. 51 (2011)

Justice THOMAS delivered the opinion of the Court.

[1] The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady v. Maryland*, 373 U.S. 83 10 L.Ed.2d 215 (1963). Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

[2] After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages under Rev. Stat. § 1979, 42 U.S.C. § 1983. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson \$14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation. We hold that it cannot.

I

A

[3] In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

[4] As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

[5] Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

[6] A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. *State v. Thompson*, 516 So.2d 349 (La.1987). In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. See *State ex rel. Thompson v. Cain*, 95-2463 (La. 4/25/96), 672 So.2d 906; *Thompson v. Cain*, 161 F.3d 802 (C.A.5 1998). The State scheduled Thompson's execution for May 20, 1999.

[7] In late April 1999, Thompson's private investigator discovered the crime lab report from the armed

robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction.^[1]

The Louisiana Court of Appeals then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. *State v. Thompson*, 2002–0361 (La.App.7/17/02), 825 So.2d 552. In 2003, the district attorney's office retried Thompson for Liuzza's murder.^[2]

B

The jury found him not guilty.

[8] Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under § 1983 that the district attorney's office had violated *Brady* by failing to disclose the crime lab report in his armed robbery trial. See *Brady*, 373 U.S. 83. Thompson alleged liability under two theories: (1) the *Brady* violation was caused by an unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

[9] Before trial, Connick conceded that the failure to produce the crime lab report constituted a *Brady* violation. See Record EX 608, EX 880. Accordingly, the District court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors. Record 1615.

[10] Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

[11] The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson \$14 million in damages, and the District Court added more than \$1 million in attorney's fees and costs.

[12] After the verdict, Connick renewed his objection—which he had raised on summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations. The District Court rejected this argument for the reasons that it had given in the summary judgment order. In that order, the court had concluded that a pattern of violations is not necessary to prove deliberate indifference when the need for training is "so obvious." No. Civ. A. 03–2045 (ED La., Nov. 15, 2005), App. to Pet. for Cert. 141a, 2005 WL 3541035, *13. Relying on *Canton v. Harris*, 489 U.S. 378, (1989), the court had held that Thompson could demonstrate deliberate indifference by proving that "the DA's office knew to a moral certainty that assistan[t] [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights." App. to Pet. for Cert. 141a, 2005 WL 3541035, *13.

[13] A panel of the Court of Appeals for the Fifth Circuit affirmed. The panel acknowledged that Thompson did not present evidence of a pattern of similar *Brady* violations, 553 F.3d 836, 851 (2008), but held that Thompson did not need to prove a pattern, *id.*, at 854. According to the panel, Thompson demonstrated

that Connick was on notice of an obvious need for *Brady* training by presenting evidence “that attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* issues while at the DA’s Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful.” 553 F.3d, at 854.

[14] The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. 578 F.3d 293 (C.A.5 2009) (*per curiam*). In four opinions, the divided en banc court disputed whether Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations, and, if so, what evidence would make that showing. We granted certiorari. 559 U.S. ____ (2010).

II

[15] The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson’s armed robbery prosecution failed to disclose the crime lab report to Thompson’s counsel. Under Thompson’s failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney’s office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.^[3]

A

[16] Plaintiffs who seek to impose liability on local governments under § 1983 must prove that “action pursuant to official municipal policy” caused their injury. *Monell*, 436 U.S., at 691, see *id.*, at 694. Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. See *ibid.*; *Pembaur*, *supra*, at 480-481; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970). These are “action[s] for which the municipality is actually responsible.” *Pembaur*, *supra*, at 479-480.

[17] In limited circumstances, a local government’s decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983. A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. To satisfy the statute, a municipality’s failure to train its employees in a relevant respect must amount to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” *Canton*, 489 U.S., at 388. Only then “can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.” *Id.*, at 389.

[18] “[D]eliberate indifference” is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” *Bryan Cty.*, 520 U.S., at 410. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.*, at 407. The city’s “policy of inaction” in light of notice that its program will cause constitutional violations “is the functional equivalent of a decision by the city itself to

violate the Constitution.” ... A less stringent standard of fault for a failure-to-train claim “would result in *de facto respondeat superior* liability on municipalities....”

B

[19] A pattern of similar constitutional violations by untrained employees is “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train. *Bryan Cty.*, 520 U.S. at 409. Policymakers’ “continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the ‘deliberate indifference’—necessary to trigger municipal liability.” *Id.* at 407. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

[20] Although Thompson does not contend that he proved a pattern of similar *Brady* violations, 553 F.3d at 851, vacated, 578 F.3d 293 (en banc), he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick’s office. Those four reversals could not have put Connick on notice that the office’s *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.^[4]

C 1

[21] Instead of relying on a pattern of similar *Brady* violations, Thompson relies on the “single-incident” liability that this Court hypothesized in *Canton*. He contends that the *Brady* violation in his case was the “obvious” consequence of failing to provide specific *Brady* training, and that this showing of “obviousness” can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

[22] In *Canton*, the Court left open the possibility that, “in a narrow range of circumstances,” a pattern of similar violations might not be necessary to show deliberate indifference. *Bryan Cty.*, *supra*, at 409. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *Canton*, *supra*, at 390, n.10. Given the known frequency with which police attempt to arrest fleeing felons and the “predictability that an officer lacking specific tools to handle that situation will violate citizens’ rights,” the Court theorized that a city’s decision not to train the officers about constitutional limits on the use of deadly force could reflect the city’s deliberate indifference to the “highly predictable consequence,” namely, violations of constitutional rights. *Bryan Cty.*, *supra*, at 409. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.

[23] Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*’s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious

need for some form of training. In stark contrast, legal “[t]raining is what differentiates attorneys from average public employees.” 578 F.3d at 304-305 (opinion of Clement, J.).

[24] Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both.... These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules....

[25] Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. See, e.g., Mass. Rule Prof. Conduct 1.1 and comment 6 (West 2006). Before Louisiana adopted continuing-education requirements, it imposed similar general competency requirements on its state bar....

[26] Attorneys who practice with other attorneys, such as in district attorney’s offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney’s Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

[27] In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession’s standards. Trial lawyers have a “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” ... Prosecutors have a special “duty to seek justice, not merely to convict.” Among prosecutors’ unique ethical obligations is the duty to produce *Brady* evidence to the defense.^[5]

An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment ... the same “highly predictable” constitutional danger as *Canton*’s untrained officer.

[28] In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the “obvious consequence” of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty.*, 520 U.S. at 409. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors’ professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in “the usual and recurring situations with which [the prosecutors] must deal.” *Canton*, 489 U.S. at 391. A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present.

[29] A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick’s office were familiar with the general *Brady* rule. Thompson’s complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, “[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city ‘could have done’ to prevent the unfortunate incident.” ...

[30] Thompson suggests that the absence of any *formal* training sessions about *Brady* is equivalent to the complete absence of legal training that the Court imagined in *Canton*. But failure-to-train liability is

concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.

[31] We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. “[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct” will not suffice. *Canton*, *supra*, at 391. The possibility of single-incident liability that the Court left open in *Canton* is not this case.^[6]

2

[32] The dissent rejects our holding that *Canton*’s hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their *Brady* obligation. It would instead apply the *Canton* hypothetical to this case, and thus devotes almost all of its opinion to explaining why the evidence supports liability under that theory.^[7]

But the dissent’s attempt to address our holding—by pointing out that not all prosecutors will necessarily have enrolled in criminal procedure class—misses the point. See *post* at 29–30. The reason why the *Canton* hypothetical is inapplicable is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles.

[33] By the end of its opinion, however, the dissent finally reveals that its real disagreement is not with our holding today, but with this Court’s precedent. The dissent does not see “any reason,” *post* at 31, for the Court’s conclusion in *Bryan County* that a pattern of violations is “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train, 520 U.S. at 409. Cf. *id.* at 406–408 (explaining why a pattern of violations is ordinarily necessary). But cf. *post* at 30–31 (describing our reliance on *Bryan County* as “imply [ing]” a new “limitation” on § 1983). As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents “difficult problems of proof,” and we must adhere to a “stringent standard of fault,” lest municipal liability under § 1983 collapse into *respondeat superior*. *Bryan County*, 520 U.S. at 406; see *Canton*, 489 U.S. at 391–392.

3

[34] The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the “obviousness” of a need for additional training. They based this conclusion on Connick’s awareness that (1) prosecutors would confront *Brady* issues while at the district attorney’s office; (2) inexperienced prosecutors were expected to understand *Brady*’s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding *Brady* evidence would result in constitutional violations. 553 F.3d at 854; App. to Pet. for Cert. 141a, 2005 WL 3541035, *13. This is insufficient.

[35] It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to “a decision by the city itself to violate the Constitution.” *Canton*, 489 U.S. at 395. (O’Connor, J., concurring in part and dissenting in part). To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was “highly predictable” that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had

to show that it was so predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. See *Bryan Cty.*, 520 U.S. at 409; *Canton*, *supra*, at 389. He did not do so.

III

[36] The role of a prosecutor is to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Ibid.* By their own admission, the prosecutors who tried Thompson's armed robbery case failed to carry out that responsibility. But the only issue before us is whether Connick, as the policymaker for the district attorney's office, was deliberately indifferent to the need to train the attorneys under his authority.

[37] We conclude that this case does not fall within the narrow range of "single-incident" liability hypothesized in *Canton* as a possible exception to the pattern of violations necessary to prove deliberate indifference in §1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, *supra*, at 395 (opinion of O'Connor, J.).

[38] The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

It is so ordered.

Justice SCALIA, with whom Justice ALITO joins, concurring.

[39] I join the Court's opinion in full. I write separately only to address several aspects of the dissent.

1

[40] The dissent's lengthy excavation of the trial record is a puzzling exertion. The question presented for our review is whether a municipality is liable for a single *Brady* violation by one of its prosecutors, even though no pattern or practice of prior violations put the municipality on notice of a need for specific training that would have prevented it. See *Brady v. Maryland*, 373 U.S. 83 (1963). That question is a legal one: whether a *Brady* violation presents one of those rare circumstances we hypothesized in *Canton*'s footnote 10, in which the need for training in constitutional requirements is so obvious *ex ante* that the municipality's failure to provide that training amounts to deliberate indifference to constitutional violations. See *Canton v. Harris*, 489 U.S. 378, 390, n.10, (1989).

[41] Thompson's failure to train theory at trial was not based on a pervasive culture of indifference to *Brady*, but rather on the inevitability of mistakes over enough iterations of criminal trials....

[42] That theory of deliberate indifference would repeal the law of *Monell*^[8] in favor of the Law of Large Numbers. *Brady* mistakes are inevitable. So are all species of error routinely confronted by prosecutors: authorizing a bad warrant; losing a *Batson*^[9] claim; crossing the line in closing argument; or eliciting hearsay that violates the Confrontation Clause....

[43] That result cannot be squared with our admonition that failure-to-train liability is available only in "limited circumstances," *id.* at 387, and that a pattern of constitutional violations is "ordinarily necessary

to establish municipal culpability and causation,” *Board of Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997). These restrictions are indispensable because without them, “failure to train” would become a talismanic incantation producing municipal liability “[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee”—which is what *Monell* rejects. *Canton*, 489 U.S. at 392. Worse, it would “engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,” thereby diminishing the autonomy of state and local governments. *Ibid.*

3

[44] But in any event, to recover from a municipality under 42 U.S.C. §1983, a plaintiff must satisfy a “rigorous” standard of causation, *Bryan Cty.*, 520 U.S. at 405; he must “demonstrate a direct causal link between the municipal action and the deprivation of federal rights.” *Id.* at 404. Thompson cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan’s willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan’s colleague Michael Riehlmann, in 1994 Deegan confessed to him—in the same conversation in which Deegan revealed he had only a few months to live—that he had “suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant.” App. 367; see also *id.* at 362 (“[Deegan] told me that he had failed to inform the defense of exculpatory information”). I have no reason to disbelieve that account, particularly since Riehlmann’s testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan’s misconduct for another five years, as a result of which he incurred professional sanctions. See *In re Riehlmann*, 2004-0680 (La. 1/19/05), 891 So.2d 1239. And if Riehlmann’s story is true, then the “moving force,” *Bryan Cty.*, *supra*, at 404 (internal quotation marks omitted), behind the suppression of evidence was Deegan, not a failure of continuing legal education.

4

[45] The dissent suspends disbelief about this, insisting that with proper *Brady* training, “surely at least one” of the prosecutors in Thompson’s trial would have turned over the lab report and blood swatch. *Post*, at 1380. But training must consist of more than mere broad encomiums of *Brady*: We have made clear that “the identified deficiency in a city’s training program [must be] closely related to the ultimate injury.” *Canton*, *supra*, at 391. So even indulging the dissent’s assumption that Thompson’s prosecutors failed to disclose the lab report *in good faith*—in a way that could be prevented by training—what sort of training would have prevented the good-faith nondisclosure of a blood report not known to be exculpatory?

[46] Perhaps a better question to ask is what *legally accurate* training would have prevented it. The dissent’s suggestion is to instruct prosecutors to ignore the portion of *Brady* limiting prosecutors’ disclosure obligations to evidence that is “favorable to an accused,” 373 U.S. at 87. Instead, the dissent proposes that “Connick could have communicated to Orleans Parish prosecutors, in no uncertain terms, that, ‘[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over.’” *Post*, at 20, n. 13 (*quoting* Tr. of Oral Arg. 34). Though labeled a training suggestion, the dissent’s proposal is better described as a *sub silentio* expansion of the substantive law of *Brady*. If any of our cases establishes such an obligation, I have never read it, and the dissent does not cite it.

[47] Since Thompson’s trial, however, we have decided a case that appears to say just the opposite of the training the dissent would require: In *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), we held that “unless a

criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” We acknowledged that “*Brady* ... makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence,” but concluded that “the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Id.* at 57. Perhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference.

5

[48] By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all—except for Deegan’s (which, since it was a bad-faith knowing violation, could not possibly be attributed to lack of training). The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that *Brady* was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan’s deliberate actions, it remains irrelevant to Connick’s training obligations. For any *Brady* violation apart from Deegan’s was surely on the very frontier of our *Brady* jurisprudence; Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not (*and still have not*) recognized. As a consequence, even if I accepted the dissent’s conclusion that failure-to-train liability could be premised on a single *Brady* error, I could not agree that the lack of an accurate training regimen cause the violation Connick has conceded.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

[49] In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

[50] The Court holds that the Orleans Parish District Attorney’s Office (District Attorney’s Office or Office) cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*’s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court’s assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

[51] From the top down, the evidence showed, members of the District Attorney’s Office, including the District Attorney himself, misperceived *Brady*’s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory

information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.

[52] What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

[53] I dissent from the Court's judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability—for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under § 1983 “where the failure ... amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” *Canton v. Harris*, 489 U.S. 378 (1989). That standard is well met in this case.

I

[54] I turn first to a contextual account of the *Brady* violations that infected Thompson's trials.

A

[55] In the early morning hours of December 6, 1984, an assailant shot and killed Raymond T. Liuzza, Jr., son of a prominent New Orleans business executive, on the street fronting the victim's home. Only one witness saw the assailant. As recorded in two contemporaneous police reports, that eyewitness initially described the assailant as African-American, six feet tall, with “close cut hair.” Record EX2–EX3, EX9. Thompson is five feet eight inches tall and, at the time of the murder, styled his hair in a large “Afro.” *Id.* at EX13. The police reports of the witness' immediate identification were not disclosed to Thompson or to the court.

[56] While engaged in the murder investigation, the Orleans Parish prosecutors linked Thompson to another violent crime committed three weeks later. On December 28, an assailant attempted to rob three siblings at gunpoint. During the struggle, the perpetrator's blood stained the oldest child's pant leg. That blood, preserved on a swatch of fabric cut from the pant leg by a crime scene analyst, was eventually tested. The test conclusively established that the perpetrator's blood was type B. *Id.* at EX151. Thompson's blood is type O. His prosecutors failed to disclose the existence of the swatch or the test results.

B

[57] One month after the Liuzza murder, Richard Perkins, a man who knew Thompson, approached the Liuzza family. Perkins did so after the family's announcement of a \$15,000 reward for information leading to the murderer's conviction. Police officers surreptitiously recorded the Perkins–Liuzza conversations. As documented on tape, Perkins told the family, “I don't mind helping [you] catch [the perpetrator], ... but I

would like [you] to help me and, you know, I'll help [you]." *Id.* at EX479, EX481. Once the family assured Perkins, "we're on your side, we want to try and help you," *id.* at EX481, Perkins intimated that Thompson and another man, Kevin Freeman, had been involved in Liuzza's murder. Perkins thereafter told the police what he had learned from Freeman about the murder, and that information was recorded in a police report. Based on Perkins' account, Thompson and Freeman were arrested on murder charges.

[58] Freeman was six feet tall and went by the name "Kojak" because he kept his hair so closely trimmed that his scalp was visible. Unlike Thompson, Freeman fit the eyewitness' initial description of the Liuzza assailant's height and hair style. As the Court notes, *ante*, at 1357, n.2, Freeman became the key witness for the prosecution at Thompson's trial for the murder of Liuzza.

[59] After Thompson's arrest for the Liuzza murder, the father of the armed robbery victims saw a newspaper photo of Thompson with a large Afro hairstyle and showed it to his children. He reported to the District Attorney's Office that the children had identified Thompson as their attacker, and the children then picked that same photo out of a "photographic lineup." Record EX120, EX642–EX643. Indicting Thompson on the basis of these questionable identifications, the District Attorney's Office did not pause to test the pant leg swatch dyed by the perpetrator's blood. This lapse ignored or overlooked a prosecutor's notation that the Office "may wish to do [a] blood test." *Id.* at EX122.

[60] The murder trial was scheduled to begin in mid-March 1985. Armed with the later indictment against Thompson for robbery, however, the prosecutors made a strategic choice: They switched the order of the two trials, proceeding first on the robbery indictment. *Id.* at EX128–EX129. Their aim was twofold. A robbery conviction gained first would serve to inhibit Thompson from testifying in his own defense at the murder trial, for the prior conviction could be used to impeach his credibility. In addition, an armed robbery conviction could be invoked at the penalty phase of the murder trial in support of the prosecution's plea for the death penalty. *Id.* at 682.

[61] Recognizing the need for an effective prosecution team, petitioner Harry F. Connick, District Attorney for the Parish of Orleans, appointed his third-in-command, Eric Dubelier, as special prosecutor in both cases. Dubelier enlisted Jim Williams to try the armed robbery case and to assist him in the murder case. Gerry Deegan assisted Williams in the armed robbery case. Bruce Whittaker, the fourth prosecutor involved in the cases, had approved Thompson's armed robbery indictment.

C

[62] During pretrial proceedings in the armed robbery case, Thompson filed a motion requesting access to all materials and information "favorable to the defendant" and "material and relevant to the issue of guilt or punishment," as well as "any results or reports" of "scientific tests or experiments." *Id.* at EX144, EX145. Prosecutorial responses to this motion fell far short of *Brady* compliance.^[10]

[63] First, prosecutors blocked defense counsel's inspection of the pant leg swatch stained by the robber's blood. Although Dubelier's April 3 response stated, "Inspection to be permitted," *id.* at EX149, the swatch was signed out from the property room at 10:05 a.m. the next day, and was not returned until noon on April 10, the day before trial, *id.* at EX43, EX670. Thompson's attorney inspected the evidence made available to him and found no blood evidence. No one told defense counsel about the swatch and its recent removal from the property room. *Id.* at EX701–EX702; Tr. 400–402. But cf. *ante*, at 17, n.11 (Thompson's attorney had "access to the evidence locker where the swatch was recorded as evidence.").

[64] Second, Dubelier or Whittaker ordered the crime laboratory to rush a pretrial test of the swatch. Tr. 952–954. Whittaker received the lab report, addressed to his attention, two days before trial commenced. Immediately thereafter, he placed the lab report on Williams' desk. Record EX151, EX589. Although the lab report conclusively identified the perpetrator's blood type, *id.* at EX151, the District Attorney's Office never revealed the report to the defense.

[65] Third, Deegan checked the swatch out of the property room on the morning of the first day of trial, but the prosecution did not produce the swatch at trial. *Id.* at EX43. Deegan did not return the swatch to the property room after trial, and the swatch has never been found. Tr. of Oral Arg. 37.

[66] “[B]ased solely on the descriptions” provided by the three victims, Record 683, the jury convicted Thompson of attempted armed robbery. The court sentenced him to 49.5 years without possibility of parole—the maximum available sentence.

D

[67] Prosecutors continued to disregard *Brady* during the murder trial, held in May 1985, at which the prosecution’s order-of-trial strategy achieved its aim. By prosecuting Thompson for armed robbery first—and withholding blood evidence that might have exonerated Thompson of that charge—the District Attorney’s Office disabled Thompson from testifying in his own defense at the murder trial.^[m]

As earlier observed, see *supra*, at 1372, impeaching use of the prior conviction would have severely undermined Thompson’s credibility. And because Thompson was effectively stopped from testifying in his own defense, the testimony of the witnesses against him gained force. The prosecution’s failure to reveal evidence that could have impeached those witnesses helped to seal Thompson’s fate.

[68] First, the prosecution undermined Thompson’s efforts to impeach Perkins. Perkins testified that he volunteered information to the police with no knowledge of reward money. Record EX366, EX372–EX373. Because prosecutors had not produced the audiotapes of Perkins’ conversations with the Liuzza family (or a police summary of the tapes), Thompson’s attorneys could do little to cast doubt on Perkins’ credibility. In closing argument, the prosecution emphasized that Thompson presented no “direct evidence” that reward money had motivated any of the witnesses. *Id.* at EX3171–EX3172.

[69] Second, the prosecution impeded Thompson’s impeachment of key witness Kevin Freeman. It did so by failing to disclose a police report containing Perkins’ account of what he had learned from Freeman about the murder. See *supra*, at 1371–1372. Freeman’s trial testimony was materially inconsistent with that report. Tr. 382–384, 612–614; Record EX270–EX274. Lacking any knowledge of the police report, Thompson could not point to the inconsistencies.

[70] Third, and most vital, the eyewitness’ initial description of the assailant’s hair, see *supra*, at 1371, was of prime relevance, for it suggested that Freeman, not Thompson, murdered Liuzza, see *supra*, at 4. The materiality of the eyewitness’ contemporaneous description of the murderer should have been altogether apparent to the prosecution. Failure to produce the police reports setting out what the eyewitness first said not only undermined efforts to impeach that witness and the police officer who initially interviewed him. The omission left defense counsel without knowledge that the prosecutors were restyling the killer’s “close cut hair” into an “Afro.”

[71] Prosecutors finessed the discrepancy between the eyewitness’ initial description and Thompson’s appearance. They asked leading questions prompting the eyewitness to agree on the stand that the perpetrator’s hair was “afro type,” yet “straight back.” Record EX322–EX323. Corroboratively, the police officer—after refreshing his recollection by reviewing material at the prosecution’s table—gave artful testimony. He characterized the witness’ initial description of the perpetrator’s hair as “black and short, *afro style*.” *Id.*, at EX265 (emphasis added). As prosecutors well knew, nothing in the withheld police reports, which described the murderer’s hair simply as “close cut,” portrayed a perpetrator with an Afro or Afro-style hair.

[72] The jury found Thompson guilty of first-degree murder. Having prevented Thompson from testifying that Freeman was the killer, the prosecution delivered its ultimate argument. Because Thompson was already serving a near-life sentence for attempted armed robbery, the prosecution urged, the only way to punish him for murder was to execute him. The strategy worked as planned; Thompson was sentenced to death.

E

[73] Thompson discovered the prosecutors' misconduct through a serendipitous series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. *Id.* at EX709. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself. *Id.* at EX712-EX713.

[74] On April 16, 1999, the State of Louisiana scheduled Thompson's execution. *Id.* at EX1366-EX1367. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. See *supra*, at 7. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan "had failed to turn over stuff that might have been exculpatory." Tr. 718. Riehlmann prepared an affidavit describing Deegan's disclosure "that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson." Record EX583.

[75] Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson's execution, *id.* at EX590, and commenced proceedings to assess the newly discovered evidence.

[76] Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. See, e.g., *id.* at EX617. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss]." *Id.* at EX882. After a full day's hearing, the court vacated Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

"[A]ll day long there have been a number of young Assistant D.A.'s ... sitting in this courtroom watching this, and I hope they take home ... and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work." *Id.* at EX883.

[77] The District Attorney's Office then initiated grand jury proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be *Brady* material if prosecutors did not know Thompson's blood type. Tr. 986; cf. *supra*, at 7, n.6. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." Tr. 978-979. In protest, that prosecutor tendered his resignation.

F

[78] Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. *State v. Thompson*, 2002-0361, p.10 (7/17/02), 825 So.2d 552, 558. The unlawfully procured robbery conviction, the court held, had violated Thompson's right to testify and thus fully present his defense in the murder trial. *Id.* at 557. The merits of several *Brady* claims arising out of the murder trial, the court observed, had therefore become "moot." 825 So.2d, at 555; see also Record 684. But cf. *ante*, at 10-11, n. 7, 16-17, n.11 (suggesting that there were no *Brady* violations in the murder prosecution because no court had adjudicated any violations).

[79] Undeterred by his assistants' disregard of Thompson's rights, Connick retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the

prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having “close cut” hair, the police report recounting Perkins’ meetings with the Liuzza family, see *supra*, at 3-4, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

[80] On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

II

[81] On July 16, 2003, Thompson commenced a civil action under 42 U.S.C. § 1983 alleging that Connick, other officials of the Orleans Parish District Attorney’s Office, and the Office itself, had violated his constitutional rights by wrongfully withholding *Brady* evidence.

* * * * *

A

[82] Thompson’s § 1983 suit proceeded to a jury trial on two theories of liability: First, the Orleans Parish Office’s official *Brady* policy was unconstitutional; and second, Connick was deliberately indifferent to an obvious need to train his prosecutors about their *Brady* obligations. Connick’s *Brady* policy directed prosecutors to “turn over what was required by state and federal law, but no more.” Brief for Petitioners 6-7. The jury thus understandably rejected Thompson’s claim that the official policy itself was unconstitutional. *Ante*, at 5.

[83] The jury found, however, that Connick was deliberately indifferent to the need to train prosecutors about *Brady*’s command. On the special verdict form, the jury answered yes to the following question:

“Was the *Brady* violation in the armed robbery case or any infringements of John Thompson’s rights in the murder trial substantially caused by [Connick’s] failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?” Record 1585.

[84] Consistent with the question put to the jury, and without objection, the court instructed the jurors: “[Y]ou are not limited to the nonproduced blood evidence and the resulting infringement of Mr. Thompson’s right to testify at the murder trial. You may consider all of the evidence presented during this trial.” Tr. 1099; Record 1620. But cf. *ante*, at 2, 6, 10, n.7, 16; *ante*, at 1 (SCALIA, J., concurring) (maintaining that the case involves a single *Brady* violation). That evidence included a stipulation that in his retrial for the Liuzza murder, Thompson had introduced ten exhibits containing relevant information withheld by the prosecution in 1985. See *supra*, at 13.

[85] Abundant evidence supported the jury’s finding that additional *Brady* training was obviously necessary to ensure that *Brady* violations would not occur: (1) Connick, the Office’s sole policymaker, misunderstood *Brady*. (2) Other leaders in the Office, who bore direct responsibility for training less experienced prosecutors, were similarly uninformed about *Brady*. (3) Prosecutors in the Office received no *Brady* training. (4) The Office shirked its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements. As a result of these multiple shortfalls, it was hardly surprising that *Brady* violations in fact occurred, severely undermining the integrity of Thompson’s trials.

1

[86] Connick was the Office's sole policymaker, and his testimony exposed a flawed understanding of a prosecutor's *Brady* obligations. First, Connick admitted to the jury that his earlier understanding of *Brady*, conveyed in prior sworn testimony, had been too narrow. Tr. 181-182. Second, Connick confessed to having withheld a crime lab report "one time as a prosecutor and I got indicted by the U.S. Attorney over here for doing it." *Id.* at 872. Third, even at trial Connick persisted in misstating *Brady*'s requirements. For example, Connick urged that there could be no *Brady* violation arising out of "the inadvertent conduct of [an] assistant under pressure with a lot of case load." Tr. 188-189. The court, however, correctly instructed the jury that, in determining whether there has been a *Brady* violation, the "good or bad faith of the prosecution does not matter." Tr. 1094-1095.

2

[87] The testimony of other leaders in the District Attorney's Office revealed similar misunderstandings. Those misunderstandings, the jury could find, were in large part responsible for the gross disregard of *Brady* rights Thompson experienced. Dubelier admitted that he never reviewed police files, but simply relied on the police to flag any potential *Brady* information. Tr. 542.... Williams was asked whether "*Brady* material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he's lying"; he responded simply, and mistakenly, "No." Tr. 381. The testimony of "high-ranking individuals in the Orleans Parish District Attorney's Office," Thompson's expert explained, exposed "complete errors ... as to what *Brady* required [prosecutors] to do." *Id.* at 427, 434. "Dubelier had no understanding of his obligations under *Brady* whatsoever," *id.* at 458, the expert observed, and Williams "is still not sure what his obligations were under *Brady*," *id.* at 448....

* * * * *

3

[88] Connick should have comprehended that Orleans Parish prosecutors lacked essential guidance on *Brady* and its application. In fact, Connick has effectively conceded that *Brady* training in his Office was inadequate. Tr. of Oral Arg. 60. Connick explained to the jury that prosecutors' offices must "make ... very clear to [new prosecutors] what their responsibility [i]s" under *Brady* and must not "giv[e] them a lot of leeway." Tr. 834-835. But the jury heard ample evidence that Connick's Office gave prosecutors no *Brady* guidance, and had installed no procedures to monitor *Brady* compliance.

[89] In 1985, Connick acknowledged, many of his prosecutors "were coming fresh out of law school," and the Office's "[h]uge turnover" allowed attorneys with little experience to advance quickly to supervisory positions. See Tr. 853-854, 832. By 1985, Dubelier and Williams were two of the highest ranking attorneys in the Office, *id.* at 342, 356-357, yet neither man had even five years of experience as a prosecutor, see *supra*, at 5, n.3; Record EX746; Tr. 55, 571-576.

[90] Dubelier and Williams learned the prosecutorial craft in Connick's Office, and, as earlier observed, see *supra*, at 17-18, their testimony manifested a woefully deficient understanding of *Brady*. Dubelier and Williams told the jury that they did not recall any *Brady* training in the Office. Tr. 170-171, 364.

[91] Connick testified that he relied on supervisors, including Dubelier and Williams, to ensure prosecutors were familiar with their *Brady* obligations. Tr. 805-806. Yet Connick did not inquire whether the supervisors themselves understood the importance of teaching newer prosecutors about *Brady*. Riehlmann

could not “recall that [he] was ever trained or instructed by anybody about [his] *Brady* obligations,” on the job or otherwise. Tr. 728-729. Whittaker agreed it was possible for “inexperienced lawyers, just a few weeks out of law school with no training,” to bear responsibility for “decisions on ... whether material was *Brady* material and had to be produced.” *Id.* at 319.

[92] Thompson’s expert characterized Connick’s supervision regarding *Brady* as “the blind leading the blind.” Tr. 458. For example, in 1985 trial attorneys “sometimes ... went to Mr. Connick” with *Brady* questions, “and he would tell them” how to proceed. Tr. 892. But Connick acknowledged that he had “stopped reading law books ... and looking at opinions” when he was first elected District Attorney in 1974. *Id.* at 175–176.

[93] Prosecutors confirmed that training in the District Attorney’s Office, overall, was deficient. Soon after Connick retired, a survey of assistant district attorneys in the Office revealed that more than half felt that they had not received the training they needed to do their jobs. Tr. 178.

[94] Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. Tr. of Oral Arg. 55. But cf. *ante*, at 1363-1364. His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced. Because that did not happen in the District Attorney’s Office, it was inevitable that prosecutors would misapprehend *Brady*. Had *Brady*’s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.

4

[95] As earlier noted, see *supra*, at 11, Connick resisted an effort to hold prosecutors accountable for *Brady* compliance because he felt the effort would “make [his] job more difficult.” Tr. 978. He never disciplined or fired a single prosecutor for violating *Brady*. Tr. 182-183. The jury was told of this Court’s decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), a capital case prosecuted by Connick’s Office that garnered attention because it featured “so many instances of the state’s failure to disclose exculpatory evidence.” *Id.* at 455 (Stevens, J., concurring). When questioned about *Kyles*, Connick told the jury he was satisfied with his Office’s practices and saw no need, occasioned by *Kyles*, to make any changes. Tr. 184-185. In both quantity and quality, then, the evidence canvassed here was more than sufficient to warrant a jury determination that Connick and the prosecutors who served under him were not merely negligent regarding *Brady*. Rather, they were deliberately indifferent to what the law requires.

B

[96] In *Canton*, this Court spoke of circumstances in which the need for training may be “so obvious,” and the lack of training “so likely” to result in constitutional violations, that policymakers who do not provide for the requisite training “can reasonably be said to have been deliberately indifferent to the need” for such training. 489 U.S. at 390. This case, I am convinced, belongs in the category *Canton* marked out.

[97] *Canton* offered an often-cited illustration. “[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons.” *Ibid.*, n.10. Those policymakers, *Canton* observed, equip police officers with firearms to facilitate such arrests. *Ibid.* The need to instruct armed officers about “constitutional limitations on the use of deadly force,” *Canton* said, is “‘so obvious,’ that failure to [train the officers] could properly be characterized as ‘deliberate indifference’ to constitutional rights.” *Ibid.*

[98] The District Court, tracking *Canton*’s language, instructed the jury that Thompson could prevail

on his “deliberate indifference” claim only if the evidence persuaded the jury on three points. First, Connick “was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused.” Tr. 1099. Second, “the situation involved a difficult choice[,] or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed.” *Ibid.* Third, “the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused’s constitutional rights.” *Ibid.*; Record 1619-1620; see *Canton*, 489 U.S. at 390, and n.10; *Walker v. New York*, 974 F.2d 293, 297-298 (C.A.2 1992).

[99] Petitioners used this formulation of the failure to train standard in pretrial and post-trial submissions, Record 1256-1257, 1662, and in their own proposed jury instruction on deliberate indifference.¹⁸ Nor do petitioners dispute that Connick “kn[e]w to a moral certainty that” his prosecutors would regularly face *Brady* decisions. See *Canton*, 489 U.S. at 390, n. 10.

[100] The jury, furthermore, could reasonably find that *Brady* rights may involve choices so difficult that Connick obviously knew or should have known prosecutors needed more than perfunctory training to make the correct choices. See *Canton*, 489 U.S. at 390, and n. 10. As demonstrated earlier, see *supra*, at 16–18, even at trial prosecutors failed to give an accurate account of their *Brady* obligations. And, again as emphasized earlier, see *supra*, at 18-20, the evidence permitted the jury to conclude that Connick should have known *Brady* training in his office bordered on “zero.” See Tr. of Oral Arg. 41. Moreover, Connick understood that newer prosecutors needed “very clear” guidance and should not be left to grapple with *Brady* on their own. Tr. 834-835. It was thus “obvious” to him, the jury could find, that constitutional rights would be in jeopardy if prosecutors received slim to no *Brady* training.

[101] Based on the evidence presented, the jury could conclude that *Brady* errors by untrained prosecutors would frequently cause deprivations of defendants’ constitutional rights. The jury learned of several *Brady* oversights in Thompson’s trials and heard testimony that Connick’s Office had one of the worst *Brady* records in the country. Tr. 163. Because prosecutors faced considerable pressure to get convictions, *id.* at 317, 341, and were instructed to “turn over what was required by state and federal law, but no more,” Brief for Petitioners 6-7, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.

[102] In sum, despite Justice SCALIA’s protestations to the contrary, *ante*, at 1, 5, the *Brady* violations in Thompson’s prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney’s Office. Thompson demonstrated that no fewer than five prosecutors—the four trial prosecutors and Riehlmann—disregarded his *Brady* rights. He established that they kept from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial.^[12]

C

[103] The Court advances Connick’s argument with greater clarity, but with no greater support. On what basis can one be confident that law schools acquaint students with prosecutors’ unique obligation under *Brady*? Whittaker told the jury he did not recall covering *Brady* in his criminal procedure class in law school. Tr. 335. Dubelier’s *alma mater*, like most other law faculties, does not make criminal procedure a required course.

[104] Connick suggested that the bar examination ensures that new attorneys will know what *Brady* demands. Tr. 835. Research indicates, however, that from 1980 to the present, *Brady* questions have not accounted for even 10% of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination. A person sitting for the Louisiana Bar Examination, moreover, need pass

only five of the exam's nine sections. One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.

[105] The majority's suggestion that lawyers do not need *Brady* training because they "are equipped with the tools to find, interpret, and apply legal principles," *ante*, at 17-18, "blinks reality" and is belied by the facts of this case. See Brief for Former Federal Civil Rights Officials and Prosecutors as *Amici Curiae* 13. Connick himself recognized that his prosecutors, because of their inexperience, were not so equipped. Indeed, "understanding and complying with *Brady* obligations are not easy tasks, and the appropriate way to resolve *Brady* issues is not always self-evident." Brief for Former Federal Civil Rights Officials and Prosecutors as *Amici Curiae* 6. "*Brady* compliance," therefore, "is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted," and "training remains critical." *Id.*, at 3, 7.

[106] The majority further suggests that a prior pattern of similar violations is necessary to show deliberate indifference to defendants' *Brady* rights. See *ante*, at 5-6, and n.4, 11-12. The text of § 1983 contains no such limitation.^[13]

Nor is there any reason to imply such a limitation. A district attorney's deliberate indifference might be shown in several ways short of a prior pattern. This case is one such instance. Connick, who himself had been indicted for suppression of evidence, created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult.

[107] A District Attorney aware of his office's high turnover rate, who recruits prosecutors fresh out of law school and promotes them rapidly through the ranks, bears responsibility for ensuring that on-the-job training takes place. In short, the buck stops with him. As the Court recognizes, "the duty to produce *Brady* evidence to the defense" is "[a]mong prosecutors' unique ethical obligations." *Ante*, at 13. The evidence in this case presents overwhelming support for the conclusion that the Orleans Parish Office slighted its responsibility to the profession and to the State's system of justice by providing no on-the-job *Brady* training. Connick was not "entitled to rely on prosecutors' professional training," *ante*, at 14, for Connick himself should have been the principal insurer of that training.

[Notes on Connick v. Thompson – Audio and Transcript of Oral Argument](#)

Footnotes

1. After Thompson discovered the crime lab report, former assistant district attorney Michael Riehlmann revealed that Deegan had confessed to him in 1994 that he had "intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." Record EX583; see also *id.* at 2677. Deegan apparently had been recently diagnosed with terminal cancer when he made his confession. Following a disciplinary complaint by the district attorney's office, the Supreme Court of Louisiana reprimanded Riehlmann for failing to disclose Deegan's admission earlier. *In re Riehlmann*, 2004–0680 (La.1/19/05), 891 So.2d 1239.
2. Thompson testified in his own defense at the second trial and presented evidence suggesting that another man committed the murder. That man, the government's key witness at the first murder trial, had died in the interval between the first and second trials.
3. Because we conclude that Thompson failed to prove deliberate indifference, we need not reach causation. Thus, we do not address whether the alleged training deficiency, or some other cause, was the "moving force," *Canton v. Harris*, 489 U.S. 378, 389(1989) (quoting *Monell v. New York City Dept. of Social Servs.*,

436 U.S. 658, 694 (1978), and *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)), that “actually caused” the failure to disclose the crime lab report, *Canton*, *supra*, at 391. The same cannot be said for the dissent, however. Affirming the verdict in favor of Thompson would require finding both that he proved deliberate indifference and that he proved causation. Perhaps unsurprisingly, the dissent has not conducted the second step of the analysis, which would require showing that the failure to provide particular training (which the dissent never clearly identifies) “actually caused” the flagrant—and quite possibly intentional—misconduct that occurred in this case. See *post*, at 21 (opinion of GINSBURG, J.) (assuming that, “[h]ad Brady’s importance been brought home to prosecutors,” the violation at issue “surely” would not have occurred). The dissent believes that evidence that the prosecutors allegedly “misapprehen[ded]” Brady proves causation. *Post*, at 27, n.20. Of course, if evidence of a need for training, by itself, were sufficient to prove that the lack of training “actually caused” the violation at issue, no causation requirement would be necessary because every plaintiff who satisfied the deliberate indifference requirement would necessarily satisfy the causation requirement.

4. Thompson also asserts that this case is not about a “single incident” because up to four prosecutors may have been responsible for the nondisclosure of the crime lab report and, according to his allegations, withheld additional evidence in his armed robbery and murder trials. But contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide “notice to the cit[y] and the opportunity to conform to constitutional dictates.” *Canton*, 489 U.S. 395 (O’Connor, J. Concurring in part and dissenting in part). Moreover, no court has ever found any of the other Brady violations that Thompson alleges occurred in his armed robbery and murder trials.
5. The Louisiana State Bar code of Professional Responsibility included a broad understanding of the prosecutor’s duty to disclose in 1985: “With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution’s case or aid the accused.” LSBA, Articles of Incorporation, Art. 16, EC 7-13 (1971); see also ABA Model Rule of Prof. Conduct 3.8(d) (1984) (“The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense....”). In addition to these ethical rules, the Louisiana Code of Criminal Procedure, with which Louisiana prosecutors are no doubt familiar, in 1985 required prosecutors, upon order of the court, to permit inspection of the evidence “favorable to the defendant ... which [is] material and relevant to the issue of guilt or punishment,” La. Code Crim. Proc. Ann. Art. 718 (West 1981) (added 1977), as well as “any results or reports” of “scientific tests or experiments, made in connection with or material to the particular case” if intended for use at trial. *Id.* Art. 719.
6. Thompson also argues that he proved deliberate indifference by “direct evidence of policymaker fault” and so, presumable, did not need to rely on circumstantial evidence at all. Brief for Respondent 37. In support, Thompson contends that Connick created a “culture of indifference” in the district attorney’s office, *id.* at 38, as evidenced by Connick’s own allegedly inadequate understanding of Brady, the office’s unwritten Brady policy that was later incorporated into a 1987 handbook, and an officewide “restrictive discovery policy,” Brief for Respondent 39-40. This argument is essentially an assertion that Connick’s office had an unconstitutional policy or custom. The jury rejected this claim, and Thompson does not challenge that finding.
7. The dissent spends considerable time finding new Brady violations in Thompson’s trials. See *post* at 3-13. How these violations are relevant to the dissent’s own legal analysis is “a mystery.” *Post* at 4, n.2. The dissent

does not list these violations among the “[a]bundant evidence” that it believes supports the jury’s finding that Brady training was obviously necessary. *Post*, at 16. Nor does the dissent quarrel with our conclusion that contemporaneous or subsequent conduct cannot establish a pattern of violations. The only point appears to be to highlight what the dissent sees as sympathetic, even if legally irrelevant, facts. In any event, the dissent’s findings are highly suspect.

8. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978).
9. *Batson v. Kentucky*, 476 U.S. 79 (1986).
10. Connick did not dispute that failure to disclose the swatch and the crime lab report violated Brady. See Tr. 46, 1095. But cf. *Ante*, at 4, 6 (limiting Connick’s concession, as Connick himself did not, to failure to disclose the crime lab report. In JUSTICE SCALIA’s contrary view, “[t]here was probably no Brady violated at all,” or if there was any violation of Thompson’s rights, it “was surely on the very frontier of our Brady jurisprudence,” such that “Connick could not possibly have been on notice” of the need to train. *Ante*, at 7. Connick’s counsel, however, saw the matter differently. “[A]ny reasonable prosecutor would have recognized blood evidence as Brady material,” he said, indeed “the proper response” was obvious to all. Record 1663, 1665.
11. The Louisiana Court of Appeal concluded, and Connick does not dispute, that Thompson “would have testified in the absence of the attempted armed robbery conviction.” *State v. Thompson*, 2002-0361, p.7 (7/17/02), 825, So.2d 552, 556. But cf. *ante*, at 1, 3 (Thompson “elected” not to testify).
12. The jury could draw a direct, causal connection between Connick’s deliberate indifference, prosecutors’ misapprehension of Brady, and the Brady violations in Thompson’s case. See, e.g., *supra*, at 17 (prosecutors’ misunderstandings of Brady “were in large part responsible for the gross disregard of Brady rights Thompson experienced”); *supra*, at 18 (“The jury could attribute the violations of Thompson’s rights directly to prosecutors’ misapprehension of Brady.”); *supra*, at 17-18 (Williams did not believe Brady required disclosure of impeachment evidence and did not believe he had any obligation to turn over the impeaching “close-cut hair” police reports); *supra*, at 18 (At the time of the armed robbery trial, Williams reported that the results of the blood test on the swatch were “inconclusive”); *ibid.* (“[Williams] testified ... that the lab report was not Brady material”); *supra*, at 19-20 (Dubelier and Williams, the lead prosecutors in Thompson’s trials, “learned the prosecutorial craft in Connick’s Office,” “did not recall any Brady training,” demonstrated “a woefully deficient understanding of Brady,” and received no supervision during Thompson’s trials); *supra*, at 21 (“Had Brady’s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.”); *supra*, at 23 (Connick did not want to hold prosecutors accountable for Brady compliance because he felt that doing so would make his job more difficult); *supra*, at 23 (Connick never disciplined a single prosecutor for violating Brady); *supra*, at 27 (“Because prosecutors faced considerable pressure to get convictions, and were instructed to turn over what was required by state and federal law, but no more, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.” (citations and internal quotation marks omitted)). But cf. *ante*, at 7, n.5 (“The dissent believes that evidence that the prosecutors allegedly ‘misapprehen[ded]’ Brady proves causation.”). I note, furthermore, that the jury received clear instructions on the causation element, and neither Connick nor the majority disputes the accuracy or adequacy of the instruction that, to prevail, Thompson must prove “that more likely than not the Brady material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of Brady evidence.” Tr. 1100. The jury was properly instructed that “[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor.” *Id.*, at 1098. Under

that instruction, in finding Connick liable, the jury necessarily rejected the argument—echoed by Justice Scalia—that Deegan “was the only bad guy.” *Id.*, at 1074. See also *id.* at 1057; *ante*, at 5. If indeed Thompson had shown simply and only that Deegan deliberately withheld evidence, I would agree that there would be no basis for liability. But, as reams of evidence showed, disregard of Brady occurred, over and over again in Orleans Parish, before, during, and after Thompson’s 1985 robbery and murder trials.

13. When Congress sought to render a claim for relief contingent on showing a pattern or practice, it did so expressly. See, e.g. 42 U.S.C. § 14141(a) (“It shall be unlawful for any governmental authority ... to engage in a pattern or practice of conduct by law enforcement officers ... that deprives persons of rights ... protected by the Constitution”); 15 U.S.C. § 6104(a) (“Any person adversely affected by any pattern or practice of telemarketing ... may ... bring a civil action”) 49 U.S.C. § 306(e) (authorizing the Attorney General to bring a civil action when he “has reason to believe that a person is engaged in a pattern or practice [of] violating this section”). See also 47 U.S.C. § 532(e)(2)-(3) (authorizing the Federal Communications Commission to establish additional rules when “the Commission finds that the prior adjudicated violations of this section constitute a pattern or practice of violations”).

V. LIABILITY OF STATE GOVERNMENT ENTITIES

EX PARTE YOUNG, 209 U.S. 123 (1908)

The legislature of the State of Minnesota enacted a law reducing the rates which could be charged by railroads and providing criminal penalties for violation of the act. Shareholders of nine railroads filed suit in the United States District Court for the District of Minnesota which alleged, among other things, that the rate reductions unconstitutionally deprived them of property without due process of law and in violation of the equal protection of the laws. The district court issued a preliminary injunction against Minnesota Attorney General Young, prohibiting him "from taking or instituting any action or proceeding to enforce the penalties and remedies specified within the act ... or to compel obedience to that act, or compliance therewith, or any part thereof." 209 U.S. at 132.

The day after the preliminary injunction was issued, Attorney General Young, in violation of the injunction, obtained a writ of mandamus in state court that commanded a railroad company to comply with the lower rates set in the new legislation. The district court then held Young to be in contempt. Young applied to the United States Supreme Court for a writ of habeas corpus.

Mr. Justice Peckham delivered the opinion of the Court.

[1] The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide.

[2] We conclude that the Circuit Court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.

[3] This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the State. This objection is to be considered with reference to the Eleventh and Fourteenth Amendments to the Federal Constitution. The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another State or citizens or subjects of any foreign State. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

[4] The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter Amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans v. Louisiana*, 134 U.S. 1. It was adopted after the decision of this court in *Chisholm v. Georgia* (1793), 2 Dall. 419 where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn v. United States Bank* (1824), 9 Wheat. 738, 846, 857, which held that the Amendment

applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia v. Madrazo* (1828), 26 U.S. 110, 122, 123, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn v. United States Bank, supra*, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the state government), the State might be considered as the party on the record (page 123), and therefore the suit could not be maintained.

* * * * *

[5] The cases upon the subject were reviewed, and it was held, *In re Ayers*, 123 U.S. 443, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood v. Southern, supra*.

[6] A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

* * * * *

[7] It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

[8] The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. *See In re Ayers, supra*, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts.

* * * * *

Mr. Justice Harlan, dissenting.

* * * * *

[9] Let it be observed that the suit instituted by Perkins and Shepard in the Circuit Court of the United States was, as to the defendant Young, one against him as, and only because he was, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity as Attorney General. And the manifest, indeed the avowed and admitted, object of seeking such relief was to tie the hands of the State

so that it could not in any manner or by any mode of proceeding, in its own courts, test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the Federal court was one, in legal effect, against the State—as much so as if the State had been formally named on the record as a party—and therefore it was a suit to which, under the Amendment, so far as the State or its Attorney General was concerned, the judicial power of the United States did not and could not extend. If this proposition be sound it will follow—indeed, it is conceded that if, so far as relief is sought against the Attorney General of Minnesota, this be a suit against the State—then the order of the Federal court enjoining that officer from taking any action, suit, step or proceeding to compel the railway company to obey the Minnesota statute was beyond the jurisdiction of that court and wholly void; in which case, that officer was at liberty to proceed in the discharge of his official duties as defined by the laws of the State, and the order adjudging him to be in contempt for bringing the mandamus proceeding in the state court was a nullity.

* * * * *

Notes on *Ex Parte Young*

1. How does the Court in [Ex Parte Young](#) resolve the question of whether the State's Eleventh Amendment immunity bars an action in federal court alleging that the State violated the Fourteenth Amendment? Under the *Young* rationale, would Attorney General Young's conduct constitute state action under the Fourteenth Amendment? Action "under color of law" within the meaning of Section 1983?
2. Did Attorney General Young have any personal interest in the subject matter of the suit? Could the State of Minnesota evade the injunction by replacing Young with a new Attorney General? See *Fed.R. Civ.P.25(d)*.
3. How does the Court distinguish *Young* from [Governor of Georgia v. Madrazo](#), 26 U.S. (1 Pet.) 110 (1828) and [In re Ayers](#), 123 U.S. 443 (1887)? What factors are relevant to determine whether a suit against a state official is in fact a suit against the State barred by the Eleventh Amendment?
4. Would the holding of the Court in *Young* have been different if the State of Minnesota rather than Attorney General Young had been named as the defendant? Compare [State of Alabama v. Pugh](#), 438 U.S. 781 (1978) with [Hutto v. Finney](#), 437 U.S. 678, 692-93 (1978). See [Seminole Tribe of Florida v. Florida](#), 517 U.S. 44, 58 (1996) ("[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.... The Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury'; it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'").
5. In [Pennhurst State School & Hosp. v. Halderman](#), 465 U.S. 89 (1984), the Court held that the Eleventh Amendment bars a federal court action for prospective injunctive relief against a state official alleged to have violated state, as opposed to federal law.

[T]he injunction in *Young* was justified ... on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character. Our decisions have repeatedly emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States.... This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law. In such a case, the entire basis for the doctrine of *Young* ... disappears. A federal court's grant of relief against state officials on the basis of state law, whether retroactive or prospective, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* ... [is] inapplicable in a suit against state officials on the basis of state law.

Halderman, 465 U.S. at 105-106.

The Court rejected the court of appeals' ruling that it was permitted to issue an injunction against state officials to restrain violations of state law under the federal court's pendent (now supplemental) jurisdiction:

[P]endent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all "cases" arising under federal law or between diverse parties. The Eleventh Amendment should not be construed to apply with less force to this implied form of jurisdiction than it does to the explicitly granted power to hear federal claims.

Halderman, 465 U.S. at 121.

6. While the text of the Eleventh Amendment does not extend to suits against a State by a citizen of that State, a majority of the Supreme Court has construed the amendment to apply to such actions:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890) has two parts: first, that each state is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Id.* at 13 (emphasis deleted), quoting *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority*, *supra*, at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). For over a century, we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans*, *supra*, at 15.

[*Seminole Tribe of Fla. v. Florida*](#), 517 U.S. 44, 54 (1996). For a competing view that a suit against a State by a citizen of that State is not barred by the Eleventh Amendment, see [*Kimel v. Florida Board of Regents*](#), 528 U.S. 62, 97-99 (2000) (Stevens, J. dissenting); *Seminole Tribe*, 517 U.S. at 101-168 (Souter, J. dissenting); [*Atascadero State Hospital v. Scanlon*](#), 473 U.S. 234, 247-302 (Brennan, J. dissenting).

EDELMAN v. JORDAN, 415 U.S. 651 (1974)

Mr. Justice Rehnquist delivered the opinion of the Court.

[1] Respondent John Jordan filed a complaint in the United States District Court for the Northern District of Illinois, individually and as a representative of a class, seeking declaratory and injunctive relief against two former directors of the Illinois Department of Public Aid, the director of the Cook County Department of Public Aid, and the comptroller of Cook County. Respondent alleged that these state officials were administering the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and with the Fourteenth Amendment to the Constitution.

[2] AABD is one of the categorical aid programs administered by the Illinois Department of Public Aid pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., c. 23, §§ 3-1 through 3-12 (1973). Under the Social Security Act, the program is funded by the State and the Federal Governments. 42 U.S.C. §§ 1381-1385. The Department of Health, Education, and Welfare (HEW), which administers these payments for the Federal Government, issued regulations prescribing maximum permissible time standards within which States participating in the program had to process AABD applications. Those regulations, originally issued in 1968, required, at the time of the institution of this suit, that eligibility determinations must be made by the States within 30 days of receipt of applications for aid to the aged and blind, and within 45 days of receipt of applications for aid to the disabled. For those persons found eligible, the assistance check was required to be received by them within the applicable time period. 45 CFR § 206.10(a)(3).

[3] During the period in which the federal regulations went into effect, Illinois public aid officials were administering the benefits pursuant to their own regulations as provided in the Categorical Assistance Manual of the Illinois Department of Public Aid. Respondent's complaint charged that the Illinois defendants, operating under those regulations, were improperly authorizing grants to commence only with the month in which an application was approved and not including prior eligibility months for which an applicant was entitled to aid under federal law. The complaint also alleged that the Illinois defendants were not processing the applications within the applicable time requirements of the federal regulations; specifically, respondent alleged that his own application for disability benefits was not acted on by the Illinois Department of Public Aid for almost four months. Such actions of the Illinois officials were alleged to violate federal law and deny the equal protection of the laws. Respondent's prayer requested declaratory and injunctive relief, and specifically requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld."

[4] In its judgment of March 15, 1972, the District Court declared § 4004 of the Illinois Manual to be invalid insofar as it was inconsistent with the federal regulations found in 45 CFR § 206.10(a)(3), and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. The District Court, in paragraph 5 of its judgment, also ordered the state officials to "release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 [the date of the federal regulations] and April 16, 1971 [the date of the preliminary injunction issued by the District Court] and were determined eligible."

[5] On appeal to the United States Court of Appeals for the Seventh Circuit, the Illinois officials contended, *inter alia*, that the Eleventh Amendment barred the award of retroactive benefits, that the judgment of inconsistency between the federal regulations and the provisions of the Illinois Categorical Assistance Manual could be given prospective effect only, and that the federal regulations in question were inconsistent with the Social Security Act itself. The Court of Appeals rejected these contentions and affirmed the judgment of the District Court. *Jordan v. Weaver*, 472 F.2d 985 (1973). Because of an apparent conflict on the Eleventh Amendment issue with the decision of the Court of Appeals for the Second Circuit in

Rothstein v. Wyman, 467 F.2d 226 (1972), *cert. denied*, 411 U.S. 921 (1973), we granted the petition for certiorari filed by petitioner Joel Edelman, who is the present Director of the Illinois Department of Public Aid, and successor to the former directors sued below. 412 U.S. 937 (1973). The petition for certiorari raised the same contentions urged by the petitioner in the Court of Appeals. Because we believe the Court of Appeals erred in its disposition of the Eleventh Amendment claim, we reverse that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid by the Illinois state officials.

[6] The historical basis of the Eleventh Amendment has been oft stated, and it represents one of the more dramatic examples of this Court's effort to derive meaning from the document given to the Nation by the Framers nearly 200 years ago. A leading historian of the Court tells us:

"The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (rev. ed. 1937).

[7] Despite such disclaimers,¹¹ the very first suit entered in this Court at its February Term in 1791 was brought against the State of Maryland by a firm of Dutch bankers as creditors. *Vanstophorst v. Maryland*, see 2 Dall. 401 and Warren, *supra*, at 91 n.1. The subsequent year brought the institution of additional suits against other States, and caused considerable alarm and consternation in the country.

[8] The issue was squarely presented to the Court in a suit brought at the August 1792 Term by two citizens of South Carolina, executors of a British creditor, against the State of Georgia. After a year's postponement for preparation on the part of the State of Georgia, the Court, after argument, rendered in February 1793, its shortlived decision in *Chisholm v. Georgia*, 2 Dall. 419. The decision in that case, that a State was liable to suit by a citizen of another State or of a foreign country, literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams. Unchanged since then, the Amendment provides:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[9] While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944); *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973). It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court said:

"When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464.

Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Great Northern Life Insurance Co. v. Read*, *supra*; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946).

[10] The Court of Appeals in this case, while recognizing that the *Hans* line of cases permitted the State to raise the Eleventh Amendment as a defense to suit by its own citizens, nevertheless concluded that the Amendment did not bar the award of retroactive payments of the statutory benefits found to have been

wrongfully withheld. The Court of Appeals held that the above-cited cases, when read in light of this Court's landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), do not preclude the grant of such a monetary award in the nature of equitable restitution.

[11] Petitioner concedes that *Ex parte Young, supra*, is no bar to that part of the District Court's judgment that prospectively enjoined petitioner's predecessors from failing to process applications within the time limits established by the federal regulations. Petitioner argues, however, that *Ex parte Young* does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenues of a State, absent consent or waiver by the State of its Eleventh Amendment immunity, and that therefore the award of retroactive benefits by the District Court was improper.

[12] *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.

[13] But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman. Addressing himself to a similar situation in *Rothstein v. Wyman*, 467 F.2d 226 (CA2 1972), *cert. denied*, 411 U.S. 921 (1973), Judge McGowan observed for the court:

"It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state....

"It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." 467 F.2d at 236-237 (footnotes omitted).

[14] We agree with Judge McGowan's observations. The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself, *Ford Motor Co. v. Department of Treasury, supra*, than it does the prospective injunctive relief awarded in *Ex parte Young*.

[15] The Court of Appeals, in upholding the award in this case, held that it was permissible because it was in the form of "equitable restitution" instead of damages, and therefore capable of being tailored in such a way as to minimize disruptions of the state program of categorical assistance. But we must judge the award actually made in this case, and not one which might have been differently tailored in a different case, and we must judge it in the context of the important constitutional principle embodied in the Eleventh Amendment.^[2]

[16] We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex parte Young* hewed to no such line. Its citation of *Hagood v. Southern*, 117 U.S. 52 (1886), and *In re Ayers*, 123 U.S. 443 (1887), which were both actions against state officers for specific performance of a contract to which the State was a party, demonstrate that equitable relief may be barred by the Eleventh Amendment.

[17] As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

[18] But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

* * * * *

[19] The Court of Appeals held in the alternative that even if the Eleventh Amendment be deemed a bar to the retroactive relief awarded respondent in this case, the State of Illinois had waived its Eleventh Amendment immunity and consented to the bringing of such a suit by participating in the federal AABD program. The Court of Appeals relied upon our holdings in *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), and *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and on the dissenting opinion of Judge Bright in *Employees v. Department of Public Health and Welfare*, 452 F.2d 820, 827 (CA8 1971). While the holding in the latter case was ultimately affirmed by this Court in 411 U.S. 279 (1973), we do not think that the answer to the waiver question turns on the distinction between *Parden, supra*, and *Employees, supra*. Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. Similarly, *Petty v. Tennessee-Missouri Bridge Comm'n, supra*, involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.

[20] But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well.

* * * * *

[21] Our Brother Marshall argues in dissent, and the Court of Appeals held, that although the Social

Security Act itself does not create a private cause of action, the cause of action created by 42 U.S.C. § 1983, coupled with the enactment of the AABD program, and the issuance by HEW of regulations which require the States to make corrective payments after successful “fair hearings” and provide for federal matching funds to satisfy federal court orders of retroactive payments, indicate that Congress intended a cause of action for public aid recipients such as respondent. It is, of course, true that *Rosado v. Wyman*, 397 U.S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State’s Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury*, *supra*.

[22] Respondent urges that since the various Illinois officials sued in the District Court failed to raise the Eleventh Amendment as a defense to the relief sought by respondent, petitioner is therefore barred [3] from raising the Eleventh Amendment defense in the Court of Appeals or in this Court. The Court of Appeals apparently felt the defense was properly presented, and dealt with it on the merits. We approve of this resolution, since it has been well settled since the decision in *Ford Motor Co. v. Department of Treasury*, *supra*, that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court:

* * * * *

[23] For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld. The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

So ordered.

* * * * *

Mr. Justice Brennan, dissenting.

[24] This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Illinois may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to respondent’s claim for retroactive AABD payments. In my view Illinois may not assert sovereign immunity for the reason I expressed in dissent in *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 298 (1973): the States surrendered that immunity in Hamilton’s words, “in the plan of the Convention,” that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964). Congressional authority to enact the Social Security Act, of which AABD is a part, former 42 U.S.C. §§ 1381-1385 (now replaced by similar provisions in 42 U.S.C. § 801-804 (1970 ed., Supp. II)), is to be found in Art. I, § 8, cl. 1, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that “because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver,” 411 U.S. at 300, and thus have no occasion to inquire whether or not

Congress authorized an action for AABD retroactive benefits, or whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which sustained judgments ordering retroactive payments.

[25] I would affirm the judgment of the Court of Appeals.

Mr. Justice Marshall, with whom Mr. Justice Blackmun joins, dissenting.

[26] In agreeing to comply with the requirements of the Social Security Act and HEW regulations, I believe that Illinois has also agreed to subject itself to suit in the federal courts to enforce these obligations. I recognize, of course, that the Social Security Act does not itself provide for a cause of action to enforce its obligations. As the Court points out, the only sanction expressly provided in the Act for a participating State's failure to comply with federal requirements is the cutoff of federal funding by the Secretary of HEW. Former 42 U.S.C. § 1384 (now 42 U.S.C. § 804 (1970 ed., Supp. II)).

[27] But a cause of action is clearly provided by 42 U.S.C. § 1983, which in terms authorizes suits to redress deprivations of rights secured by the "laws" of the United States. And we have already rejected the argument that Congress intended the funding cutoff to be the sole remedy for noncompliance with federal requirements. In *Rosado v. Wyman*, 397 U.S. 397, 420-423 (1970), we held that suits in federal court under § 1983 were proper to enforce the provisions of the Social Security Act against participating States. Mr. Justice Harlan, writing for the Court, examined the legislative history and found "not the slightest indication" that Congress intended to prohibit suits in federal court to enforce compliance with federal standards. *Id.* at 422.

[28] Absent any remedy which may act with retroactive effect, state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate that assistance be paid with reasonable promptness to all eligible individuals. This is not idle speculation without basis in practical experience. In this very case, for example, Illinois officials have knowingly violated since 1968 federal regulations on the strength of an argument as to its invalidity which even the majority deems unworthy of discussion. *Ante*, at 659-660, n.8. Without a retroactive-payment remedy, we are indeed faced with "the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." *Jordan v. Weaver*, 472 F.2d 985, 995 (CA7 1972). Like the Court of Appeals, I cannot believe that Congress could possibly have intended any such result.



[Edelman v. Jordan – Audio and Transcript of Oral Argument](#)

Footnotes

1. While the debates of the Constitutional Convention themselves do not disclose a discussion of the question, the prevailing view at the time of the ratification of the Constitution was stated by various of the Framers in the writings and debates of the period. Examples of these views have been assembled by Mr. Chief Justice Hughes:

"... Madison, in the Virginia Convention, answering objections to the ratification of the Constitution, clearly stated his view as to the purpose and effect of the provision conferring jurisdiction over controversies between States of the Union and foreign States. That purpose was suitably to provide

for adjudication in such cases if consent should be given but not otherwise. Madison said: 'The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made.' 3 Elliot's Debates, 533. "Marshall, in the same Convention, expressed a similar view. Replying to an objection as to the admissibility of a suit by a foreign state, Marshall said: 'He objects, in the next place, to its jurisdiction in controversies between a state and a foreign state. Suppose, says he, in such a suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce.' 3 Elliot's Debates, 557. "Hamilton, in *The Federalist*, No. 81, made the following emphatic statement of the general principle of immunity: 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.'" *Monaco v. Mississippi*, 292 U.S. 313, 323-325 (1934) (footnotes omitted). [↗](#)

2. It may be true, as stated by our Brother Douglas in dissent, that "most welfare decisions by federal courts have a financial impact on the States." *Post*, at 680-681. But we cannot agree that such a financial impact is the same where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments as was made in the instant case. It is not necessarily true that "whether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same." *Post*, at 682. This argument neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system. As stated by Judge McGowan in *Rothstein v. Wyman*, 467 F.2d 226, 235 (CA2 1972):

"The second federal policy which might arguably be furthered by retroactive payments is the fundamental goal of congressional welfare legislation—the satisfaction of the ascertained needs of impoverished persons. Federal standards are designed to ensure that those needs are equitably met; and there may perhaps be cases in which the prompt payment of funds wrongfully withheld will

serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.” [↓](#)

3. Respondent urges that the State of Illinois has abolished its common-law sovereign immunity in its state courts, and appears to argue that suit in a federal court against the State may thus be maintained. Brief for Respondent 23. Petitioner contends that sovereign immunity has not been abolished in Illinois as to this type of case. Brief for Petitioner 31-36. Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts. *Chandler v. Dix*, 194 U.S. 590, 591-592 (1904). [↓](#)

Notes on *Edelman v. Jordan*

1. Was the State of Illinois named as a defendant in [Edelman](#)? Why, then, did the Court find the injunction awarding benefits wrongfully withheld prior to April 16, 1981 violated the Eleventh Amendment? How does the Court distinguish the permanent injunction requiring compliance with the federal regulations concerning processing and paying benefits?
2. May state officials be sued in federal court for retroactive relief if the judgment will not be paid out of the state treasury? In [Regents of the University of California v. Doe](#), 519 U.S. 425 (1997), plaintiff sued the Regents of the University of California in federal court for damages for breach of an agreement to hire him as a mathematical physicist at a laboratory that the University operated under a contract with the federal government. The Court of Appeals for the Ninth Circuit held that the action was not barred by the Eleventh Amendment because, under a separate agreement with the University, the United States Department of Energy would pay any judgment issued against the University. The United States Supreme Court reversed, finding the suit precluded by the Eleventh Amendment:

[W]ith respect to the underlying Eleventh Amendment question, it is the entity’s potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant. Surely, if the sovereign State of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be “one of the United States.”

Accordingly, we reject respondent’s principal contention—that the Eleventh Amendment does not apply to this litigation because any award of damages would be paid by the Department of Energy, and therefore have no impact upon the treasury of the State of California. The Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.

Regents of the University of California, 519 U.S. at 431.

3. The Supreme Court has recently rejected efforts to avoid the Eleventh Amendment bar through the *Ex Parte Young* fiction even where prospective relief is sought.
 - a. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Tribe sued the State of Florida and its Governor in federal court under the Indian Gaming Regulatory Act, 25 U.S.C. § 2702, seeking to order the defendants to negotiate a compact that would permit the Tribe to operate gaming activities. Under the Act, Indian tribes may conduct gaming activities only in accordance with a compact

between the tribe and the State in which the gaming is to occur. The Act requires the State to negotiate in good faith with the tribe. Should the State fail to bargain, the tribe may sue the State in federal court to compel performance of the duty to negotiate. If the court finds the State breached its duty, the only remedy prescribed by Section 2710(d)(7) of the Act is an order directing the State and tribe to enter into a compact within 60 days. If the parties fail to conclude a compact by the 60 day deadline, the Act requires each party to submit a proposed compact to a mediator, who then chooses the compact that best conforms to the Act. If the State rejects the compact chosen by the mediator, the lone sanction is that the mediator notify the Secretary of the Interior, who then will promulgate regulations regulating gaming on the tribal lands. While acknowledging that Congress intended to abrogate the States' Eleventh Amendment immunity when it enacted the Indian Gaming Regulatory Act, the Supreme Court held that Congress lacked the power under the Indian Commerce Clause to abrogate that immunity. The Court further held that the Tribe could not evade the Eleventh Amendment by seeking prospective equitable relief in a suit against the Governor:

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex Parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*.

Here, Congress intended §2710(d)(3) to be enforced against the State in an action brought under §2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3).

If § 2710(d)(3) could be enforced in a suit under *Ex Parte Young*, § 2710(d)(7) would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex Parte Young*. (citation omitted)

Here, of course, we have found that Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex Parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3).

Seminole Tribe, 517 U.S. at 74-76.

- b. The scope of *Ex Parte Young* was further cabined in [Idaho v. Coeur d'Alene Tribe of Idaho](#), 521 U.S.

261 (1997). The case arose out of a suit in federal court filed by the Coeur d'Alene Tribe to establish the Tribe's claim to submerged lands within the boundaries of the Coeur d'Alene Reservation. In an effort to avoid the bar of the Eleventh Amendment, plaintiffs (a) named as defendants several state officials in their individual capacities; and (b) did not seek damages but instead sought a declaratory judgment establishing the Tribe's entitlement to the exclusive use and occupancy of the submerged lands as well as an injunction prohibiting defendants from taking any action violative of the Tribe's rights of exclusive use and occupancy. Despite the Tribe's effort to mold the case to the requirements of *Ex Parte Young*, the Court, in a 5-4 decision, held the suit barred by the Eleventh Amendment:

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of caption and pleadings.

[I]f the Tribe were to prevail, Idaho's sovereign interest in its land and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable.

Id. at 270, 287.

Justice Kennedy, joined by Chief Justice Rehnquist, opined that avoiding Eleventh Amendment immunity by recourse to suing state officials for prospective relief should be limited generally to "where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law." *Id.* at 270. Where a remedy is available in a state forum, "[t]he *Young* exception may not be applicable if the suit would 'upset the balance of federal and state interests that it embodies.'" *Id.* at 277, quoting *Papasan v. Allain*, 478 U.S. 265, 277 (1986). In determining whether the plaintiff may successfully surmount Eleventh Amendment immunity by relying upon the *Young* fiction, the court must engage in a case-by-case "careful balancing and accommodation of state interests [C]ourts should consider whether there are 'special factors counselling hesitation' before allowing a suit against a state official for prospective relief to proceed in federal court where a state forum is available." *Id.* at 278-80.

A majority of the Court, however, rejected Justice Kennedy's approach. In a concurring opinion joined by Justices Scalia and Thomas, Justice O'Connor disavowed Justice Kennedy's attempt to confine *Ex Parte Young* to instances where no relief is available in state court; instead, Justice O'Connor noted, "[n]ot only do our early *Young* cases fail to rely on the absence of a state forum as a basis for jurisdiction, but we also permitted federal actions to proceed even though a state forum was open to hear the plaintiff's claims." *Id.* at 292 (O'Connor, J., concurring). Justice O'Connor also repudiated Justice Kennedy's proposed balancing test:

The principal opinion characterizes our modern *Young* cases as

fitting this case-by-case model. While it is true that the Court has decided a series of cases on the scope of the *Young* doctrine, these cases do not reflect the principal opinion's approach. Rather, they establish only that a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal law*, and where the relief sought is *prospective* rather than *retrospective*.

Id. at 294 (O'Connor, J., concurring). In a dissenting opinion joined by Justices Stevens, Ginsburg and Breyer, Justice Souter likewise countered Justice Kennedy's construction of the *Ex Parte Young* doctrine:

In *Seminole Tribe*, the Court declared *Ex Parte Young* inapplicable to the case before it, having inferred that Congress meant to leave no such avenue of relief open to those claiming federal rights under the statute then under consideration.... When Congress has not so displaced the *Young* doctrine, a federal court has jurisdiction in an individual's action against state officers so long as two conditions are met. The plaintiff must allege that the officers are acting in violation of federal law, and must seek prospective relief to address an ongoing violation, not compensation or other retrospective relief for violations past. The Tribe's claim satisfies each condition.

Id. at 298-99 (Souter, J., dissenting) (citation omitted).

Do either *Seminole Tribe* or *Coeur d'Alene* restrict the availability of prospective relief under Section 1983 to redress violations of federal constitutional rights? Federal statutory rights?

4. The *Edelman* Court's finding that the suit was against the State for purposes of the Eleventh Amendment did not end the inquiry. Rather, the Court was confronted with the issue it had avoided in *Ex Parte Young*—the clash between the Eleventh and Fourteenth Amendments. Did the Court's holding that Section 1983 did not abrogate the Eleventh Amendment immunity rest on lack of congressional power to waive the immunity? Legislative intent?
5. Does *Edelman* hold that the Eleventh Amendment bars recovery of damages from state officials who violate the Constitution? In [Kentucky v. Graham](#), 473 U.S. 159 (1985), the Court differentiated between a Section 1983 action against a state official in his personal (or individual) capacity, and a suit against a state officer in his official capacity:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 237-238 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, 469 U.S., at 471-472. It is *not* a suit against the official in his personal capacity, for the real party in interest is the entity. Thus, while an award of damages against an officer in his personal capacity can be executed only against the official's personal assets, a plaintiff

seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. (citation omitted)

On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a “moving force” behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell, supra*, at 694); thus, in an official-capacity suit the entity’s “policy or custom” must have played a part in the violation of federal law. *Monell, supra*; *Oklahoma City v. Tuttle*, 471 U.S. 808, 817-818 (1985); *id.* at 827-828 (Brennan, J., concurring in judgment). (citation omitted) When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (same); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (same). In an official-capacity action, these defenses are unavailable. *Owen v. City of Independence*, 445 U.S. 622 (1980); see also *Brandon v. Holt*, 469 U.S. 464 (1985). (citation omitted) The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions. (citation omitted)

Graham, 473 U.S. at 165-67. See also [Brandon v. Holt](#), 469 U.S. 464 (1985) (action against municipal official in his “official capacity” is an action against the entity).

What would be the likely outcome had the *Edelman* plaintiffs sued the directors of the Illinois Department of Public Aid in their personal capacity for retroactive benefits wrongly withheld? Does Section 1983 afford any remedy for past deprivations of constitutional rights that are inflicted by officials of state government pursuant to the policy or custom of the state?

6. Assuming, as Chief Justice Marshall suggested in [Marbury v. Madison](#), that the true existence of a right depends upon the availability of a remedy for violation of the right, what “rights” are protected from invasion by the States under the Fourteenth Amendment?
7. What is the basis for Justice Brennan’s dissent? Even if his interpretation of the scope of the Eleventh Amendment is incorrect, does he nevertheless suggest another avenue for holding a State liable for damages under Section 1983?

***FITZPATRICK v. BITZER*, 427 U.S. 445 (1976)**

Mr. Justice Rehnquist delivered the opinion of the Court.

[1] In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of “race, color, religion, sex, or national origin.” The principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, *Edelman v. Jordan*, 415 U.S. 651 (1974), Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment. The Court of Appeals for the Second Circuit held that the effect of our decision in *Edelman* was to foreclose Congress’ power. We granted certiorari to resolve this important constitutional question. 423 U.S. 1031 (1975). We reverse.

I

[2] Petitioners in No. 75-251 sued in the United States District Court for the District of Connecticut on behalf of all present and retired male employees of the State of Connecticut. Their amended complaint asserted, inter alia, that certain provisions in the State’s statutory retirement benefit plan discriminated against them because of their sex, and therefore contravened Title VII of the 1964 Act, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. IV). Title VII, which originally did not include state and local governments, had in the interim been amended to bring the States within its purview.

[3] The District Court held that the Connecticut State Employees Retirement Act violated Title VII’s prohibition against sex-based employment discrimination. 390 F. Supp. 278, 285-288 (1974).^[1] It entered prospective injunctive relief in petitioners’ favor against respondent state officials.^[2] Petitioners also sought an award of retroactive retirement benefits as compensation for losses caused by the State’s discrimination, as well as “a reasonable attorney’s fee as part of the costs.” But the District Court held that both would constitute recovery of money damages from the State’s treasury, and were therefore precluded by the Eleventh Amendment and by this Court’s decision in *Edelman v. Jordan*, *supra*.

[4] On petitioners’ appeal, the Court of Appeals affirmed in part and reversed in part. It agreed with the District Court that the action, “insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment.” 519 F.2d 559, 565 (1975). The Court of Appeals also found that under the 1972 Amendments to Title VII, “Congress intended to authorize a private suit for backpay by state employees against the state.” *Id.* at 568. Notwithstanding this statutory authority, the Court of Appeals affirmed the District Court and held that under *Edelman* a “private federal action for retroactive damages” is not a “constitutionally permissible method of enforcing Fourteenth Amendment rights.” 519 F.2d at 569. It reversed the District Court and remanded as to attorneys’ fees, however, reasoning that such an award would have only an “ancillary effect” on the state treasury of the kind permitted under *Edelman*, *supra*, at 667-668. 519 F.2d at 571. The petition filed here by the state employees in No. 75-251 contends that Congress does possess the constitutional power under § 5 of the Fourteenth Amendment to authorize their Title VII damages action against the State. The state officials’ cross-petition, No. 75-283, argues that under *Edelman* the Eleventh Amendment bars any award of attorneys’ fees here because it would be paid out of the state treasury.

[5] In *Edelman* this Court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness, violated the Eleventh Amendment. Such an award was found to be indistinguishable from a monetary award against the State itself which had been prohibited in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). It was therefore controlled by that case rather than by *Ex parte Young*, 209 U.S. 123 (1908), which permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment.

[6] *Edelman* went on to hold that the plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), and *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the Eleventh Amendment. We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant. The provisions of the Social Security Act relied upon by plaintiffs were held by their terms not to "authorize suit against anyone," 415 U.S. at 674, and they, too, were incapable of supplying the predicate for a claim of waiver on the part of the State.

[7] All parties in the instant litigation agree with the Court of Appeals that the suit for retroactive benefits by the petitioners is in fact indistinguishable from that sought to be maintained in *Edelman*, since what is sought here is a damages award payable to a private party from the state treasury.^[3]

[8] Our analysis begins where *Edelman* ended, for in this Title VII case the "threshold fact of congressional authorization," *id.* at 672, to sue the State as employer is clearly present. This is, of course, the prerequisite found present in *Parden* and wanting in *Employees*. We are aware of the factual differences between the type of state activity involved in *Parden* and that involved in the present case, but we do not think that difference is material for our purposes. The congressional authorization involved in *Parden* was based on the power of Congress under the Commerce Clause; here, however, the Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment.

[9] As ratified by the States after the Civil War, that Amendment quite clearly contemplates limitations on their authority. In relevant part, it provides:

"Section 1 ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[10] The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress' power to "enforce" them "by appropriate legislation."

[11] The impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States, and the reach of congressional power under § 5, were examined at length by this Court in *Ex parte Virginia*, 100 U.S. 339 (1880). A state judge had been arrested and indicted under a federal criminal statute prohibiting the exclusion on the basis of race of any citizen from service as a juror in a state court. The judge claimed that the statute was beyond Congress' power to enact under either the Thirteenth or the

Fourteenth Amendment. The Court first observed that these Amendments “were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.” *Id.* at 345. It then addressed the relationship between the language of § 5 and the substantive provisions of the Fourteenth Amendment:

“The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

* * * * *

“The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State. But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.” *Id.* at 346-348.

[12] *Ex parte Virginia*’s early recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Mitchum v. Foster*, 407 U.S. 225, 238-239 (1972).

[13] There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress’ powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States’ ratification of those Amendments, a phenomenon aptly described as a “carv[ing] out” in *Ex parte Virginia*, *supra*, at 346.

[14] It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce “by appropriate legislation” the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.^[4] See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

III

[15] In No. 75-283, the state officials contest the Court of Appeals' conclusion that an award of attorneys' fees in this case would under *Edelman* have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). 415 U.S. at 667-668. We need not address this question, since, given the express congressional authority for such an award in a case brought under Title VII, it follows necessarily from our holding in No. 75-251 that Congress' exercise of power in this respect is also not barred by the Eleventh Amendment. We therefore affirm the Court of Appeals' judgment in No. 75-283 on this basis.

[16] The judgment in No. 75-251 is

Reversed.

[17] The judgment in No. 75-283 is
Affirmed.

Mr. Justice Brennan, concurring in the judgment.

[18] This suit was brought by present and retired employees of the State of Connecticut against the State Treasurer, the State Comptroller, and the Chairman of the State Employees' Retirement Commission. In that circumstance, Connecticut may not invoke the Eleventh Amendment, since that Amendment bars only federal-court suits against States by citizens of other States. Rather, the question is whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII. In my view Connecticut may not assert sovereign immunity for the reason I expressed in dissent in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 298 (1973): The States surrendered that immunity, in Hamilton's words, "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.* at 319 n.7; *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964). Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution. Cf. *Oregon v. Mitchell*, 400 U.S. 112, 131-134 (1970) (Black, J.); *id.* at 135-150 (Douglas, J.); *id.* at 216-217 (Harlan, J.); *id.* at 236-281 (Brennan, White, and Marshall, JJ.); *id.* at 282-284 (Stewart, J.); *Katzbach v. Morgan*, 384 U.S. 641, 651 (1966). I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver." *Employees v. Missouri Public Health Dept.*, *supra*, at 300.

[19] I therefore concur in the judgment of the Court.

Mr. Justice Stevens, concurring in the judgment.

[20] In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on § 5 of the Fourteenth Amendment. But I do not believe plaintiffs proved a violation of the Fourteenth Amendment, and because I am not sure that the

1972 Amendments were “needed to secure the guarantees of the Fourteenth Amendment,” see *Katzenbach v. Morgan*, 384 U.S. 641, 651, I question whether § 5 of that Amendment is an adequate reply to Connecticut’s Eleventh Amendment defense. I believe the defense should be rejected for a different reason.

[21] Even if the Eleventh Amendment does cover a citizen’s suit against his own State, it does not bar an action against state officers enforcing an invalid statute, *Ex parte Young*, 209 U.S. 123, 159-160. Since the Connecticut pension law has been held to be invalid, at least in part, *Ex parte Young* makes it clear that the federal court properly acquired jurisdiction of the proceeding.

[22] The Eleventh Amendment issue presented is whether the court has power to enter a judgment payable immediately out of trust assets which subsequently would be reimbursed from the general revenues of the State. Although I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court’s jurisdiction of a case and merely restricts the kind of relief the federal court may grant, I must recognize that it has been so construed in *Edelman v. Jordan*, 415 U.S. 651, and that the language of that opinion would seem to cover this case. However, its actual holding appears to be limited to the situation in which the award is payable directly from state funds and “not as a necessary consequence of compliance in the future” with a substantive determination. *Id.* at 668.

[23] The holding in *Edelman* does not necessarily require the same result in this case; this award will not be paid directly from the state treasury, but rather from two separate and independent pension funds. The fact that the State will have to increase its future payments into the funds as a consequence of this award does not, in my opinion, sufficiently distinguish this case from other cases in which a State may be required to conform its practices to the Federal Constitution and thereby to incur additional expense in the future. Since the rationale of *Ex parte Young* remains applicable to such cases, and since this case is not squarely covered by the holding in *Edelman*, I am persuaded that it is proper to reject the Eleventh Amendment defense.

[24] With respect to the fee issue, even if the Eleventh Amendment were applicable, I would place fees in the same category as other litigation costs. *Cf. Fairmont Co. v. Minnesota*, 275 U.S. 70.



[Fitzpatrick v. Bitzer – Audio and Transcript of Oral Argument](#)

Footnotes

1. Petitioners had also alleged that the retirement plan was contrary to the Equal Protection Clause of the Fourteenth Amendment, but in view of its ruling under Title VII the District Court found no reason to address the constitutional claim. 390 F. Supp., at 290. [↴](#)
2. In No. 75-251, respondent Bitzer is the Chairman of the State Employees’ Retirement Commission, and the other respondents are the Treasurer and the Comptroller of the State of Connecticut. These officials are cross-petitioners in No. 75-283. [↴](#)
3. The Court of Appeals rejected petitioners’ arguments that the retroactive benefits would not be paid out of public funds from the state treasury, and that the rule in *Edelman* and *Ford Motor Co.* was therefore inapplicable. 519 F.2d at 564-565. Petitioners have not challenged this ruling here. [↴](#)
4. Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as

applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.

↩

Notes on *Fitzpatrick v. Bitzer*

1. How does the Court resolve the clash between the Eleventh and Fourteenth Amendments? Does the Court find the States' Eleventh Amendment immunity abrogated by Section 1 of the Fourteenth Amendment? Is this significant?
2. In [Seminole Tribe of Fla. v. Florida](#), 517 U.S. 44 (1996), the Supreme Court held that Congress lacks the power under the Commerce Clause and Indian Commerce Clause to override the States' Eleventh Amendment immunity. However, the Court in *dicta* reaffirmed that Congress is empowered to abrogate the Eleventh Amendment immunity when it acts pursuant to Section 5 of the Fourteenth Amendment:

[O]ur inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution.... We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Fitzpatrick was based on a rationale wholly inapplicable to the Interstate Commerce Clause, *viz.*, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.... *Fitzpatrick* cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."

Seminole Tribe, 517 U.S. at 59, 65-66.

3. Although the Court has reaffirmed Congress' power to abrogate the States' Eleventh Amendment immunity under the Fourteenth Amendment, it has been exacting in scrutinizing legislative efforts to impose liability upon States to determine whether the acts are proper exercises of Congress' Section 5 power to enforce the Fourteenth Amendment by "appropriate" legislation.
 - a. In [Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank](#), 527 U.S. 627 (1999), the Court in a 5-4 decision held that Congress acted beyond its power under Section 5 of the Fourteenth Amendment when it passed the [Patent and Plant Variety Protection Remedy Clarification Act](#), 35 U.S.C. § 271(h) ("Any State, any instrumentality of a State, and any officer or

employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person ... for infringement of a patent under section 271, or for any other violation of this title. which extended the reach of federal patent laws to the states.”).In order to act within its enforcement powers under Section 5, the Court reasoned, Congress “must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” *Id.* at 639; *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). The Court found that the evil that Congress sought to remedy was the infringement of patents by the States coupled with the assertion of sovereign immunity to deny compensation in state court to patent holders. However, the legislative record was bereft of evidence of any pattern of patent infringement by the States. Furthermore, under *Parratt v. Taylor* and its progeny, state deprivation of a patent would not constitute a violation of the Constitution if the state provided an adequate post-deprivation remedy. Just as the legislative record did not sustain widespread infringement of patents by states, Congress did not find that state remedies for infringement were inadequate. Finally, to transgress constitutional bounds, a state must act recklessly or with the intent to deprive the patent holder of property. See *Daniels v. Williams*, 474 U.S. 327 (1986). The evidence before Congress, however, suggested that the few instances of state infringement of patents were innocent or at worst negligent and hence not violative of the Fourteenth Amendment. Therefore, the Court concluded, Congress acted beyond its power to enforce the constraints of Section 1 of the Fourteenth Amendment.

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of “widespread and persistent deprivation of constitutional rights” of the sort Congress has faced in enacting proper prophylactic § 5 legislation.... Though the lack of support in the legislative record is not determinative ... identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because “[s]trong measures appropriate to address one harm may be an unwarranted response to another lesser one.” ... Here the record at best offers scant support for Congress’ conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions. Because of this lack, the provisions of the Patent Remedy Act are “so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.... Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

The statute’s apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper

Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.

Florida Prepaid Postsecondary Education Expense Board, 527 U.S. at 645-48.

In a companion case, the Court likewise held that Congress exceeded its Section 5 power when it enacted the [Trademark Remedy Clarification Act](#), 15 U.S.C. § 1122, which subjected the States to suits under the Lanham Act for false and misleading advertising. [College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board](#), 527 U.S. 666 (1999). The Court determined that the wrongs remedied by the Act—incursions of the right to be free from a business competitor's false advertising and the right to be secure in one's business interests—were not property rights protected by the Due Process Clause of the Fourteenth Amendment. Accordingly, the Trademark Remedy Clarification Act fell outside Congress' "power to enforce, by appropriate legislation, the provisions of [Section 1 of the fourteenth amendment]." U.S. Const. amend. XIV, § 5.

- b. In [Kimel v. Florida Board of Regents](#), 528 U.S. 62 (2000), the Court struck down the 1974 amendments to the Age Discrimination in Employment Act of 1967 (ADEA) that extended the Act's substantive requirements to the States. ("The term [employer] also means ... a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State...." [29 U.S.C. § 630\(b\)](#)). While accepting that Congress intended to abrogate the States' Eleventh Amendment immunity, the Court held that Congress exceeded its Section 5 power by imposing substantive proscriptions against age discrimination that surpassed the prohibitions of the Equal Protection Clause of Section 1 of the Fourteenth Amendment. Because age is not a suspect classification under the Constitution, States are permitted to discriminate on the basis of age so long as the classification is rationally related to a legitimate state interest. The ADEA, however, demands that the state justify any discrimination on the basis of age by what is tantamount to heightened scrutiny under the Equal Protection Clause. Because there was little evidence in the legislative record that state governments were engaged in widespread unconstitutional discrimination, the Court concluded that the ADEA was not an effort to design an appropriate remedy for violations of the Equal Protection Clause but instead was "[m]erely an attempt to substantively redefine the States' legal obligations with respect to age discrimination." *Kimel*, 528 U.S. at 648. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, filed a vigorous dissent to the Court's rigorous scrutiny of the exercise of Congress' Section 5 power:

In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the State in the first place.... The application of the ancient judge-made doctrine of sovereign immunity in cases like these is supposedly justified as a freestanding limit on congressional authority, a limit necessary to protect the States' "dignity and respect" from impairment by the National Government. The Framers did not, however, select the Judicial Branch as the constitutional guardian of those state interests. Rather, the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement....

It is the Framers' compromise giving each State equal representation

in the Senate that provides the principal structural protection for the sovereignty of the several States. [W]e can safely assume that the burdens the statute imposes on the sovereignty of the several States were taken into account during the deliberative process leading to the enactment of the measure. Those burdens necessarily include the cost of defending against enforcement proceedings and paying whatever penalties might be incurred for violating the statute. The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by Congress and signed by the President.

Kimel, 528 U.S. at 651 (Stevens, J. dissenting).

The dissenters further disagreed with the majority's construction of the Eleventh Amendment:

[T]he Amendment only places a textual limitation on the diversity jurisdiction of the federal courts. Here, however, private petitioners did not invoke the federal court's diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that arise under federal law. Thus, today's decision rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, which the Court treats as if it were a constitutional precept.

Kimel, 528 U.S. at 652-53 (Stevens, J. dissenting).

4. What does the *Fitzpatrick* Court offer as the rationale for its earlier holding in *Edelman* that Congress did not intend to abrogate the States' Eleventh Amendment immunity when it enacted Section 1983? What new argument arises from the Court's elaboration of its construction of Congress' intent under Section 1983?

In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court considered whether Congress intended to exert its Fourteenth Amendment power and abrogate the States' Eleventh Amendment immunity when it enacted the Attorneys' Fees Award Act of 1976. ("In any action or proceeding to enforce a provision of [42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.) Despite the fact that the language of the statute makes no express reference to States, the Court held that Congress intended to authorize attorney fee awards to be paid by the States when state officers are sued in their official capacities for prospective relief.

Justice Brennan authored a concurring opinion solely to respond to points made by Justice Powell's dissent as to the Eleventh Amendment issue:

Mr. Justice Powell takes the view, however, that unless 42 U.S.C. §1983 also authorizes damage awards against the States, the requirements of the Eleventh Amendment are not met. Citing *Edelman v. Jordan*, 415 U.S. 651 (1974), he concludes that § 1983 does not authorize damage awards against the State and, accordingly, that §1988 does not either. There are a number of difficulties with this syllogism, but the most striking is its reliance on *Edelman v. Jordan*, a case whose foundations would seem to have been seriously undermined by our later holdings in *Fitzpatrick v. Bitzer* . . . and *Monell v. New York City Dept. of Social Services*.

Given our holding in *Monell*, the essential premise of our *Edelman* holding—that no statute involved in *Edelman* authorized suit against a “class of defendants which literally included states”—would clearly appear to be no longer true. Moreover, given *Fitzpatrick*’s holding that Congress has plenary power to make States liable in damages when it acts pursuant to § 5 of the Fourteenth Amendment, it is surely at least an open question whether §1983 properly construed does not make States liable for relief of all kinds, notwithstanding the Eleventh Amendment.

Hutto, 437 U.S. at 700-703 (Brennan, J. concurring).

STATE OF ALABAMA v. PUGH, 438 U.S. 781 (1978)

Per Curiam

[1] Respondents, inmates or former inmates of the Alabama prison system, sued petitioners, who include the State of Alabama and the Alabama Board of Corrections as well as a number of Alabama officials responsible for the administration of its prisons, alleging that conditions in Alabama prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The United States District Court agreed and issued an order prescribing measures designed to eradicate cruel and unusual punishment in the Alabama prison system. The Court of Appeals for the Fifth Circuit affirmed but modified some aspects of the order which it believed exceeded the limits of the appropriate exercise of the court's remedial powers. 559 F.2d 283.

[2] Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States and their agencies. The Court of Appeals did not address this contention, perhaps because it was of the view that in light of the numerous individual defendants in the case dismissal as to these two defendants would not affect the scope of the injunction. There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). Respondents do not contend that Alabama has consented to this suit, and it appears that no consent could be given under Art. I, § 14, of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Moreover, the question of the State's Eleventh Amendment immunity is not merely academic. Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction.^[1] Consequently, we grant the petition for certiorari limited to Question 2 presented by petitioners,^[2] reverse the judgment in part, and remand the case to the Court of Appeals with instructions to order the dismissal of the State of Alabama and the Alabama Board of Corrections from this action.

So ordered.

Mr. Justice Stevens, dissenting.

[3] This Court is much too busy to spend its time correcting harmless errors. Nothing more is accomplished by the summary action it takes today.^[3]

[4] The Court does not question the propriety of the injunctive relief entered by the District Court and upheld by the Court of Appeals. Striking the State's name from the list of parties will have no impact on the effectiveness of that relief. If the state officers disobey the injunction, financial penalties may be imposed on the responsible state agencies. *Hutto v. Finney*, 437 U.S. 678. The District Court's asserted error did not trouble the Court of Appeals because it has no practical significance. It does not justify the exercise of this Court's certiorari jurisdiction. I respectfully dissent.

Footnotes

1. Respondents contend that petitioners failed to raise the Eleventh Amendment issue in the District Court. The Court held in *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), however, that “the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.” [↵](#)
2. “Whether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State’s Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. § 1983.” [↵](#)
3. Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in *Hutto v. Finney*, 437 U.S. 678, 700 (Brennan, J., concurring), and 708-709, n.6 (Powell, J., concurring in part and dissenting in part). [↵](#)

Notes on *State of Alabama v. Pugh*

1. On what basis does the Court find the injunction to violate the Eleventh Amendment? Is the substance of the injunction affected if the State of Alabama and the Board of Correction are dismissed?
2. Ten days before its [Pugh](#) decision, the Court in [Hutto v. Finney](#), 437 U.S. 678 (1978) held that the Eleventh Amendment does not bar an award of attorneys’ fees arising out of defendant state officials’ bad faith failure to comply with the district court’s injunctive decrees. Although the plaintiffs in *Hutto* had sued the Commissioner of Correction and members of the Alabama Department of Correction in their official capacities for injunctive relief, the district court directed that the fees were “to be paid out of Department of Correction funds.” *Hutto*, 437 U.S. at 692.

The Supreme Court dismissed the Attorney General’s contention that the order should not have been directed against the Department of Correction:

Although the Attorney General objects to the form of the order, no useful purpose would be served by requiring that it be recast in different language. We have previously approved directives that were comparable in their actual impact on the State without pausing to attach significance to the language used by the District Court. Even if it might have been better form to omit the reference to the Department of Correction, the use of that language is surely not reversible error.

Hutto, 437 U.S. at 692-93. Why, then, did the Court grant *certiorari* and reverse the lower court’s order in *Pugh*?

3. The *Pugh* Court indicated that the action against the State of Alabama would not be barred by the Eleventh Amendment if it consented to suit in federal court. Under the Court’s analysis, what was the intent of Congress with respect to the liability of States when it enacted Section 1983?

QUERN v. JORDAN, 440 U.S. 332 (1979)

Mr. Justice Rehnquist delivered the opinion of the Court.

[1] This case is a sequel to *Edelman v. Jordan*, 415 U.S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a Federal District Court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment. The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits.

* * * * *

[2] Petitioner state official devotes a significant part of his brief to an attack on the proposed notice which the District Court required the state officials to send. It is, however, the decision of the Court of Appeals, and not that of the District Court, which we review at the behest of petitioner. And just as petitioner insists on tilting at windmills by attacking the District Court's decision, respondent suggests that our decision in *Edelman* has been eviscerated by later decisions such as *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Brief for Respondent 55 n.37. See also *Aldridge v. Turlington*, No. TCA-78-830 (N.D. Fla., Nov. 17, 1978); but see *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (CA3 1978). As we have noted above, we held in *Edelman* that in "a [42 U.S.C.] § 1983 action ... a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury*, *supra*." 415 U.S. at 677. We disagree with respondent's suggestion. This Court's holding in *Monell* was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes," 436 U.S. at 690 n.54, and our Eleventh Amendment decisions subsequent to *Edelman* and to *Monell* have cast no doubt on our holding in *Edelman*. See *Alabama v. Pugh*, 438 U.S. 781 (1978); *Hutto v. Finney*, 437 U.S. 678 (1978); *Milliken v. Bradley*, *supra*; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Scheuer v. Rhodes*, *supra*.^[1]

[3] While the separate opinions in *Hutto v. Finney*, *supra*,^[2] debated the continuing soundness of *Edelman* after our decision in *Monell*, any doubt on that score was largely dispelled by *Alabama v. Pugh*, *supra*, decided just 10 days after *Hutto*. In *Pugh* the Court held, over three dissents, that the State of Alabama could not be joined as a defendant without violating the Eleventh Amendment, even though the complaint was based on 42 U.S.C. § 1983 and the claim was a violation of the Eighth and Fourteenth Amendments similar to that made in *Hutto*. The Court said:

"There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937)." 438 U.S., at 782.^[3]

The decision in *Pugh* was consistent both with *Monell*, which was limited to "local government units," 436 U.S. at 690 n.54, and with *Fitzpatrick v. Bitzer*, *supra*. In the latter case we found that "'threshold fact of congressional authorization,'" which had been lacking in *Edelman*, to be present in the express language of the congressional amendment making Title VII of the Civil Rights Act of 1964 applicable to state and local governments. 427 U.S. at 452, quoting *Edelman v. Jordan*, 415 U.S. at 672.

[4] Mr. Justice Brennan in his opinion concurring in the judgment argues that our holding in *Edelman* that § 1983 does not abrogate the States' Eleventh Amendment immunity is "most likely incorrect." *Post*, at

354. To reach this conclusion he relies on “[assumptions]” drawn from the Fourteenth Amendment, *post*, at 355, on “occasional remarks” found in a legislative history that contains little debate on § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983, *post*, at 358 n.15, on the reference to “bodies politic” in the Act of Feb. 25, 1871, 16 Stat. 431, the “Dictionary Act,” *post*, at 355-357,^[4] and, finally on the general language of § 1983 itself, *Post*, at 356. But, unlike our Brother Brennan, we simply are unwilling to believe, on the basis of such slender “evidence,” that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States. We therefore conclude that neither the reasoning of *Monell* or of our Eleventh Amendment cases subsequent to *Edelman*, nor the additional legislative history or arguments set forth in Mr. Justice Brennan’s opinion, justify a conclusion different from that which we reached in *Edelman*.^[5]

[5] There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States. Many of the remarks from the legislative history of the Act quoted in Mr. Justice Brennan’s opinion amply demonstrate this point. *Post*, at 359-365. See also *Monroe v. Pape*, 365 U.S. 167, 173-176 (1961). But neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court rejected a similar attempt to interpret the word “person” in § 1983 as a withdrawal of the historic immunity of state legislators.

* * * * *

Given the importance of the States’ traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

[6] Our cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother Brennan is able to marshal. In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), the Court concluded that Congress did not lift the sovereign immunity of the States by enacting the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, because of the absence of any indication “by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.” 411 U.S. at 285. In *Fitzpatrick v. Bitzer* the Court found present in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the “threshold fact of congressional authorization” to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments in the event the Equal Employment Opportunity Commission or the Attorney General failed to bring suit or effect a conciliation agreement. 427 U.S., at 448 n. 1, 449 n. 2, 452; see Equal Opportunity Employment Act of 1972, 86 Stat. 105, 42 U.S.C. § 2000e-5 (f)(1); H.R. Rep. No. 92-238, pp. 17-19 (1971); S. Rep. No. 92-415, pp. 9-11 (1971); S. Conf. Rep. No. 92-681, pp. 17-18 (1972); H.R. Conf. Rep. No. 92-899, pp. 17-18 (1972). Finally, in *Hutto v. Finney*, decided just last Term, the Court held that in enacting the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, Congress intended to override the Eleventh Amendment immunity of the States and authorize fee awards payable by the States when their officials are sued in their official capacities. 437 U.S. at 693-694. Although the statutory language in *Hutto* did not separately impose liability on States in so many words,^[6] statute had “a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune from fee awards.”

Id. at 698 n.31. Also, the Court noted that the statute would have been rendered meaningless with respect to States if the Act did not impose liability for attorney's fees on the States. *Ibid.*; see *Employees v. Missouri Public Health Dept.*, *supra*, at 285-286. By contrast, § 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. Nor does our reaffirmance of *Edelman* render § 1983 meaningless insofar as States are concerned. See *Ex parte Young*, 209 U.S. 123 (1908).

[7] We turn, then, to the question which has caused disagreement between the Courts of Appeals: does the modified notice contemplated by the Seventh Circuit constitute permissible prospective relief or a "retroactive award which requires the payment of funds from the state treasury"? We think this relief falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side. Petitioner makes no issue of the incidental administrative expense connected with preparing and mailing the notice. Instead, he argues that giving the proposed notice will lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award. But the chain of causation which petitioner seeks to establish is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. The notice of appeal, we are told, is virtually identical to the notice sent by the Department of Public Aid in every case of a denial or reduction of benefits. The mere sending of that notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

[8] The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court. See *Milliken v. Bradley*, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue. Petitioner raises no objection to the expense of preparing or sending it. The class members are "given no more ... than what they would have gathered by sitting in the courtroom." *Jordan v. Trainor*, 563 F.2d at 877-878. The judgment of the Court of Appeals is therefore *Affirmed*.

Mr. Justice Brennan, with whom Mr. Justice Marshall joins as to Parts I, II, and III, concurring in the judgment.

[9] For the reasons set forth in my dissent in *Edelman v. Jordan*, 415 U.S. 651, 687 (1974), I concur in the judgment of the Court.

I

[10] It is deeply disturbing, however, that the Court should engage in today's gratuitous departure from customary judicial practice and reach out to decide an issue unnecessary to its holding. The Court today correctly rules that the explanatory notice approved by the Court of Appeals below is "properly viewed as ancillary to ... prospective relief." *Ante*, at 349. This is sufficient to sustain the Court's holding that such notice

is not barred by the Eleventh Amendment. But the Court goes on to conclude, in what is patently dicta, that a State is not a “person” for purposes of 42 U.S.C. § 1983, Rev. Stat. § 1979.

[11] This conclusion is significant because, only three Terms ago, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that “Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.” *Id.* at 456. If a State were a “person” for purposes of § 1983, therefore, its immunity under the Eleventh Amendment would be abrogated by the statute. *Edelman v. Jordan*, *supra*, had held that § 1983 did not override state immunity, for the reason, as the Court later stated in *Fitzpatrick*, that “[the] Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.” 427 U.S. at 452. The premise of this reasoning was undercut last Term, however, when *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), upon re-examination of the legislative history of § 1983, held that a municipality was indeed a “person” for purposes of that statute. As I stated in my concurrence in *Hutto v. Finney*, 437 U.S. 678, 703 (1978), *Monell* made it “surely at least an open question whether § 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment.”

[12] The Court’s dicta today would close that open question on the basis of *Alabama v. Pugh*, 438 U.S. 781 (1978). In that case the State of Alabama had been named as a party defendant in a suit alleging unconstitutional conditions of confinement. The question presented was “[whether] the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State’s Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. § 1983.” *Id.* at 782-783, n.2. The Court held that the State should not have been named as a party defendant.

[13] *Pugh*, however, does not stand for the proposition that a State is not a “person” for purposes of § 1983. Not only does the Court’s opinion in that case fail even to mention § 1983, it frames the issue addressed as whether Alabama had “consented to the filing of such a suit.” 438 U.S. at 782. Since Alabama’s consent would have been irrelevant if Congress had intended States to be encompassed within the reach of § 1983, the Court apparently decided the first half of the question presented—“[whether] the mandatory injunction issued against the State of Alabama ... violates the State’s Eleventh Amendment immunity”—without considering or deciding the second half—whether the mandatory injunction “exceeds the jurisdiction granted federal courts by 42 U.S.C. § 1983.”^[7]

[14] This parsing of *Pugh* is strengthened by a consideration of the circumstances surrounding that decision. *Pugh*, a short per curiam, was issued on the last day of the Term without the assistance of briefs on the merits or argument. Alabama’s petition for certiorari and respondents’ brief in opposition were filed on February 6, 1978, and April 6, 1978, respectively, months before *Monell* was announced. They were thus necessarily without the benefit of *Monell*’s major re-evaluation of the legislative history of § 1983.^[8] Respondents did not even raise the possibility that Alabama might be a “person” for purposes of § 1983.^[9] Since the issue is not, as the Court now phrases it, whether the Members of this Court were then aware of *Monell*, *ante*, at 340 n.9, but rather whether they had before them briefs and arguments detailing the implications of *Monell* for the question of whether a State is a “person” for purposes of § 1983, it is not anomalous that the Court’s opinion in *Pugh* failed to address or consider this issue.

[15] The Court’s reliance on *Pugh* is particularly significant because the question whether a State is a “person” for purposes of § 1983 is neither briefed nor argued by the parties in the instant case. Indeed, petitioner states flatly that “the en banc decision of the Seventh Circuit does not rest upon a conclusion that the term ‘person’ for purposes of § 1983 includes sovereign states, as opposed to state officials, within its ambit. That issue is not the issue before this Court on Petitioner’s Writ for Certiorari.” Reply Brief for Petitioner 14. Respondent concurs, stating that “it is unnecessary in this case to confront directly the far-reaching question of whether Congress intended in § 1983 to provide for relief directly against States, as it did against municipalities.” Brief for Respondent 55 n.37.

[16] Thus, the Court today decides a question of major significance without ever having had the assistance of a considered presentation of the issue, either in briefs or in arguments. The result is pure judicial fiat.

II

[17] This fiat is particularly disturbing because it is most likely incorrect. Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. The Act was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment. That Amendment exemplifies the “vast transformation” worked on the structure of federalism in this Nation by the Civil War.

* * * * *

[18] The prohibitions of the Fourteenth Amendment and Congress’ power of enforcement are thus directed at the States themselves, not merely at state officers. It is logical to assume, therefore, that § 1983, in effectuating the provisions of the Amendment by “[interposing] the federal courts between the States and the people, as guardians of the people’s federal rights,” *Mitchum v. Foster, supra*, at 242, is also addressed to the States themselves. Certainly Congress made this intent plain enough on the face of the statute.

[19] Section 1 of the Civil Rights Act of 1871 created a federal cause of action against “any person” who, “under color of any law, statute, ordinance, regulation, custom, or usage of any State,” deprived another of “any rights, privileges, or immunities secured by the Constitution of the United States.” On February 25, 1871, less than two months before the enactment of the Civil Rights Act, Congress provided that “in all acts hereafter passed ... the word ‘person’ may extend and be applied to bodies politic and corporate ... unless the context shows that such words were intended to be used in a more limited sense.”^[10] § 2, 16 Stat. 431. *Monell*, held that “[since] there is nothing in the ‘context’ of the Civil Rights Act calling for a restricted interpretation of the word ‘person,’ the language of that section should prima facie be construed to include ‘bodies politic’ among the entities that could be sued.” 436 U.S. at 689-690, n.53. Even the Court’s opinion today does not dispute the fact that in 1871 the phrase “bodies politic and corporate” would certainly have referred to the States.

* * * * *

[20] Indeed, during the very debates surrounding the enactment of the Civil Rights Act, States were referred to as bodies politic and corporate. See, e. g., Cong. Globe, 42d Cong., 1st Sess., 661-662 (1871) (hereinafter *Globe*) (Sen. Vickers) (“What is a State? Is it not a body politic and corporate?”); *cf. id.* at 696 (Sen. Edmunds). Thus the expressed intent of Congress, manifested virtually simultaneously with the enactment of the Civil Rights Act of 1871, was that the States themselves, as bodies corporate and politic, should be embraced by the term “person” in § 1 of that Act.

[21] The legislative history of the Civil Rights Act of 1871 reinforces this conclusion. The Act was originally reported to the House as H.R. 320 by Representative Shellabarger. At that time Representative Shellabarger stated that the bill was meant to be remedial “in aid of the preservation of human liberty and human rights,” and thus to be “liberally and beneficently construed.”^[11] *Globe App.* 68. The bill was meant to give “[full] force and effect ... to section five” of the Fourteenth Amendment, *Globe* 322 (Rep. Stoughton),^[12] *see id.*, at 800 (Rep. Perry); *Monell*, 436 U.S., at 685 n.45, and therefore, like the prohibitions of that Amendment, to be addressed against the States themselves. See, e.g., *Globe* 481-482 (Rep. Wilson); 696 (Sen. Edmunds). It was, as Representative Kerr who opposed the bill instantly recognized, “against the rights of the States of this Union.” *Globe App.* 46. Representative Shellabarger, in introducing the bill, made this explicit, stressing the need for “necessary affirmative legislation to enforce the personal rights which the Constitution guaranties, as between persons in the State and the State itself.” *Id.*, at 70. See, e.g., *id.* at 80 (Rep. Perry); *Globe* 375 (Rep. Lowe); 481-482 (Rep. Wilson); 568 (Sen. Edmunds). Representative Bingham elaborated the point:

“The powers of the States have been limited and the powers of Congress extended by the

last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to *protect the rights of citizens against States*, and individuals in States, never before granted.

* * * * *

“Why not in advance provide *against the denial of rights by States*, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?

“The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States *and by States*, or combination of persons?” Globe App. 83, 85 (emphasis added).^[13]

[22] H.R. 320 was necessary, as Senator Edmunds stated, to protect citizens “in the rights that the Constitution gave them ... against any assault by any State or under any State or through the neglect of any State,” Globe 697, and by a “State,” Edmunds meant “a corporation ... an organized thing manifested, represented entirely, and fully in respect to every one of its functions, by that department of its government on which the execution of those functions is respectively devolved.” *Id.* at 696. See *id.* at 607-608 (Sen. Pool).

[23] It was common ground, therefore, that, as Representative Wilson argued, the prohibitions of the Fourteenth Amendment were directed against the State, meaning “the government of the State ... the legislative, the judicial, and the executive”; that the fifth section of the Amendment had given Congress the power to enforce it by “appropriate legislation,” meaning “legislation adequate to meet the difficulties to be encountered, to suppress the wrongs existing, to furnish remedies and inflict penalties adequate to the suppression of all infractions of the rights of the citizens”; and that H.R. 320 was such legislation. Globe 481-483. Those who opposed the bill were fully aware of the major implications of such a statute. Representative Blair, for example, rested his opposition on the fact that the bill, including § 1, was aimed at the States in their “corporate and legislative capacity”:

“The inhibitions in the [Thirteenth, Fourteenth, and Fifteenth] amendments against the United States and the States are against them in their corporate and legislative capacities, for the thing or acts prohibited can alone be performed by them in their corporate or legislative capacities.

* * * * *

“As the States have the power to violate them and not individuals, we must presume that the legislation provided for is against the States in their corporate and legislative capacity or character and those acting under their laws, and not against the individuals, as such, of the States. I am sustained in this view of the case by the tenth section of the first article of the Constitution of the United States. In it are a number of inhibitions against the States, which it is evident are against them in their corporate and legislative capacity; and to which I respectfully call the attention of the gentlemen who favor this bill.” Globe App. 208.^[14]

See *id.* at 209. This conclusion produced an anguished outcry from those committed to unrevised notions of state sovereignty. Representative Arthur, for example, complained that § 1 “reaches out and draws within

the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were.” *Globe* 365.

[24] The answer to such arguments was, of course, that the Civil War had irrevocably and profoundly altered the balance of power between Federal and State Governments:

“If any one thinks it is going too far to give the United States this national supervisory power to protect the fundamental rights of citizens of the United States, I do not agree with him. It is not wise to permit our devotion to the reserved rights of the States to be carried so far as to deprive the citizen of his privileges and immunities.

“We must remember that it was State rights, perverted I admit from their true significance, that arrayed themselves against the nation and threatened its existence. We must remember that it was for the very purpose of placing in the General Government a check upon this arrogance of some of the States that the fourteenth amendment was adopted by the people. We must remember that, if the legislation we propose does trench upon what have been, before the fourteenth amendment, considered the rights of the States, it is in behalf and for the protection of immunities and privileges clearly given by the Constitution; and that Federal laws and Federal rights must be protected whether domestic laws or their administration are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land. We are not making a constitution, we are enacting a law, and its virtue can be tested without peril by the experiment.” *Id.* at 502 (Sen. Frelinghuysen).

In the reconstructed union, national rights would be guaranteed federal protection even from the States themselves.

III

[24] The plain words of §1983, its legislative history and historical context, all evidence that Congress intended States to be embraced within its remedial cause of action. The Court today pronounces its conclusion in dicta by avoiding such evidence. It chooses to hear, in the eloquent and pointed legislative history of §1983, only “silence.” Such silence is in fact deafening to those who have ears to listen. But without reason to reach the question, without briefs, without argument, relying on a precedent that was equally ill-informed and in any event not controlling, the Court resolutely opines that a State is not a “person” for purposes of §1983. The 42d Congress, of course, can no longer pronounce its meaning with unavoidable clarity. *Fitzpatrick*, however, cedes to the present Congress the power to rectify this erroneous misinterpretation. It need only make its intention plain.

Mr. Justice Marshall, concurring in the judgment.

[25] I concur in the judgment of the Court, for the reasons expressed in my dissenting opinion in *Edelman v. Jordan*, 415 U.S. 651, 688 (1974), and my concurring opinion in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 287 (1973). Moreover, I agree that an affirmance here follows logically from the Court’s decision in *Edelman*, because the explanatory notice approved by the Court of Appeals clearly is ancillary to prospective relief. But given that basis for deciding the present case, it is entirely unnecessary for the Court to address

the question whether a State is a “person” within the meaning of § 1983. Accordingly, I join Parts I, II, and III of my Brother Brennan’s opinion.



[Quern v. Jordan – Audio and Transcript of Oral Argument](#)

Footnotes

1. Mr. Justice Brennan’s opinion concurring in the judgment states that “*Edelman v. Jordan*, *supra*, had held that § 1983 did not override state immunity, for the reason, as the Court later stated in *Fitzpatrick*, that “[the] Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.” *Post*, at 351. Since *Monell* overruled *Monroe*’s holding that cities and other municipal corporations are not “persons” within the meaning of § 1983, Mr. Justice Brennan’s opinion argues that the “premise” of *Edelman* has been “undercut.” *Post*, at 351. The fallacy of this line of reasoning was aptly demonstrated last Term by Mr. Justice Powell in his concurring opinion in *Hutto*, where he stated: “The language in question from *Fitzpatrick* was not essential to the Court’s holding in that case. Moreover, this position ignores the fact that *Edelman* rests squarely on the Eleventh Amendment immunity, without advert[ing] in terms to the treatment of the legislative history in *Monroe v. Pape*” 437 U.S., at 708-709, n.6. In fact, *Monroe v. Pape* is not even cited in *Edelman*. [↩](#)
2. In *Hutto v. Finney* there were three separate opinions in addition to that of the Court. Two opinions expressed the view that the Court had misapplied the rule laid down in *Edelman*. 437 U.S. at 704 (Powell, J., concurring and dissenting); *id.* at 710 (Rehnquist, J., dissenting). Mr. Justice Brennan, though joining the opinion of the Court, wrote separately to suggest that the Court’s opinions in *Monell* and *Fitzpatrick v. Bitzer* had rendered “the essential premise of our *Edelman* holding ... no longer true.” 437 U.S. at 703. The Court itself in *Hutto*, however, recognized and applied *Edelman*’s distinction between retrospective and prospective relief. [↩](#)
3. Our Brother Brennan in his opinion concurring in the judgment curiously suggests that the language quoted from Pugh in the text could not mean what it, on its face, says, because the briefs in the case were filed before our decision in *Monell* was announced. *Post*, at 352-354. But while the parties in Pugh were “without the benefit of *Monell*’s major re-evaluation of the legislative history of § 1983,” *Post*, at 352-353, the Members of this Court labored under no similar disability. The decision in *Pugh* was handed down nearly one month after *Monell* and 10 days after *Hutto*, where separate opinions debated this precise point. If, after *Monell* and *Hutto*, this Court harbored any doubts about the continued validity of *Edelman*’s conclusion that § 1983 does not constitute a waiver of the Eleventh Amendment immunity of the States, it is inconceivable that the Court would have taken the extraordinary action of summarily reversing a lower court on the basis of *Edelman*. [↩](#)
4. The Dictionary Act was intended to provide a “few general rules for the construction of statutes.” Cong. Globe, 41st Cong., 3d Sess., 1474 (1871) (remarks of Rep. Poland). While it was enacted two months before the enactment of the 1871 Civil Rights Act, it came more than five years after passage of § 2 of the Civil Rights Act of 1866, 14 Stat. 27, which served as the model for the language of § 1 of the 1871 Act. Cong. Globe, 42d

Cong., 1st Sess., App. 68 (1871) (remarks of Rep. Shellabarger); see *Monroe v. Pape*, 365 U.S. 167, 183-185 (1961); post, at 362 n.17. [↴](#)

5. Mr. Justice Brennan's opinion characterizes this conclusion as "gratuitous" and "[patent] dicta." *Post*, at 350. But we cannot think of a more "gratuitous" or useless exercise of this Court's discretionary jurisdiction than to decide which of two conflicting interpretations of *Edelman v. Jordan* is correct, if in truth we believed that *Edelman* itself no longer were valid. The question does not arise out of the blue; it was extensively discussed in our Brother Brennan's concurrence in *Hutto v. Finney* last Term. We therefore fail to see how our reaffirmance of *Edelman* can be characterized as "dicta." [↴](#)
6. While *Hutto*, unlike *Fitzpatrick* and *Employees*, did not require an express statutory waiver of the State's immunity, 437 U.S. at 695, 698 n. 31, the Court was careful to emphasize that it was concerned only with expenses incurred in litigation seeking prospective relief while the other cases involved retroactive liability for prelitigation conduct. *Id.* at 695. The Court also noted that it was not concerned with a statute that imposed "'enormous fiscal burdens on the States'" and that if it were, it might require a formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity, as did *Employees* and *Fitzpatrick*. 437 U.S. at 697 n.27. Extending § 1983 liability to States obviously would place "enormous fiscal burdens on the States." But we need not reach the question whether an express waiver is required because neither the language of the statute nor the legislative history discloses an intent to overturn the States' Eleventh Amendment immunity by imposing liability directly upon them. [↴](#)
7. This is what I take to be the significance of the observation of my Brother Stevens in *Pugh*: "Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in *Hutto v. Finney*, 437 U.S. 678, 700 (Brennan, J., concurring), and 708-709, n.6 (Powell, J., concurring in part and dissenting in part)." 438 U.S. at 783 n.* (1978) (Stevens, J., dissenting). *Cf. The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 325-326 (1978). [↴](#)
8. Indeed, the entire discussion of the issue in the petition for *certiorari* is as follows: "The grant of an injunction against the State and the Board of Corrections in an action based upon 42 U.S.C. § 1983 is in direct conflict with decisions of other courts of appeal which hold that neither a State nor a State agency is a 'person' within the meaning of the statute and amenable to suit under it. *Meredith v. Arizona*, 523 F.2d 481 (9th Cir. 1975); *Curtis v. Everette*, 489 F.2d 516 (3rd Cir. 1973). The decisions below conflict, at least in principle, with this Court's holding in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), that municipalities are not 'persons' under 42 U.S.C. § 1983." Pet. for Cert. in *Alabama v. Pugh*, O.T. 1977, No. 77-1107, pp. 11-12. [↴](#)
9. The discussion of the issue by the respondents in *Pugh* was unilluminating:
"Supreme Court Rule 19(1) states that *certiorari* will only be 'granted where there are special and important reasons therefor.' The second issue raised by the Petitioners challenges the injunction against the State of Alabama and the Alabama Board of Corrections alleging: (1) each is immune from suit under the Eleventh Amendment; (2) neither is a 'person' subject to 42 U.S.C. 1983 jurisdiction; and (3) *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Ex Parte Young*, 209 U.S. 123 (1908) bar judgments against the State for prospective costs of compliance with an order. Under the facts of these cases, the questions presented are not only unimportant but are essentially irrelevant.
"First, additional defendants enjoined include all members of the Alabama Board of Corrections and

numerous other prison officials who would clearly remain bound by the injunction issued, *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974) and have the authority in their official capacity to carry out the court's orders. Second, the State of Alabama and the Board of Corrections were only named defendants in the Pugh case and not the James case. Therefore, any action taken on this issue in Pugh would not affect the same relief granted in James. Third, this issue was never thought important enough by counsel for the petitioners to raise, brief or argue in the trial court. Fourth, the Court of Appeals did not see fit to speak to this issue at all. Fifth, whether the State of Alabama and/or the Board of Corrections are enjoined in addition to the members of the Board of Corrections has absolutely no practical effect on what has happened or will happen under the court's order." Brief in Opposition in *Alabama v. Pugh*, O.T. 1977, No. 77-1107, pp. 9-10. [↵](#)

10. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), held that the word "may" in the Act was to be interpreted as the equivalent of "shall": "Such a mandatory use of the extended meanings of the words defined by the Act is ... required for it to perform its intended function—to be a guide to 'rules of construction' of Acts of Congress. See [Cong. Globe, 41st Cong. 3d Sess., 775 (1871)] (remarks of Sen. Trumbull)." *Id.* at 689 n. 53. [↵](#)
11. *Monell, supra*, stated that "there can be no doubt that § 1 of the Civil Rights Act was intended ... to be broadly construed." 436 U.S. at 700. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, post, at 399-400, and n.17. Senator Thurman of Ohio, who opposed the Act, stated with respect to § 1 that "there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Cong. Globe, 42d Cong., 1st Sess., App. 217 (1871) (hereinafter Globe App.) (emphasis added). [↵](#)
12. One of the reasons given by the Court in *Hutto v. Finney*, 437 U.S. 678 (1978), for not requiring an "express statutory waiver of the State's immunity," ante, at 344 n.16, before applying to the States the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, was that the Act had been "enacted to enforce the Fourteenth Amendment." 437 U.S. at 698 n.31. [↵](#)
13. Section 1 of H.R. 320 was modeled after § 2 of the Civil Rights Act of 1866, 14 Stat. 27, which imposed criminal penalties on "any person" who, "under color of any law, statute, ordinance, regulation, or custom," deprived "any inhabitant of any State or Territory" of "any right secured ... by this act." As Representative Shellabarger stated: "That section [§ 2] provides a criminal proceeding in identically the same case as this one [§ 1] provides a civil remedy...." Globe App. 68. Representative Bingham noted the limited application of the remedy provided by § 2: "It is clear that if Congress do so provide by penal laws for the protection of these rights [guaranteed by the Fourteenth Amendment], those violating them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law." Globe App. 85-86. Representative Bingham was thus able to distinguish, as apparently the Court is not, ante, at 341 n.11, between the reach of the word "person" in § 2 of the Civil Rights Act of 1866, and its reach in § 1 of the Civil Rights Act of 1871. [↵](#)
14. Representative Blair reached this conclusion after reasoning that if the bill were interpreted as applicable only to individuals, it would not be able to fulfill the purposes of the Reconstruction Amendments. [↵](#)

Notes on *Quern v. Jordan*

1. Was it necessary for the Court to reach the issue of whether Section 1983 affords an action against States? Where does the Court find the issue raised by the parties? What in fact was the position of the parties as expressed in the Brief for Respondent and the Reply Brief for Petitioner?
2. Did the Court in *Quern* apply the same standards in construing the legislative history of Section 1983 to determine the liability of States as it had employed nine months earlier in *Monell* to ascertain whether municipalities are suable under Section 1983? Should the governing standards differ?
3. Could the 1871 Congress have been aware of the test which the *Quern* Court utilized to determine whether the legislature intended to impose liability upon the States? Would the enacting Congress have necessarily addressed the Eleventh Amendment implications of Section 1983? See [Hans v. Louisiana](#), 134 U.S. 1, 14-45 (1890), where the Court for the first time held the Eleventh Amendment to bar a suit against a State by its own citizen.

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court held that Congress did not have the power under the Commerce Clause to annul the States' immunity under the Eleventh Amendment. Repudiating the dissenting justices' argument that the framers of the Constitution never contended that sovereign immunity would affect the new federal question jurisdiction created by Article III of the Constitution, the majority offered that "the lack of any statute vesting general federal-question jurisdiction in the federal courts until much later [1875] makes the dissent's demand for greater specificity about then-dormant jurisdiction overly exacting." *Id.* at 70.

4. In [Hutto v. Finney](#), 437 U.S. 678, 698 n.31 (1978), the Court rejected the Attorney General's argument that the [Attorneys Fees Award Act of 1976](#) did not abrogate the Eleventh Amendment immunity because the language of the statute did not expressly extend to States

The present Act ... has a history focusing directly upon the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune from fee awards. Moreover, the Act is not part of an intricate regulatory scheme offering alternative methods of obtaining relief. If the Act does not impose liability for attorney's fees on the States, it has no meaning with respect to them. Finally, the claims asserted in [Edelman v. Jordan](#), 415 U.S. 651, were based on a statute rooted in Congress' Article I power. . . . In this case, as in [Fitzpatrick v. Bitzer](#), 427 U.S. 445, the claim is based on a statute enacted to enforce the Fourteenth Amendment. As we pointed out in *Fitzpatrick*: "[The] Eleventh Amendment, and the principle of state sovereignty which it embodies ... are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.... Applying the standard appropriate in a case

brought to enforce the Fourteenth Amendment, we have no doubt that the Act is clear enough to authorize the award of attorney's fees payable by the State.

- a. Under the *Hutto* analysis, should the Eleventh Amendment bar Section 1983 actions against a State for retroactive relief?
- b. What meaning does the *Quern* Court find attaches to Section 1983 insofar as States are concerned?
- c. After *Quern*, what remedy is afforded for past invasions of constitutional rights by the State?

[T]he Eleventh Amendment certainly does not bar constitutional tort actions against states, save in a purely formal sense. In the main, it functions to force civil rights plaintiffs to sue state officers rather than the states themselves, thus triggering qualified immunity. The alternative of suing state officers under Section 1983 is anything but irrelevant to the law of the Eleventh Amendment. The Eleventh Amendment has survived not because it means so much but precisely because it means so little. If it were not possible to circumvent the Eleventh Amendment through Section 1983, the Supreme Court would long ago have confined the Eleventh Amendment to diversity cases or adopted some other debilitating construction. Put another way, *Monroe v. Pape* is the *Ex Parte Young* of retrospective relief. Just as the fiction of *Ex Parte Young* routinely allows civil rights plaintiffs to evade the Eleventh Amendment when they seek injunctive relief, *Monroe v. Pape* (almost as) routinely allows civil rights plaintiffs to evade the Eleventh Amendment when they seek money damages.

John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 59 (1998). Will suits against individual state officials under Section 1983 ensure redress to citizens who have suffered deprivations of federal constitutional rights. In what circumstances is recovery least likely?

5. Because it determined that Congress did not intend to hold States liable under Section 1983, the *Quern* Court did not decide whether an express waiver in the language of an act is necessary to validly negate the Eleventh Amendment. In [*Atascadero State Hospital v. Scanlon*](#), 473 U.S. 234 (1985), the Court held that Congress had not rescinded the States' Eleventh Amendment immunity when it enacted the Rehabilitation Act. Rejecting plaintiff's invitation to find the abrogation in the legislative history of the Act, the Court mandated that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242.
6. How did the Court respond to the argument that the Dictionary Act, passed two months before Section 1983, indicates that States are "persons" and thus amenable to suit under Section 1983? Could a holding that States are not "persons" be reconciled with [*Monell v. New York Dept. of Social Services*](#), 436 U.S. 658 (1978)? Does the Court in fact hold that States are not "persons" within the meaning of the statute?

7. In [*Marrapese v. State of Rhode Island*](#), 500 F. Supp. 1207 (D.R.I. 1980), plaintiff brought an action for damages against the State under Section 1983. Plaintiff successfully argued that Rhode Island had waived its immunity from suit in federal court by enacting a state law that rendered the State liable “in all actions of tort in the same manner as a private individual or corporation.” The district court rejected the State’s contention that *Quern* prohibited all Section 1983 actions against States:

Justice Rehnquist’s opinion, while emphatic in reasserting the Court’s belief that Congress had not intended to abrogate the states’ immunity through § 1983, see 440 U.S. at 345, conspicuously avoided any statement that the term “person” did not include “state.”^[1]

Stated precisely, *Quern* concluded only that the Congress which enacted § 1983 did not intend to force the states to answer in federal court for their constitutional violations. Of itself, this holding does not mandate the further conclusion that the 42d Congress did not intend to allow the states to answer in federal court for their constitutional violations if they consented to do so. The alternate interpretation of *Quern*, then, would recognize that the word “person,” when considered in light of the Dictionary Act and the legislative history of § 1983, is broad enough to encompass the state as a “body politic and corporate.”^[2]

Limiting the practical effect of this construction would be the caveat that the statute leaves untouched Eleventh Amendment immunity, so that a state is not compellable to respond to § 1983 claims in federal court.

Suggesting that Congress included the states within the scope of § 1983 only to leave them free to decline to answer for any constitutional wrongdoing appears strained, if not actually illogical. However, it seems to this Court that the consequences of adopting Justice Brennan’s interpretation of *Quern* are equally unreasonable. The legislative history reveals that proponents of § 1983 had the highest ambitions for the scope and effectiveness of its remedial powers. Representative Bingham, author of § 1 of the Fourteenth Amendment, argued in favor of the passage of § 1983:

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws.... (And) the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen has no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy.... Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?

Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871), *quoted in Monell v. New York Dept. of Social Services*, 436 U.S. at 685 n.45.

Senator Edmunds, manager of the bill in the Senate, characterized § 1983 as “really reenact(ing) the Constitution.” Cong. Globe, 42d Cong., 1st Sess. 569 (1871), *quoted in Monell v. New York Dept. of Social Services*, 436 U.S. at 685. In interpreting a statute which “was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights,” *Monell v. New York Dept. of Social Services*, 436 U.S. at 700-01,

would seem strained, if not actually illogical, to conclude that Congress meant to exclude the governmental entities which, being most powerful, could pose the greatest threat to the constitutional rights of citizens, *even when those entities consented to suit*.

Faced, then, with two possible interpretations-neither of which is particularly satisfactory-this Court accepts the one that gives greatest latitude to § 1983's broad remedial purpose. It concludes that the states are "persons" potentially liable for constitutional deprivations inflicted through official custom and policy, but that, because Congress has not exercised its § 5 powers to abrogate Eleventh Amendment immunity, each state must consent to the imposition of such liability. This interpretation allows victims of unconstitutional activity the largest possibility for redress, while exacting little cost in terms of federalism. Because there is no forced waiver, each state maintains ultimate control over its own potential liability.^[3]

Moreover, this interpretation is consistent with earlier cases in which the Supreme Court seems to have assumed that a state could consent to § 1983 liability. *See, e.g., Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *Edelman v. Jordan*, 415 U.S. at 671-74, 94 S. Ct. at 1358-1359.^[4]

Therefore, this Court holds that Rhode Island is a "person" within the meaning of § 1983.

8. Under the interpretation of *Quern* adopted in *Marrapese*, is there a way in which plaintiffs could sue States for damages under Section 1983 even where the State has not waived its Eleventh Amendment immunity?

Notes

1. The Court's refusal to cast its discussion in the form of a "person" analysis is all the more striking in light of Justice Brennan's vehement insistence in his concurring opinion that the critical question was precisely the meaning of the word "person."
2. This point has been amply demonstrated by Justice Brennan's review of the legislative history of the 1871 Act. *See Quern v. Jordan*, 440 U.S. at 355-57 (Brennan, J., concurring in the judgment); *Hutto v. Finney*, 437 U.S. 678, 700-04 (1978) (Brennan, J., concurring). *See generally Monell v. New York Dept. of Social Services*, 436 U.S. at 665-95. As noted above, the majority opinion in *Quern* rejects only Justice Brennan's view that the legislative history supports a finding of congressional intent to abrogate the states' Eleventh Amendment immunity. It does not appear to agree with him that the immunity question is necessarily synonymous with the "person" inquiry.
3. The concept of a "person" whose activities are subject to the law but who may be held liable only for those violations for which he chooses to answer is not the legal oddity it first appears to be. Cases in which a wrongdoer is outside the personal jurisdiction of the court present that very situation. To the extent that the Eleventh Amendment is regarded as jurisdictional in nature, *see Edelman v. Jordan*, 415 U.S. at 678, it is not implausible to frame the issue in personal jurisdictional terms: Congressional intent in § 1983 was that states be governed by the statute's substantive requirements but be answerable in federal court for its violation only when they consent to that court's exercise of "personal jurisdiction."

In any event, Congress' refusal to force a waiver of Eleventh Amendment immunity would not necessarily render meaningless the inclusion of states within the ambit of § 1983 even in cases where voluntary waiver was not forthcoming. In states where sovereign immunity has

been legislatively or judicially abrogated, § 1983 plaintiffs could take their claims against the state into state court.

4. In [*Alabama v. Pugh*](#), the Court dismissed a § 1983 claim against the State of Alabama, saying: There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

438 U.S. 781, 782 (1978) (per curiam) (citations omitted).

The majority opinion in *Quern* quotes this language, apparently with approval. 440 U.S. at 340. Since, as noted above, the issue of consent is irrelevant if the state is not a “person” within § 1983, *Quern*’s reference to *Pugh* seems to support the interpretation adopted by this Court today. At least two federal courts have reached the consent issue in post-*Quern* § 1983 actions against states, stating or implying that there would be jurisdiction if the state had consented. See *Beck v. California*, 479 F. Supp. 392, 396 (C.D. Cal. 1979); *Savage v. Pennsylvania*, 475 F. Supp. 524, 529-31 (E.D. Pa. 1979).

***WILL v. MICHIGAN DEPARTMENT OF STATE POLICE*, 491 U.S. 58 (1989)**

Justice White delivered the opinion of the Court.

[1] This case presents the question whether a State, or an official of the State while acting in his or her official capacity, is a “person” within the meaning of Rev. Stat. § 1979, 42 U.S.C. § 1983.

[2] Petitioner Ray Will filed suit in Michigan Circuit Court alleging various violations of the United States and Michigan Constitutions as grounds for a claim under § 1983. He alleged that he had been denied a promotion to a data systems analyst position with the Department of State Police for an improper reason, that is, because his brother had been a student activist and the subject of a “red squad” file maintained by respondent. Named as defendants were the Department of State Police and the Director of State Police in his official capacity, also a respondent here.

[3] The Circuit Court remanded the case to the Michigan Civil Service Commission for a grievance hearing. While the grievance was pending, petitioner filed suit in the Michigan Court of Claims raising an essentially identical § 1983 claim. The Civil Service Commission ultimately found in petitioner’s favor, ruling that respondents had refused to promote petitioner because of “partisan considerations.” App. 46. On the basis of that finding, the state-court judge, acting in both the Circuit Court and the Court of Claims cases, concluded that petitioner had established a violation of the United States Constitution. The judge held that the Circuit Court action was barred under state law but that the Claims Court action could go forward. The judge also ruled that respondents were persons for purposes of § 1983.

[4] The Michigan Court of Appeals vacated the judgment against the Department of State Police, holding that a State is not a person under § 1983, but remanded the case for determination of the possible immunity of the Director of State Police from liability for damages. The Michigan Supreme Court granted discretionary review and affirmed the Court of Appeals in part and reversed in part. *Smith v. Department of Pub. Health*, 428 Mich. 540, 410 N.W.2d 749 (1987). The Supreme Court agreed that the State itself is not a person under § 1983, but held that a state official acting in his or her official capacity also is not such a person.

[5] The Michigan Supreme Court’s holding that a State is not a person under § 1983 conflicts with a number of state- and federal-court decisions to the contrary. We granted certiorari to resolve the conflict. 485 U.S. 1005 (1988).

[6] Prior to *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the question whether a State is a person within the meaning of § 1983 had been answered by this Court in the negative. In *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), the Court had held that a municipality was not a person under § 1983. “[T]hat being the case,” we reasoned, § 1983 “could not have been intended to include States as parties defendant.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976).

[7] But in *Monell*, the Court overruled *Monroe*, holding that a municipality was a person under § 1983. 436 U.S. at 690. Since then, various members of the Court have debated whether a State is a person within the meaning of § 1983, see *Hutto v. Finney*, 437 U.S. 678, 700-704 (1978) (Brennan, J., concurring); *id.*, at 708, n.6 (Powell, J., concurring in part and dissenting in part), but this Court has never expressly dealt with that issue.

* * * * *

[8] Petitioner filed the present § 1983 actions in Michigan state court, which places the question whether a State is a person under § 1983 squarely before us since the Eleventh Amendment does not apply in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 9, n.7 (1980). For the reasons that follow, we reaffirm today what we had concluded prior to *Monell* and what some have considered implicit in *Quern*: that a State is not a person within the meaning of § 1983.

[9] We observe initially that if a State is a “person” within the meaning of § 1983, the section is to be read as saying that “every person, including a State, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects ” That would be a decidedly awkward way of expressing an intent to subject the States to liability. At the very least, reading the statute in this way is not so clearly indicated that it provides reason to depart from the often-expressed understanding that “in common usage, the term ‘person’ does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.” [citations omitted].

[10] This approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before. This common usage of the term “person” provides a strong indication that “person” as used in § 1983 likewise does not include a State.

[11] The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention “clear and manifest” if it intends to preempt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *United States v. Bass*, 404 U.S. 336, 349 (1971).

[12] Our conclusion that a State is not a “person” within the meaning of § 1983 is reinforced by Congress’ purpose in enacting the statute. Congress enacted § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983, shortly after the end of the Civil War “in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers.” *Felder v. Casey*, 487 U.S. 131, 147 (1988). Although Congress did not establish federal courts as the exclusive forum to remedy these deprivations, *ibid.*, it is plain that “Congress assigned to the federal courts a paramount role” in this endeavor, *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 503 (1982).

[13] Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 472-473 (1987) (plurality opinion), or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States’ Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear in our decision in *Quern*. Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner’s argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.

[14] This does not mean, as petitioner suggests, that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.^[1]

[15] Our conclusion is further supported by our holdings that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. “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." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); and *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), are also to this effect. The doctrine of sovereign immunity was a familiar doctrine at common law.... We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent.^[2]

[16] The legislative history of § 1983 does not suggest a different conclusion. Petitioner contends that the congressional debates on § 1 of the 1871 Act indicate that § 1983 was intended to extend to the full reach of the Fourteenth Amendment and thereby to provide a remedy "against all forms of official violation of federally protected rights." Brief for Petitioner 16 (quoting *Monell*, 436 U.S. at 700-701). He refers us to various parts of the vigorous debates accompanying the passage of § 1983 and revealing that it was the failure of the States to take appropriate action that was undoubtedly the motivating force behind § 1983. The inference must be drawn, it is urged, that Congress must have intended to subject the States themselves to liability. But the intent of Congress to provide a remedy for unconstitutional state action does not without more include the sovereign States among those persons against whom § 1983 actions would lie. Construing § 1983 as a remedy for "official violation of federally protected rights" does no more than confirm that the section is directed against state action—action "under color of" state law. It does not suggest that the State itself was a person that Congress intended to be subject to liability.

[17] Although there were sharp and heated debates, the discussion of § 1 of the bill, which contained the present § 1983, was not extended. And although in other respects the impact on state sovereignty was much talked about, no one suggested that § 1 would subject the States themselves to a damages suit under federal law. *Quern*, 440 U.S. at 343. There was complaint that § 1 would subject state officers to damages liability, but no suggestion that it would also expose the States themselves. Cong. Globe, 42d Cong., 1st Sess., 366, 385 (1871). We find nothing substantial in the legislative history that leads us to believe that Congress intended that the word "person" in § 1983 included the States of the Union. And surely nothing in the debates rises to the clearly expressed legislative intent necessary to permit that construction.

[18] Likewise, the Act of Feb. 25, 1871, § 2, 16 Stat. 431 (the "Dictionary Act"), on which we relied in *Monell*, *supra*, at 688-689, does not counsel a contrary conclusion here. As we noted in *Quern*, that Act, while adopted prior to § 1 of the Civil Rights Act of 1871, was adopted after § 2 of the Civil Rights Act of 1866, from which § 1 of the 1871 Act was derived. 440 U.S. at 341, n.11. Moreover, we disagree with Justice Brennan that at the time the Dictionary Act was passed "the phrase 'bodies politic and corporate' was understood to include the States." *Post*, at 78. Rather, an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States.^[3] In our view, the Dictionary Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable.

[19] Finally, *Monell* itself is not to the contrary. True, prior to *Monell* the Court had reasoned that if municipalities were not persons then surely States also were not. *Fitzpatrick v. Bitzer*, 427 U.S. at 452. And *Monell* overruled *Monroe*, undercutting that logic. But it does not follow that if municipalities are persons then so are States. States are protected by the Eleventh Amendment while municipalities are not, *Monell*, 436 U.S. at 690, n.54, and we consequently limited our holding in *Monell* "to local government units which are not considered part of the State for Eleventh Amendment purposes," *ibid.* Conversely, our holding here does not cast any doubt on *Monell*, and applies only to States or governmental entities that are considered "arms of the State" for Eleventh Amendment purposes. See, e.g., *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).

[20] Petitioner asserts, alternatively, that state officials should be considered "persons" under § 1983 even

though acting in their official capacities. In this case, petitioner named as defendant not only the Michigan Department of State Police but also the Director of State Police in his official capacity.

[21] Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a suit against the State itself. See, e. g., *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Monell, supra*, at 690, n.55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.^[4]

[22] We hold that neither a State nor its officials acting in their official capacities are “persons” under § 1983. The judgment of the Michigan Supreme Court is affirmed.

It is so ordered.

Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Stevens join, dissenting.

[23] Because this case was brought in state court, the Court concedes, the Eleventh Amendment is inapplicable here. See *ante*, at 63-64. Like the guest who would not leave, however, the Eleventh Amendment lurks everywhere in today's decision and, in truth, determines its outcome.

I

[24] Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, renders certain “persons” liable for deprivations of constitutional rights. The question presented is whether the word “person” in this statute includes the States and state officials acting in their official capacities.

[25] One might expect that this statutory question would generate a careful and thorough analysis of the language, legislative history, and general background of § 1983. If this is what one expects, however, one will be disappointed by today's decision. For this case is not decided on the basis of our ordinary method of statutory construction; instead, the Court disposes of it by means of various rules of statutory interpretation that it summons to its aid each time the question looks close. Specifically, the Court invokes the following interpretative principles: the word “persons” is ordinarily construed to exclude the sovereign; congressional intent to affect the federal-state balance must be “clear and manifest”; and intent to abrogate States' Eleventh Amendment immunity must appear in the language of the statute itself. The Court apparently believes that each of these rules obviates the need for close analysis of a statute's language and history. Properly applied, however, only the last of these interpretative principles has this effect, and that principle is not pertinent to the case before us.

[26] The Court invokes, first, the “often-expressed understanding” that “‘in common usage, the term “person” does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.’” *Ante*, at 64, quoting *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979). This rule is used both to refute the argument that the language of § 1983 demonstrates an intent that States be included as defendants, *ante*, at 64, and to overcome the argument based on the Dictionary Act's definition of “person” to include bodies politic and corporate, *ante*, at 69-70. It is ironic, to say the least, that the Court chooses this interpretive rule in explaining why the Dictionary Act is not decisive, since the rule is relevant only when the word “persons” has no statutory definition. When one considers the origins and content of this interpretive guideline, moreover, one realizes that it is inapplicable here and, even if applied, would defeat rather than support the Court's approach and result.

[27] The idea that the word “persons” ordinarily excludes the sovereign can be traced to the “familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words.” *Dollar Savings Bank v. United States*, 19 Wall. 227, 239 (1874). As this passage suggests, however, this interpretive principle applies only to “the enacting sovereign.” *United States v. California*, 297 U.S. 175, 186 (1936). See also *Jefferson County Pharmaceutical Assn., Inc. v. Abbott Laboratories*, 460 U.S. 150, 161, n.21 (1983). Furthermore, as explained in *United States v. Herron*, 20 Wall. 251, 255 (1874), even the principle as applied to the enacting sovereign is not without limitations: “Where an act of Parliament is made for the public good, as for the advancement of religion and justice or to prevent injury and wrong, the king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words.” It would be difficult to imagine a statute more clearly designed “for the public good,” and “to prevent injury and wrong,” than § 1983.

[28] Even if this interpretive principle were relevant to this case, the Court’s invocation of it to the exclusion of careful statutory analysis is in error. As we have made clear, this principle is merely “an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated.” *United States v. California*, *supra*, at 186. Indeed, immediately following the passage quoted by the Court today, *ante*, at 64, to the effect that statutes using the word “person” are “ordinarily construed to exclude” the sovereign, we stated:

“But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

*****.

“Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction.” *United States v. Cooper Corp.*, 312 U.S. 600, 604-605 (1941).

[29] The second interpretive principle that the Court invokes comes from cases ... which require a “clear and manifest” expression of congressional intent to change some aspect of federal-state relations. *Ante*, at 65. These cases do not, however, permit substitution of an absolutist rule of statutory construction for thorough statutory analysis. Indeed, in each of these decisions the Court undertook a careful and detailed analysis of the statutory language and history under consideration...

[30] The only principle of statutory construction employed by the Court that would justify a perfunctory and inconclusive analysis of a statute’s language and history is one that is irrelevant to this case. This is the notion “that if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” *Ante*, at 65, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). As the Court notes, *Atascadero* was an Eleventh Amendment case; the “constitutional balance” to which *Atascadero* refers is that struck by the Eleventh Amendment as this Court has come to interpret it. Although the Court apparently wishes it were otherwise, the principle of interpretation that *Atascadero* announced is unique to cases involving the Eleventh Amendment.

[31] Where the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other situation.... Since this case was brought in state court, however, this strict drafting requirement has no application here. The Eleventh Amendment can hardly be “a consideration,” *ante*, at 67, in a suit to which it does not apply.

[32] That this Court has generated a uniquely daunting requirement of clarity in Eleventh Amendment cases explains why *Quern v. Jordan*, 440 U.S. 332 (1979), did not decide the question before us today. Because only the Eleventh Amendment permits use of this clear-statement principle, the holding of *Quern v. Jordan* that § 1983 does not abrogate States' Eleventh Amendment immunity tells us nothing about the meaning of the term "person" in § 1983 as a matter of ordinary statutory construction. *Quern's* conclusion thus does not compel, or even suggest, a particular result today.

[33] The singularity of this Court's approach to statutory interpretation in Eleventh Amendment cases also refutes the Court's argument that, given *Quern's* holding, it would make no sense to construe § 1983 to include States as "persons." See *ante*, at 66. This is so, the Court suggests, because such a construction would permit suits against States in state but not federal court, even though a major purpose of Congress in enacting § 1983 was to provide a federal forum for litigants who had been deprived of their constitutional rights. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). In answering the question whether § 1983 provides a federal forum for suits against the States themselves, however, one must apply the clear-statement principle reserved for Eleventh Amendment cases. Since this principle is inapplicable to suits brought in state court, and inapplicable to the question whether States are among those subject to a statute, see *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 287 (1973); *Atascadero*, *supra*, at 240, n.2, the answer to the question whether § 1983 provides a federal forum for suits against the States may be, and most often will be, different from the answer to the kind of question before us today. Since the question whether Congress has provided a federal forum for damages suits against the States is answered by applying a uniquely strict interpretive principle, see *supra*, at 75, the Court should not pretend that we have, in *Quern*, answered the question whether Congress intended to provide a federal forum for such suits, and then reason backwards from that "intent" to the conclusion that Congress must not have intended to allow such suits to proceed in state court.

[34] In short, the only principle of statutory interpretation that permits the Court to avoid a careful and thorough analysis of § 1983's language and history is the clear-statement principle that this Court has come to apply in Eleventh Amendment cases—a principle that is irrelevant to this state-court action. In my view, a careful and detailed analysis of § 1983 leads to the conclusion that States are "persons" within the meaning of that statute.

II

[35] Although § 1983 itself does not define the term "person," we are not without a statutory definition of this word. "Any analysis of the meaning of the word 'person' in § 1983 ... must begin ... with the Dictionary Act." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 719 (1978) (Rehnquist, J., dissenting). Passed just two months before § 1983, and designed to "suppl[y] rules of construction for all legislation," *ibid.*, the Dictionary Act provided:

"That in all acts hereafter passed ... the word 'person' may extend and be applied to bodies politic and corporate ... unless the context shows that such words were intended to be used in a more limited sense " Act of Feb. 25, 1871, § 2, 16 Stat. 431.

In *Monell*, we held this definition to be not merely allowable but mandatory, requiring that the word "person" be construed to include "bodies politic and corporate" unless the statute under consideration "by its terms called for a deviation from this practice." 436 U.S., at 689-690, n.53. Thus, we concluded, where nothing in the "context" of a particular statute "call[s] for a restricted interpretation of the word 'person,' the language of that [statute] should prima facie be construed to include 'bodies politic' among the entities that could be sued." *Ibid.*

[36] Both before and after the time when the Dictionary Act and § 1983 were passed, the phrase "bodies

politic and corporate” was understood to include the States.... Indeed, the very legislators who passed § 1 referred to States in these terms. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 661-662 (1871) (Sen. Vickers) (“What is a State? Is it not a body politic and corporate?”); *id.* at 696 (Sen. Edmunds) (“A State is a corporation”).

[37] The reason why States are “bodies politic and corporate” is simple: just as a corporation is an entity that can act only through its agents, “[t]he State is a political corporate body, can act only through agents, and can command only by laws.” As a “body politic and corporate,” a State falls squarely within the Dictionary Act’s definition of a “person.”

[38] While it is certainly true that the phrase “bodies politic and corporate” referred to private and public corporations, see *ante*, at 69, and n.9, this fact does not draw into question the conclusion that this phrase also applied to the States. Phrases may, of course, have multiple referents. Indeed, each and every dictionary cited by the Court accords a broader realm—one that comfortably, and in most cases explicitly, includes the sovereign—to this phrase than the Court gives it today... .

[39] Because I recognize that both uses of this phrase were deemed valid when § 1983 and the Dictionary Act were passed, the Court accuses me of “confus[ing] [the] precise definition of [this] phrase with its use ‘in a rather loose way,’” “to refer to the state (as opposed to a State).” *Ante*, at 70, n.9, *quoting* BLACK, *supra*, at 143. It had never occurred to me, however, that only “precise” definitions counted as valid ones. Where the question we face is what meaning Congress attached to a particular word or phrase, we usually—and properly—are loath to conclude that Congress meant to use the word or phrase in a hypertechnical sense unless it said so. Nor does the Court’s distinction between “the state” and “a State” have any force. The suggestion, I take it, is that the phrase “bodies politic and corporate” refers only to nations rather than to the states within a nation; but then the Court must explain why so many of the sources I have quoted refer to states in addition to nations. In an opinion so utterly devoted to the rights of the States as sovereigns, moreover, it is surprising indeed to find the Court distinguishing between our sovereign States and our sovereign Nation.

[40] In deciding what the phrase “bodies politic and corporate” means, furthermore, I do not see the relevance of the meaning of the term “public corporation.” See *ante*, at 69-70, n.9. That is not the phrase chosen by Congress in the Dictionary Act, and the Court’s suggestion that this phrase is coterminous with the phrase “bodies politic and corporate” begs the question whether the latter one includes the States.

* * * * *

[41] Thus, the question before us is whether the presumption that the word “person” in § 1 of the Civil Rights Act of 1871 included bodies politic and corporate—and hence the States—is overcome by anything in the statute’s language and history. Certainly nothing in the statutory language overrides this presumption. The statute is explicitly directed at action taken “under color of” state law, and thus supports rather than refutes the idea that the “persons” mentioned in the statute include the States. Indeed, for almost a century—until *Monroe v. Pape*, 365 U.S. 167 (1961)—it was unclear whether the statute applied at all to action not authorized by the State, and the enduring significance of the first cases construing the Fourteenth Amendment, pursuant to which § 1 was passed, lies in their conclusion that the prohibitions of this Amendment do not reach private action. See *Civil Rights Cases*, 109 U.S. 3 (1883). In such a setting, one cannot reasonably deny the significance of § 1983’s explicit focus on state action.

[42] Unimpressed by such arguments, the Court simply asserts that reading “States” where the statute mentions “person” would be “decidedly awkward.” *Ante*, at 64. The Court does not describe the awkwardness that it perceives, but I take it that its objection is that the under-color-of-law requirement would be redundant if States were included in the statute because States necessarily act under color of state law. But § 1983 extends as well to natural persons, who do not necessarily so act; in order to ensure that they would be liable only when they did so, the statute needed the under-color-of-law requirement. The only way to remove the redundancy that the Court sees would have been to eliminate the catchall phrase “person” altogether, and separately describe each category of possible defendants and the circumstances under which they

might be liable. I cannot think of a situation not involving the Eleventh Amendment, however, in which we have imposed such an unforgiving drafting requirement on Congress.

[43] Taking the example closest to this case, we might have observed in *Monell* that §1983 was clumsily written if it included municipalities, since these, too, may act only under color of state authority. Nevertheless, we held there that the statute does apply to municipalities...

[44] The legislative history and background of the statute confirm that the presumption created by the Dictionary Act was not overridden in §1 of the 1871 Act, and that, even without such a presumption, it is plain that “person” in the 1871 Act must include the States. I discussed in detail the legislative history of this statute in my opinion concurring in the judgment in *Quern v. Jordan*, 440 U.S., at 357-365, and I shall not cover that ground again here. Suffice it to say that, in my view, the legislative history of this provision, though spare, demonstrates that Congress recognized and accepted the fact that the statute was directed at the States themselves. One need not believe that the statute satisfies this Court’s heightened clear-statement principle, reserved for Eleventh Amendment cases, in order to conclude that the language and legislative history of §1983 show that the word “person” must include the States.

[45] As to the more general historical background of §1, we too easily forget, I think, the circumstances existing in this country when the early civil rights statutes were passed. “[V]iewed against the events and passions of the time,” *United States v. Price*, 383 U.S. 787, 803 (1966), I have little doubt that §1 of the Civil Rights Act of 1871 included States as “persons.” The following brief description of the Reconstruction period is illuminating:

“The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States. It had declared the governments in 10 ‘unreconstructed’ States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress’ requirements in 1868, the other four by 1870.

“For a few years ‘radical’ Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.

“Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866.... On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted.” *Id.* at 803-805 (footnotes omitted).

This was a Congress in the midst of altering the “balance between the States and the Federal Government.” *Ante*, at 65, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. at 242. It was fighting to save the Union, and in doing so, it transformed our federal system. It is difficult, therefore, to believe that this same Congress did not intend to include States among those who might be liable under §1983 for the very deprivations that were threatening this Nation at that time.

III

[46] To describe the breadth of the Court's holding is to demonstrate its unwisdom. If States are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.

[47] This is indeed an exceptional holding. Not only does it depart from our suggestion in *Alabama v. Pugh*, 438 U.S. 781, 782 (1978), that a State could be a defendant under § 1983 if it consented to suit, see also *Quern v. Jordan*, *supra*, at 340, but it also renders ineffective the choices some States have made to permit such suits against them. See, e.g., *Della Grotta v. Rhode Island*, 781 F.2d 343 (CA1 1986). I do not understand what purpose is served, what principle of federalism or comity is promoted, by refusing to give force to a State's explicit consent to suit.

[48] The Court appears to be driven to this peculiar result in part by its view that "in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law." *Ante*, at 67. But the question whether States are "persons" under § 1983 is separate and distinct from the question whether they may assert a defense of common-law sovereign immunity. In our prior decisions involving common-law immunities, we have not held that the existence of an immunity defense excluded the relevant state actor from the category of "persons" liable under § 1983, see, e.g., *Forrester v. White*, 484 U.S. 219 (1988), and it is a mistake to do so today. Such an approach entrenches the effect of common-law immunity even where the immunity itself has been waived.

[49] For my part, I would reverse the judgment below and remand for resolution of the question whether Michigan would assert common-law sovereign immunity in defense to this suit and, if so, whether that assertion of immunity would preclude the suit.

[50] Given the suggestion in the court below that Michigan enjoys no common-law immunity for violations of its own Constitution, *Smith v. Department of Public Health*, 428 Mich. 540, 641-642, 410 N.W.2d 749, 793-794 (1987) (Boyle, J., concurring), there is certainly a possibility that that court would hold that the State also lacks immunity against § 1983 suits for violations of the Federal Constitution. Moreover, even if that court decided that the State's waiver of immunity did not apply to § 1983 suits, there is a substantial question whether Michigan could so discriminate between virtually identical causes of action only on the ground that one was a state suit and the other a federal one. Cf. *Testa v. Katt*, 330 U.S. 386 (1947); *Martinez v. California*, 444 U.S. 277, 283, n.7 (1980). Finally, even if both of these questions were resolved in favor of an immunity defense, there would remain the question whether it would be reasonable to attribute to Congress an intent to allow States to decide for themselves whether to take cognizance of § 1983 suits brought against them. Cf. *Martinez*, *supra*, at 284, and n.8; *Owen v. City of Independence*, 445 U.S. 622, 647-648 (1980).

[51] Because the court below disposed of the case on the ground that States were not "persons" within the meaning of § 1983, it did not pass upon these difficult and important questions. I therefore would remand this case to the state court to resolve these questions in the first instance.

Justice Stevens, dissenting.

[52] Legal doctrines often flourish long after their *raison d'être* has perished. The doctrine of sovereign immunity rests on the fictional premise that the "King can do no wrong." Even though the plot to assassinate James I in 1605, the execution of Charles I in 1649, and the Colonists' reaction to George III's stamp tax made rather clear the fictional character of the doctrine's underpinnings, British subjects found a gracious means

of compelling the King to obey the law rather than simply repudiating the doctrine itself. They held his advisers and his agents responsible.^[5]

[53] In our administration of § 1983, we have also relied on fictions to protect the illusion that a sovereign State, absent consent, may not be held accountable for its delicts in federal court. Under a settled course of decision, in contexts ranging from school desegregation to the provision of public assistance benefits to the administration of prison systems and other state facilities, we have held the States liable under § 1983 for their constitutional violations through the artifice of naming a public officer as a nominal party. Once one strips away the Eleventh Amendment overlay applied to actions in federal court, it is apparent that the Court in these cases has treated the State as the real party in interest both for the purposes of granting prospective and ancillary relief and of denying retroactive relief. When suit is brought in state court, where the Eleventh Amendment is inapplicable, it follows that the State can be named directly as a party under § 1983.

* * * * *

[54] The Civil Rights Act of 1871 was “intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.” *Monell v. New York City Dept. of Social Services*, 436 U.S. at 700-701. Our holdings that a § 1983 action can be brought against state officials in their official capacity for constitutional violations properly recognize and are faithful to that profound mandate. If prospective relief can be awarded against state officials under § 1983 and the State is the real party in interest in such suits, the State must be a “person” which can be held liable under § 1983. No other conclusion is available. Eleventh Amendment principles may limit the State’s capacity to be sued as such in federal court. See *Alabama v. Pugh*, 438 U.S. 781 (1978). But since those principles are not applicable to suits in state court, see *Thiboutot*, *supra*, at 9, n.7; *Nevada v. Hall*, 440 U.S. 410 (1979), there is no need to resort to the fiction of an official-capacity suit and the State may and should be named directly as a defendant in a § 1983 action.

* * * * *

[55] The Court having constructed an edifice for the purposes of the Eleventh Amendment on the theory that the State is always the real party in interest in a § 1983 official-capacity action against a state officer, I would think the majority would be impelled to conclude that the State is a “person” under § 1983. As Justice Brennan has demonstrated, there is also a compelling textual argument that States are persons under § 1983. In addition, the Court’s construction draws an illogical distinction between wrongs committed by county or municipal officials on the one hand, and those committed by state officials on the other. Finally, there is no necessity to import into this question of statutory construction doctrine created to protect the fiction that one sovereign cannot be sued in the courts of another sovereign. Aside from all of these reasons, the Court’s holding that a State is not a person under § 1983 departs from a long line of judicial authority based on exactly that premise.

I respectfully dissent.



[Will v. Michigan Department of State Police – Audio and Transcript of Oral Argument](#)

Footnotes

1. Petitioner argues that Congress would not have considered the Eleventh Amendment in enacting § 1983 because in 1871 this Court had not yet held that the Eleventh Amendment barred federal-question cases against States in federal court. This argument is no more than an attempt to have this Court reconsider *Quern v. Jordan*, 440 U.S. 332 (1979), which we decline to do. [↴](#)
2. Our recognition in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), that a municipality is

a person under § 1983, is fully consistent with this reasoning. In *Owen v. City of Independence*, 445 U.S. 622 (1980), we noted that by the time of the enactment of § 1983, municipalities no longer retained the sovereign immunity they had previously shared with the States. “[B]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city’s immunity from liability for the nonperformance or misperformance of its obligation,” *id.*, at 646, and, as a result, municipalities had been held liable for damages “in a multitude of cases” involving previously immune activities, *id.*, at 646-647. [↩](#)

3. See *United States v. Fox*, 94 U.S. 315, 321 (1877); 1 B. ABBOTT, *DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE* 155 (1879) (“most exact expression” for “public corporation”); W. ANDERSON, *A DICTIONARY OF LAW* 127 (1893) (“most exact expression for a public corporation or corporation having powers of government”); BLACK’S *LAW DICTIONARY* 143 (1891) (“body politic” is “term applied to a corporation, which is usually designated as a ‘body corporate and politic’” and “is particularly appropriate to a public corporation invested with powers and duties of government”); 1 A. BURRILL, *A LAW DICTIONARY AND GLOSSARY* 212 (2d ed. 1871) (“body politic” is “term applied to a corporation, which is usually designated as a body corporate and politic”). A public corporation, in ordinary usage, was another term for a municipal corporation, and included towns, cities, and counties, but not States. See 2 ABBOTT, *supra*, at 347; ANDERSON, *supra*, at 264-265; BLACK, *supra*, at 278; 2 BURRILL, *supra*, at 352.

Justice Brennan appears to confuse this precise definition of the phrase with its use “in a rather loose way,” see BLACK, *supra*, at 143, to refer to the state (as opposed to a State). This confusion is revealed most clearly in Justice Brennan’s reliance on the 1979 edition of BLACK’S *LAW DICTIONARY*, which defines “body politic or corporate” as “[a] social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” *Post*, at 79. To the extent Justice Brennan’s citation of other authorities does not suffer from the same confusion, those authorities at best suggest that the phrase is ambiguous, which still renders the Dictionary Act incapable of supplying the necessary clear intent. [↩](#)

4. Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because “official-capacity actions for prospective relief are not treated as actions against the State.” *Kentucky v. Graham*, 473 U.S. at 167, n.14; *Ex parte Young*, 209 U.S. 123, 159-160 (1908). This distinction is “commonplace in sovereign immunity doctrine,” L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-27, p. 190, n.3 (2d ed. 1988), and would not have been foreign to the 19th-century Congress that enacted § 1983, see, e.g., *In re Ayers*, 123 U.S. 443, 506-507 (1887); *United States v. Lee*, 106 U.S. 196, 219-222 (1882); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *Osborn v. Bank of United States*, 9 Wheat. 738 (1824). *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973), on which Justice Stevens relies, see *post*, at 93, n.8, is not to the contrary. That case involved municipal liability under § 1983, and the fact that nothing in § 1983 suggests its “bifurcated application to municipal corporations depending on the nature of the relief sought against them,” 412 U.S. at 513, is not surprising, since by the time of the enactment of § 1983 municipalities were no longer protected by sovereign immunity. *Supra* at 67-68, n.7. [↩](#)

5. In the first chapter of his classic *History of England*, published in 1849, Thomas Macaulay wrote:

“Of these kindred constitutions the English was, from an early period, justly reputed the best. The prerogatives of the sovereign were undoubtedly extensive....

“But his power, though ample, was limited by three great constitutional principles, so ancient that

none can say when they began to exist, so potent that their natural development, continued through many generations, has produced the order of things under which we now live.

First, the King could not legislate without the consent of his Parliament. Secondly, he could impose no tax without the consent of his Parliament. Thirdly, he was bound to conduct the executive administration according to the laws of the land, and, if he broke those laws, his advisers and his agents were responsible." 1 T. MACAULAY, HISTORY OF ENGLAND 28-29. In the United States as well, at the time of the passage of the Civil Rights Act of 1871, actions against agents of the sovereign were the means by which the State, despite its own immunity, was required to obey the law. See, e.g., *Poindexter v. Greenhow*, 114 U.S. 270, 297 (1885) ("The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible, except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State, and in violation of the Constitution of the United States"); *Davis v. Gray*, 16 Wall. 203, 220 (1873) ("Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record"). [↵](#)

Notes on *Will v. Michigan Department of State Police*

1. Should the analysis of the issue whether a State is a "person" within the meaning of Section 1983 be different from the analysis of the issue of whether Congress intended to abrogate the State's Eleventh Amendment immunity? Did the majority's reasoning in *Will* differ from the majority's reasoning in [Quern v. Jordan](#)?
2. After *Will*, may a State be sued in state court under Section 1983 if it consents to suit? If the State waives sovereign immunity for constitutional violations? If the State fails to move to dismiss for failure to state a claim upon which relief may be granted?
3. Under [Ex Parte Young](#) and [Edelman v. Jordan](#), a state official sued in his official capacity for prospective relief is a "person" under Section 1983. After *Will*, may plaintiff bring a Section 1983 action in state court for damages against a state official in his official capacity? Does *Will* overrule *Ex Parte Young* and *Edelman*?
4. In [Hafer v. Melo](#), 502 U.S. 21 (1991), employees of the Auditor General's Office of the Commonwealth of Pennsylvania sued Auditor General Hafer for damages in federal court under Section 1983. The suit alleged that Hafer had dismissed the employees because of their Democratic political affiliation and because they had supported her opponent during the election for office. The district court dismissed the claims on the ground that under *Will*, Hafer could not be held liable for damages for employment decisions that she made in her official capacity as Auditor General. The United States Court of Appeals for the Third Circuit reversed the dismissal, finding that plaintiffs sought damages from Hafer in her personal, as opposed to official capacity. Before the Supreme Court, Hafer argued that the distinction between official and personal capacity suits turns not on the capacity in which the state official is sued, but rather rests on the capacity in which the officer acted when injuring the plaintiff. Hafer interpreted *Will* as holding that state officials may not be held accountable for damages in their personal capacity for actions taken in their official capacity. The Supreme Court, however, rejected Hafer's construction of *Will*:

Will itself makes clear that the distinction between official-capacity suits and personal-capacity suits is more than “a mere pleading device.” [*Will*, 491 U.S. at 71]. State officers sued for damages in their official capacity are not “persons” for purposes of the suit because they assume the identity of the government that employs them. *Ibid*. By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term “person.” *Cf. Id.* at 71 n.10 (“A state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official capacity actions for prospective relief are not treated as actions against the State.’”) (quoting *Graham*, 473 U.S. at 167, n.14).

Through § 1983, Congress sought “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.” *Monroe v. Pape*, 365 U.S. 167 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting “under color of any [state] statute, ordinance, regulation, custom or usage.” 42 U.S.C. § 1983. The requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as Auditor General. We cannot accept the novel proposition that this same official authority insulates Hafer from suit.

Hafer, 502 U.S. at 27-28 .

The Court also spurned Hafer’s proffered distinction between a) actions outside the official’s authority or not essential to the operation of state government, which can subject the official to personal liability under Section 1983, and b) actions both within the official’s authority and necessary to the performance of governmental functions, which should be considered acts of the State and thus cannot give rise to a personal-capacity action:

The distinction Hafer urges finds no support in the broad language of § 1983. To the contrary, it ignores our holding that Congress enacted § 1983 “to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” *Scheuer v. Rhodes*, 416 U.S. 232, 243, 40 L. Ed.2d 90 (1974), quoting *Monroe v. Pape*, *supra*, at 171-172). Furthermore, Hafer’s distinction cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties. Her theory would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities. Yet our cases do not extend absolute immunity to all officers who engage in necessary official acts. Rather, immunity from suit under § 1983 is “predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it,” *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976), and officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue, *Burns v. Reed*, 500 U.S. 478 (1991).

Hafer, 502 U.S. at 28-29.

Finally, the Court dismissed Hafer’s argument that under *Will*, the Eleventh Amendment prohibits personal-capacity suits against state officials in federal court because holding individual officers liable for damages infringes on state sovereignty by rendering government less effective:

Most certainly, *Will*’s holding does not rest directly on the Eleventh Amendment.... We considered the Eleventh Amendment in *Will* only because the fact that Congress did not intend to override state immunity when it enacted § 1983 was relevant to statutory construction....

To be sure, imposing liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence. Insofar as respondents seek damages against Hafer personally, the Eleventh Amendment does not restrict their ability to sue in federal court.

Hafer, 502 U.S. at 30-31.

5. Given that States are not liable under Section 1983 for retroactive relief, may a plaintiff whose federal constitutional rights are violated by a municipality acting pursuant to the mandate of state law recover damages from that local governmental entity?

- a. In [*Surplus Store and Exchange, Inc. v. City of Delphi*](#), 928 F.2d 788 (7th Cir. 1991), plaintiff filed a Section 1983 action for damages alleging that the City was liable for the actions of its police officer who, believing rings displayed in the plaintiff's store had been stolen, seized the rings and returned them to whom the officer believed to be the true owner. Plaintiff asserted that because the officer's actions were taken pursuant to a state law that authorized the seizure and transfer of the property without a pre-disposition hearing, the City was liable for its policy of enforcing those state statutes. The court of appeals affirmed dismissal of the complaint:

It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

Cf. Tuttle, 476 U.S. at 823:

Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official... But *Monell* must be taken to require proof of a city policy different in kind from [the policy of establishing a police force] before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

Would plaintiff be able to recover damages from the individual officer? Is injunctive relief available? See Chapter VI(B), *infra*.

- b. In [*Davis v. City of Camden*](#), 657 F. Supp. 396 (D. N.J. 1987), the court rejected the City's contention that it could not be held liable in damages for a strip search of an inmate in a county jail that was mandated by a state regulation:

[W]e believe that a municipality should be held liable under § 1983 when it officially adopts a policy that subsequently is declared unconstitutional, notwithstanding the fact that the policy was mandated by state law, and we so hold. [A] holding contrary to the one we reach would be palpably inconsistent with the underlying purpose of § 1983, a statute designed to insure that victims of unconstitutional state action are compensated for the violation of their rights, and one that, as such, must be liberally construed. In light of these factors, the Supreme Court held in *Owen v. City of Independence* that municipalities are not entitled to qualified immunity based on the good faith of their officials, reasoning that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." ... Faced with

a choice between depriving victims of constitutional violations of recovery and imposing liability without any real fault on local governments, the *Owen* court, in view of the remedial purposes of § 1983, chose the latter course. Our holding today is motivated by similar policy considerations.

Davis, 657 F. Supp. at 403. In a footnote, the *Davis* court identified the net result were they to exonerate the City for acting in accordance with state law:

Were we to immunize municipalities in the circumstances presented in this case, plaintiffs whose constitutional rights are violated through the execution of state mandated municipal policies frequently would be unable to recover damages; municipal officials often may be shielded from liability in their personal capacities under the qualified immunity defense, and the Eleventh Amendment prohibits private actions for damages against the state in federal court....

Davis, 657 F. Supp. at 403 n.6. See also [*Evers v. County of Custer*](#), 745 F.2d 1196, 1203-04 (9th Cir. 1984) (County is liable for actions mandated by state law; “The policies discussed by the Supreme Court in *Owen* fully support the imposition of liability on the County.”).

VI. REMEDIES

A. Damages

CAREY v. PIPHUS, 435 U.S. 247 (1978)

Mr. Justice Powell delivered the opinion of the Court.

I [1] In this case, brought under 42 U.S.C. § 1983, we consider the elements and prerequisites for recovery of damages by students who were suspended from public elementary and secondary schools without procedural due process. The Court of Appeals for the Seventh Circuit held that the students are entitled to recover substantial nonpunitive damages even if their suspensions were justified, and even if they do not prove that any other actual injury was caused by the denial of procedural due process. We disagree, and hold that in the absence of proof of actual injury, the students are entitled to recover only nominal damages.

[2] We granted certiorari to consider whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial “nonpunitive” damages. 430 U.S. 964 (1977).

II

[3] The legislative history of § 1983, elsewhere detailed, e.g., *Monroe v. Pape*, 365 U.S. 167, 172-183 (1961); *id.*, at 225-234 (Frankfurter, J., dissenting in part); *Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972), demonstrates that it was intended to “[create] a species of tort liability” in favor of persons who are deprived of “rights, privileges, or immunities secured” to them by the Constitution. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

[4] Petitioners contend that the elements and prerequisites for recovery of damages under this “species of tort liability” should parallel those for recovery of damages under the common law of torts. In particular, they urge that the purpose of an award of damages under § 1983 should be to compensate persons for injuries that are caused by the deprivation of constitutional rights; and, further, that plaintiffs should be required to prove not only that their rights were violated, but also that injury was caused by the violation, in order to recover substantial damages. Unless respondents prove that they actually were injured by the deprivation of procedural due process, petitioners argue, they are entitled at most to nominal damages.

[5] Respondents seem to make two different arguments in support of the holding below. First, they contend that substantial damages should be awarded under § 1983 for the deprivation of a constitutional right whether or not any injury was caused by the deprivation. This, they say, is appropriate both because constitutional rights are valuable in and of themselves, and because of the need to deter violations of constitutional rights. Respondents believe that this view reflects accurately that of the Congress that enacted § 1983. Second, respondents argue that even if the purpose of a § 1983 damages award is, as petitioners

contend, primarily to compensate persons for injuries that are caused by the deprivation of constitutional rights, every deprivation of procedural due process may be presumed to cause some injury. This presumption, they say, should relieve them from the necessity of proving that injury actually was caused.

A

[6] Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

[7] Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, p. 1299 (1956) (emphasis in original). The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions "found ... to have been violative of ... constitutional rights *and to have caused compensable injury*...." The lower federal courts appear generally to agree that damages awards under § 1983 should be determined by the compensation principle.

[8] The Members of the Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871.^[1] Two other sections of the Civil Rights Act of 1871 appear to incorporate this principle, and no reason suggests itself for reading § 1983 differently.^[2] To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. See *Imbler v. Pachtman*, 424 U.S. at 442 (White, J., concurring in judgment).^[3]

B

[9] It is less difficult to conclude that damages awards under § 1983 should be governed by the principle of compensation than it is to apply this principle to concrete cases. But over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.^[4]

[10] It is not clear, however, that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case. In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action. In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts. In those cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.

[11] Although this task of adaptation will be one of some delicacy as this case demonstrates it must be undertaken. The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action. Cf. *Jones v. Hildebrand*, 432 U.S. 183, 190-191 (1977) (White, J., dissenting); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969). In order to further the purpose of § 1983, the rules governing compensation

for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law. We agree with Mr. Justice Harlan that the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights." *Bivens v. Six Unknown Fed. Narcotics Agents*, *supra*, at 409 (Harlan, J., concurring in judgment). With these principles in mind, we now turn to the problem of compensation in the case at hand.

C

[12] The Due Process Clause of the Fourteenth Amendment provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

[13] This Clause "raises no impenetrable barrier to the taking of a person's possessions," or liberty, or life. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process...." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Such rules "minimize substantively unfair or mistaken deprivations of" life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin*, *supra*, at 81.

[14] In this case, the Court of Appeals held that if petitioners can prove on remand that "[respondents] would have been suspended even if a proper hearing had been held," 545 F.2d, at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspensions. The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation. We do not understand the parties to disagree with this conclusion. Nor do we.

[15] The parties do disagree as to the further holding of the Court of Appeals that respondents are entitled to recover substantial although unspecified damages to compensate them for "the injury which is 'inherent in the nature of the wrong,'" 545 F.2d, at 31, even if their suspensions were justified and even if they fail to prove that the denial of procedural due process actually caused them some real, if intangible, injury. Respondents, elaborating on this theme, submit that the holding is correct because injury fairly may be "presumed" to flow from every denial of procedural due process. Their argument is that in addition to protecting against unjustified deprivations, the Due Process Clause also guarantees the "feeling of just treatment" by the government. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). They contend that the deprivation of protected interests without procedural due process, even where the premise for the deprivation is not erroneous, inevitably arouses strong feelings of mental and emotional distress in the individual who is denied this "feeling of just treatment." They analogize their case to that of defamation per se, in which "the plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured" in order to recover substantial compensatory damages. C. MCCORMICK, LAW OF DAMAGES § 116, p. 423 (1935).

[16] Petitioners do not deny that a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests. They go so far as to concede that, in a proper case, persons in respondents' position might well recover damages for mental and emotional distress caused by the denial of procedural due

process. Petitioners' argument is the more limited one that such injury cannot be presumed to occur, and that plaintiffs at least should be put to their proof on the issue, as plaintiffs are in most tort actions.

[17] We agree with petitioners in this respect. As we have observed in another context, the doctrine of presumed damages in the common law of defamation per se "is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). The doctrine has been defended on the grounds that those forms of defamation that are actionable per se are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove. See *id.* at 373, 376 (White, J., dissenting). Moreover, statements that are defamatory per se by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury either. But these considerations do not support respondents' contention that damages should be presumed to flow from every deprivation of procedural due process.

[18] First, it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently is as likely to cause distress as the publication of defamation per se is to cause injury to reputation and distress. Where the deprivation of a protected interest is substantively justified but procedures are deficient in some respect, there may well be those who suffer no distress over the procedural irregularities. Indeed, in contrast to the immediately distressing effect of defamation per se, a person may not even know that procedures were deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation.

[19] Moreover, where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. But as the Court of Appeals held, the injury caused by a justified deprivation, including distress, is not properly compensable under § 1983.^[5] This ambiguity in causation, which is absent in the case of defamation per se, provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.

[20] Finally, we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.^[6] In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

D

[21] The Court of Appeals believed, and respondents urge, that cases dealing with awards of damages for racial discrimination, the denial of voting rights, and the denial of Fourth Amendment rights support a presumption of damages where procedural due process is denied. Many of the cases relied upon do not help respondents because they held or implied that some actual, if intangible, injury must be proved before compensatory damages may be recovered. Others simply did not address the issue.^[7] More importantly, the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said, *supra* at 258-259, these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question. For this reason, and without intimating an opinion as to their merits, we do not deem the cases relied upon to be controlling.

III

[22] Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing." *Fuentes v. Shevin*, 407 U.S. at 87; see *Codd v. Velger*, 429 U.S. at 632 (Stevens, J., dissenting); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

[23] Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

[24] Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971); *Anti-Fascist Committee v. McGrath*, 341 U.S. at 171-172 (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.

[25] The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Marshall concurs in the result.

Mr. Justice Blackmun took no part in the consideration or decision of this case.



[Carey v. Piphus – Audio and Transcript of Oral Argument](#)

Footnotes

1. See 1 F. HILLIARD, LAW OF TORTS, ch. 3, § 5 (3d ed. 1866); T. SEDGWICK, MEASURE OF DAMAGES 25-35 (5th ed. 1869). Thus, one proponent of § 1 of the Civil Rights Act of 1871 asked during debate: "[W]hat legislation could be more appropriate than to give a person injured by another under color of ... State laws a remedy by civil action?" Cong. Globe, 42d Cong., 1st Sess., 482 (1871) (remarks of Rep. Wilson). And one opponent of § 1 complained: "The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States." *Id.* at App. 216 (remarks of Sen. Thurman). See also Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 10 (1974). [↗](#)

2. Section 2 of the Act, 17 Stat. 13-14, now codified at 42 U.S.C. § 1985(3), made it unlawful to conspire, *inter alia*, “for the purpose of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.” It further provided (emphasis supplied):

“[I]f any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy”

Section 6 of the Act, 17 Stat. 15, now codified at 42 U.S.C. § 1986, provided (emphasis supplied): “[A]ny person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act.” [↴](#)

3. This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights. See, e.g., *Silver v. Cormier*, 529 F.2d 161, 163-164 (CA10 1976); *Stengel v. Belcher*, 522 F.2d 438, 444 n.4 (CA6 1975), *cert. dismissed*, 429 U.S. 118 (1976); *Spence v. Staras*, 507 F.2d 554, 558 (CA7 1974); *Caperci v. Huntoon*, 397 F.2d 799, 801 (CA1), *cert. denied*, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573, 576 (CA5 1967); *Basista v. Weir*, 340 F.2d 74, 84-88 (CA3 1965). Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury, see n.6, *supra*, and the Court of Appeals approved only the award of “non-punitive” damages, 545 F.2d 30, 31 (1976).

We also note that the potential liability of § 1983 defendants for attorney’s fees, see Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional and by no means inconsequential assurance that agents of the State will not deliberately ignore due process rights. See also 18 U.S.C. § 242, the criminal counterpart of § 1983. [↴](#)

4. The Court has looked to the common law of torts in similar fashion in constructing immunities under § 1983. See *Imbler v. Pachtman*, 424 U.S. 409, 417-419 (1976), and cases there discussed. Title 42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is “necessary to furnish suitable remedies” under § 1983. [↴](#)
5. In this case, for example, respondents denied the allegations against them. They may well have been distressed that their denials were not believed. They might have been equally distressed if they had been disbelieved only after a full-dress hearing, but in that instance they would have no cause of action against petitioners. [↴](#)
6. We use the term “distress” to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one’s conduct and observed by others. Juries

must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). [↵](#)

7. In *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119 (CA7 1974) and *Seaton v. Sky Realty Co.*, 491 F.2d 634 (CA7 1974), cited in *Hostrop, supra*, at 579, the court held that damages may be awarded for humiliation and distress caused by discriminatory refusals to lease housing to plaintiffs. The court's comment in *Seaton* that "[h]umiliation can be inferred from the circumstances as well as established by the testimony," 491 F.2d, at 636, suggests that the court considered the question of actual injury to be one of fact. See generally *Annot., Recovery of Damages for Emotional Distress Resulting from Racial, Ethnic, or Religious Abuse or Discrimination*, 40 A.L.R.3d 1290 (1971).

In *Basista v. Weir*, 340 F.2d 74 (CA3 1965); *Sexton v. Gibbs*, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (CA5 1971), *cert. denied*, 404 U.S. 1062 (1972); and *Rhoads v. Horvat*, 270 F. Supp. 307 (Colo. 1967), cited in *Hostrop, supra* at 579, the courts indicated that damages may be awarded for humiliation and distress caused by unlawful arrests, searches, and seizures. In *Basista v. Weir*, the court held that nominal damages could be awarded for an illegal arrest even if compensatory damages were waived; and that such nominal damages would, in an appropriate case, support an award of punitive damages. 340 F.2d, at 87-88. Because it was unclear whether the plaintiff had waived his claim for compensatory damages, that issue was left open upon remand. *Id.*, at 88. In *Sexton v. Gibbs*, where the court found "that Plaintiff suffered humiliation, embarrassment and discomfort," substantial compensatory damages were awarded. 327 F. Supp. at 143. In *Rhoads v. Horvat*, the court allowed a jury award of \$5,000 in compensatory damages for an illegal arrest to stand, stating that it did "not doubt that the plaintiff was outraged by the arrest." 270 F. Supp. at 311.

Wayne v. Venable, 260 F. 64 (CA8 1919), cited in *Hostrop, supra*, at 579, and *Ashby v. White*, 1 Bro. P.C. 62, 1 Eng. Rep. 417 (H.L. 1703), *rev'd* 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703), do appear to support the award of substantial damages simply upon a showing that a plaintiff was wrongfully deprived of the right to vote. Citing *Ashby v. White*, this Court has held that actions for damages may be maintained for wrongful deprivations of the right to vote, but it has not considered the prerequisites for recovery. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927); see also *Smith v. Allwright*, 321 U.S. 649 (1944); *Coleman v. Miller*, 307 U.S. 433, 469 (1939) (opinion of Frankfurter, J.); *Nixon v. Condon*, 286 U.S. 73 (1932); *Myers v. Anderson*, 238 U.S. 368 (1915); *Giles v. Harris*, 189 U.S. 475 (1903); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900). The commonlaw rule of damages for wrongful deprivations of voting rights embodied in *Ashby v. White* would, of course, be quite relevant to the analogous question under § 1983. [↵](#)

Notes on *Carey v. Phipus*

1. Can the *Carey* approach to the measure of damages be reconciled with Justice Harlan's view in [Monroe v. Pape](#) that Section 1983 "becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy?"
2. In *Robertson v. Wegmann*, 346 U.S. 584 (1991), Clay Shaw lodged a Section 1983 damage action alleging that the government prosecuted him in bad faith for allegedly having participated in a conspiracy to assassinate President John F. Kennedy. When Shaw died before trial, defendants moved to dismiss the action on the ground that the cause of action abated under the applicable Louisiana statute. According to the Louisiana survivorship statute, Shaw's action would survive only in favor of a spouse, children, parents or sibling. No

person having such a relationship with Shaw was alive at the time of his death. The Supreme Court granted certiorari to consider whether the Louisiana statute abating the Section 1983 claim controlled or whether the trial court was at liberty to create a federal common rule permitting the action to survive. The Court found the resolution of the issue to turn on 42 U.S.C. § 1988, which provides in pertinent part:

The jurisdiction in civil ... matters conferred on the district courts by the provisions of this chapter ... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies ... the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil ... cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....

The Court reasoned that because Section 1983 was “deficient” in failing to address whether civil rights actions survive the death of the plaintiff, state common law, as well as modifications generated by state statutes, would control unless “inconsistent with the Constitution and laws of the United States.” It then held that the Louisiana survivorship statute was not incompatible with federal law despite the fact that it extinguished Shaw’s Section 1983 claim:

Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship.

The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased’s estate. And, given that most Louisiana actions survive the plaintiff’s death, the fact that a particular action might abate surely would not adversely affect § 1983’s role in preventing official illegality, at least in situations where there is no claim that the illegality caused the plaintiff’s death.

A state statute cannot be considered “inconsistent” with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instruct us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. A different situation might well be presented ... if state law “did not provide for the survival of any tort actions,” ... or if it significantly restricted the types of action that survive.... We intimate no view, moreover, about whether abatement based on state law would be allowed in a situation in which deprivation of federal rights caused death.

Robertson, 436 U.S. at 590-94.

3. Under *Carey* and *Robertson*, do state statutes that limit the amount of damages recoverable in death cases apply to Section 1983 actions?

- a. In [*City of Tarrant v. Jefferson*](#), 682 So.2d 29 (Ala. 1996), Melvin Jefferson sued under Section 1983 claiming that city firefighters, in furtherance of a policy of denying fire protection to minorities, purposefully refused to attempt to rescue and revive his mother, Alberta. The city moved for judgment on the pleadings, arguing that a) under the Alabama Wrongful Death Act, punitive but not compensatory damages are recoverable, and b) punitive damages, the only remedy available under the Alabama statute, may not be awarded against local governmental entities under Section 1983.

The Alabama Supreme Court rejected plaintiff's assertion that application of the state Wrongful Death Act to Section 1983 actions against municipalities is inconsistent with the Constitution and laws of the United States and must be disregarded in favor of a federal common law rule permitting a claim for compensatory damages. The Court reasoned that rather than unduly restrict the federal claim, the Alabama statute supplies a remedy—punitive damages—which exceeds the relief available against a local governmental entity under federal law. Even though the Supreme Court of the United States holds that punitive damages are not recoverable under Section 1983, the Alabama Supreme Court concluded that “the application of state law ... does not, in substance, abrogate plaintiff's remedy against the city for violations of § 1983, but rather expands the recovery.” *City of Tarrant*, 682 So.2d at 30. The United States Supreme Court accepted the case for review but then dismissed its grant of certiorari for want of jurisdiction. *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997)

- b. In [*Berry v. City of Muskogee*](#), 900 F.2d 1489 (10th Cir. 1990), the court of appeals held that Oklahoma survival and wrongful death acts did not govern a Section 1983 damages claim arising out of the murder of Mark Berry by fellow prisoners at the Muskogee City-Federal Jail.

Applying the principles set out in § 1988 for borrowing law from another source, we are satisfied that the Oklahoma survival action alone does not meet the stated criteria. As applied to the instant case, it would provide extraordinarily limited recovery, possibly only damages for property loss, of which there were none, and loss of decedent's earnings between the time of injury and death, of which there also were none. Thus, the Oklahoma survival action is clearly deficient in both its remedy and deterrent effect.

The more difficult question is whether the Oklahoma law on survival actions, as supplemented by Oklahoma's wrongful death statute [which provided damages for pain and suffering, lost earnings, funeral and burial expenses and punitive damages], sufficiently meets the §1988 criteria to satisfy the test for borrowing state law.

[I]f we were to define § 1983 remedies in terms of the state survival action, supplemented by the state wrongful death act, we place into the hands of the state the decision as to allocation of the recovery in a § 1983 case, and, indeed, whether there can be any recovery at all. In an Oklahoma wrongful death action nearly all recoverable damages are expressly funneled to the decedent's surviving spouse and children to the exclusion of decedent's creditors or the beneficiaries of decedent's will, if he or she has one.... The statute also permits recovery for loss of consortium and grief of the surviving spouse, grief and loss of companionship of the children and parents ... items decedent could not have recovered had he lived to sue for himself.

Allowing the state determinations to prevail also permits the state to define the scope and extent of recovery. For instance, some states may preclude, or limit, recovery for pain and suffering or for punitive damages. In addition some state laws may deny all recovery in particular circumstances, as when wrongful death actions must be for dependents and there are none.

We therefore conclude ... that the federal courts must fashion a federal remedy to be applied in § 1983 death cases. The remedy should be a survival action, brought by the estate of the

deceased victim, in accordance with §1983's express statement that the liability is to "the party injured." 42 U.S.C. §1983. It must make available to plaintiffs sufficient damages to serve the deterrent function central to the purpose of §1983.... We believe appropriate compensatory damages would include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions.

The state wrongful death actions are not foreclosed by this approach; they remain as pendent state tort claims. But, of course, There can be no duplication of recovery.

Berry, 900 F. 2d at 1504-08.

4. Where a constitutional deprivation causes death, may the surviving family members recover damages under Section 1983 for violation of their own constitutional rights resulting from the death?

- a. In [Valdivieso Ortiz v. Burgos](#), 807 F.2d 6 (1st Cir. 1986), the stepfather and siblings of an inmate beaten to death by guards at the Guayama Regional Detention Center brought a Section 1983 action to redress deprivation of their constitutional right to companionship. The court of appeals affirmed the district court's grant of summary judgment to defendants:

Until now, the Supreme Court cases involving the familial liberty interest have fallen generally into two categories, neither of which applies here. First, the Court has held as a matter of substantive due process that the government may not interfere in certain particularly private family decisions. These substantive due process cases do not hold that family relationships are, in the abstract, protected against all state encroachments, direct or indirect, but only that the state may not interfere with an individual's right to choose how to conduct his or her family affairs. This case does not involve such a choice.

Appellants also are not within the protective umbrella of the second category of Supreme Court cases. Those cases have held only that when the state seeks to change or affect the relationship of parent and child in furtherance of a legitimate state interest, such as cases involving termination of parental rights ... a fourteenth amendment liberty interest is implicated and the state therefore must adhere to rigorous procedural safeguards.

Although we recognize and deplore the egregious nature of the alleged governmental action in this case, we hesitate ... to erect a new substantive right upon the relatively uncharted terrain of substantive due process. It does not necessarily follow that the incidental deprivation of even a natural parent's parental rights is actionable simply because the relevant deprivation of life is shocking.... [T]he problem of giving definition and limits to a liberty interest in this vast area seems not only exceedingly difficult but to a considerable extent duplicative of the widespread existence of state causes of action, as in this case, which provide some compensation to the grieving relatives.

Valdivieso Ortiz, 807 F.2d at 7-9.

- b. In [Smith v. City of Fontana](#), 818 F.2d 1411 (9th Cir. 1987), a city police officer, responding to a call concerning a domestic dispute, shot and killed Rufus Smith, Sr. in the parking lot of his apartment building. The court of appeals held that Smith's children, suing in their individual capacities, could not assert a claim for relief for violation of the Fourth Amendment proscription of excessive force because the children were not themselves subjected to such force and could not vicariously assert

the constitutional rights of their father. However, the court found that the children stated a claim for violation of their substantive due process right to be free from deprivation of the life, love, comfort and support of their father:

The Supreme Court has yet to address whether and when the government's act of taking the life of one family member deprives other family members of a cognizable liberty interest in continued association with the decedent. Our court, however, has held that parents can challenge under Section 1983 a state's severance of a parent-child relationship as interfering with their substantive liberty interests in the companionship and society of their children. We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond is reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.

* * * * *

We recognize that the Supreme Court cases [defining] the substantive liberty interest in a parent-child relationship involved suits by parents of minor children. The state's interference with the parent-child relationship therefore threatened not only the parents' interest in the companionship of their children, but also the parents' constitutionally-protected interest in raising their children. When, as in this case, a child claims constitutional protection for her relationship with a parent, there is not custodial interest implicated, but only a companionship interest. This distinction between the parent-child and the child-parent relationships does not, however, justify constitutional protection for one but not the other. We hold that a child's liberty interest in the companionship and support of a parent is sufficiently weighty by itself that interference with this interest may trigger a violation of substantive due process.

* * * * *

Our conclusion also finds compelling support in the legislative history of Section 1983's precursor, the Ku Klux Klan act of 1871. Representative Butler described the Act "as remedy for wrongs, arsons and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy."

Smith, 818 F.2d at 1418-19. See also [Byrd v. Guess](#), 137 F.3d 1126 (9th Cir. 1998) (Mother and widow of decedent shot to death by police officers could not recover damages for loss of society by proving objectively unreasonable application of force in violation of Fourth Amendment but could recover damages upon proof of deliberate indifference to the right of familial relationship and society in violation of Fourteenth Amendment).

- c. In [Crumpton v. Gates](#), 947 F.2d 1418 (9th Cir. 1991), six-year-old John Crumpton IV filed a Section 1983 action to redress the killing of his father by an alleged Los Angeles Police Department "death squad." The district court granted defendants' motion for summary judgment, finding that because Compton was a two-month-old fetus at the time of the killing, he was not a "person" within the meaning of Section 1983. The court of appeals reversed:

Crumpton claims unwarranted state interference with his rights to familial companionship and society. Because a child has familial relationships only after birth, it follows that the

child's right to familial relationships exists only after birth. Thus, although the wrongful act occurred while Compton was *in utero*, the injury or suffering which flowed from that wrongful act occurred postnatally.... He was a "person" when the injury occurred, at his birth. Recognizing the temporal distinction, when it exists, between a wrongful act and the injury it ultimately causes is no new concept. It is one consistent with common law tort principles.

We hold that Crumpton's injury and cause of action did not arise until his birth. In light of this holding we are not required to reach Crumpton's claim that state law [allowing children born alive to recover in tort for prenatal injuries caused by third parties] should be incorporated into section 1983 for the purpose of allowing him to maintain his action.

Crumpton, 947 F.2d at 1422-24.

5. Are there any arguable limits to the ruling in *Carey* that absent proof of actual injury, plaintiffs in Section 1983 actions may recover only nominal damages in an amount not to exceed one dollar?

MEMPHIS COMMUNITY SCHOOL DISTRICT v. STACHURA, 477 U.S. 299 (1986)

Justice Powell delivered the opinion of the Court.

[1] This case requires us to decide whether 42 U.S.C. § 1983 authorizes an award of compensatory damages based on the factfinder's assessment of the value or importance of a substantive constitutional right.

I

[2] Respondent Edward Stachura is a tenured teacher in the Memphis, Michigan, public schools. When the events that led to this case occurred, respondent taught seventh-grade life science, using a textbook that had been approved by the School Board. The textbook included a chapter on human reproduction. During the 1978-1979 school year, respondent spent six weeks on this chapter. As part of their instruction, students were shown pictures of respondent's wife during her pregnancy. Respondent also showed the students two films concerning human growth and sexuality. These films were provided by the County Health Department, and the Principal of respondent's school had approved their use. Both films had been shown in past school years without incident.

[3] After the showing of the pictures and the films, a number of parents complained to school officials about respondent's teaching methods. These complaints, which appear to have been based largely on inaccurate rumors about the allegedly sexually explicit nature of the pictures and films, were discussed at an open School Board meeting held on April 23, 1979. Following the advice of the School Superintendent, respondent did not attend the meeting, during which a number of parents expressed the view that respondent should not be allowed to teach in the Memphis school system. The day after the meeting, respondent was suspended with pay. The School Board later confirmed the suspension, and notified respondent that an "administration evaluation" of his teaching methods was underway. No such evaluation was ever made. Respondent was reinstated the next fall, after filing this lawsuit.

[4] Respondent sued the School District, the Board of Education, various Board members and school administrators, and two parents who had participated in the April 23 School Board meeting. The complaint alleged that respondent's suspension deprived him of both liberty and property without due process of law and violated his First Amendment right to academic freedom. Respondent sought compensatory and punitive damages under 42 U.S.C. § 1983 for these constitutional violations.

At the close of trial on these claims, the District Court instructed the jury as to the law governing the asserted bases for liability. Turning to damages, the court instructed the jury that on finding liability it should award a sufficient amount to compensate respondent for the injury caused by petitioners' unlawful actions:

"You should consider in this regard any lost earnings; loss of earning capacity; out-of-pocket expenses; and any mental anguish or emotional distress that you find the Plaintiff to have suffered as a result of conduct by the Defendants depriving him of his civil rights." App. 94.

[5] In addition to this instruction on the standard elements of compensatory damages, the court explained that punitive damages could be awarded, and described the standards governing punitive awards. Finally, at respondent's request and over petitioners' objection, the court charged that damages also could be awarded based on the value or importance of the constitutional rights that were violated:

If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right. *Id.* at 96.

[6] The jury found petitioners liable, and awarded a total of \$275,000 in compensatory damages and \$46,000 in punitive damages. The District Court entered judgment notwithstanding the verdict as to one of the defendants, reducing the total award to \$266,750 in compensatory damages and \$36,000 in punitive damages.

[7] In an opinion devoted primarily to liability issues, the Court of Appeals for the Sixth Circuit affirmed, holding that respondent's suspension had violated both procedural due process and the First Amendment. *Stachura v. Truskowski*, 763 F.2d 211 (1985). Responding to petitioners' contention that the District Court improperly authorized damages based solely on the value of constitutional rights, the court noted only that "there was ample proof of actual injury to plaintiff Stachura both in his effective discharge ... and by the damage to his reputation and to his professional career as a teacher. Contrary to the situation in *Carey v. Piphus*, 435 U.S. 247 (1978) ..., there was proof from which the jury could have found, as it did, actual and important damages." *Id.* at 214.

[8] We granted certiorari limited to the question whether the Court of Appeals erred in affirming the damages award in the light of the District Court's instructions that authorized not only compensatory and punitive damages, but also damages for the deprivation of "any constitutional right." 474 U.S. 918 (1985). We reverse, and remand for a new trial limited to the issue of compensatory damages.

II

[9] Petitioners challenge the jury instructions authorizing damages for violation of constitutional rights on the ground that those instructions permitted the jury to award damages based on its own unguided estimation of the value of such rights. Respondent disagrees with this characterization of the jury instructions, contending that the compensatory damages instructions taken as a whole focused solely on respondent's injury and not on the abstract value of the rights he asserted.

[10] We believe petitioners more accurately characterize the instructions. The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional "[compensatory]" damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first. On the contrary, the damages instructions plainly authorized—in addition to punitive damages—two distinct types of "compensatory" damages: one based on respondent's actual injury according to ordinary tort law standards, and another based on the "value" of certain rights. We therefore consider whether the latter category of damages was properly before the jury.

III

A

[11] We have repeatedly noted that 42 U.S.C. § 1983 creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Carey v. Phipus*, 435 U.S. 247, 253 (1978), quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). See also *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-259 (1981). Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts. See *Smith v. Wade*, *supra*, at 34; *Carey v. Phipus*, *supra*, at 257-258; *cf. Monroe v. Pape*, 365 U.S. 167, 196, and n.5 (1961) (Harlan, J., concurring).

[12] Punitive damages aside, damages in tort cases are designed to provide "compensation for the injury caused to plaintiff by defendant's breach of duty." 2 F. HARPER, F. JAMES, & O. GRAY, LAW OF TORTS § 25.1, p. 490 (2d ed. 1986) (emphasis in original), quoted in *Carey v. Phipus*, *supra*, at 255. See also *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395, 397 (1971); *id.*, at 408-409 (Harlan, J., concurring in judgment). To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation ..., personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See also *Carey v. Phipus*, *supra*, at 264 (mental and emotional distress constitute compensable injury in § 1983 cases). Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses. E.g., 4 HARPER, JAMES & GRAY, *supra*, § 25.3 (discussing need for certainty in damages determinations); D. DOBBS, LAW OF REMEDIES § 3.1, pp. 135-136 (1973). Congress adopted this common-law system of recovery when it established liability for "constitutional torts." Consequently, "the basic purpose" of § 1983 damages is "to compensate persons for injuries that are caused by the deprivation of constitutional rights." *Carey v. Phipus*, 435 U.S. at 254 (emphasis added). See also *id.* at 257 ("damages awards under § 1983 should be governed by the principle of compensation").

* * * * *

[13] The instructions at issue here cannot be squared with *Carey*, or with the principles of tort damages

on which *Carey* and § 1983 are grounded. The jurors in this case were told that, in determining how much was necessary to “compensate [respondent] for the deprivation” of his constitutional rights, they should place a money value on the “rights” themselves by considering such factors as the particular right’s “importance ... in our system of government,” its role in American history, and its “significance ... in the context of the activities” in which respondent was engaged. App. 96. These factors focus, not on compensation for provable injury, but on the jury’s subjective perception of the importance of constitutional rights as an abstract matter. *Carey* establishes that such an approach is impermissible. The constitutional right transgressed in *Carey*—the right to due process of law—is central to our system of ordered liberty. See *In re Gault*, 387 U.S. 1, 20-21 (1967). We nevertheless held that no compensatory damages could be awarded for violation of that right absent proof of actual injury. *Carey*, 435 U.S. at 264. *Carey* thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.

[14] Respondent nevertheless argues that *Carey* does not control here, because in this case a *substantive* constitutional right—respondent’s First Amendment right to academic freedom—was infringed. The argument misperceives our analysis in *Carey*. That case does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than “mere” procedural safeguards. We did acknowledge in *Carey* that “the elements and prerequisites for recovery of damages” might vary depending on the interests protected by the constitutional right at issue. *Id.* at 264-265. But we emphasized that, whatever the constitutional basis for § 1983 liability, such damages must always be designed “to compensate injuries caused by the [constitutional] deprivation.” *Id.* at 265 (emphasis added).^[8] See also *Hobson v. Wilson*, 237 U.S. App. D.C. 219, 277-279, 737 F.2d 1, 59-61 (1984), *cert. denied*, 470 U.S. 1084 (1985); *cf. Smith v. Wade*, 461 U.S. 30 (1983). That conclusion simply leaves no room for noncompensatory damages measured by the jury’s perception of the abstract “importance” of a constitutional right.

[15] Nor do we find such damages necessary to vindicate the constitutional rights that § 1983 protects. See n.11, *supra*. Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations. *Carey, supra*, at 256-257 (“To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages”). Moreover, damages based on the “value” of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants. *Cf. Gertz*, 418 U.S. at 350. Such damages would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages in § 1983 cases. We therefore hold that damages based on the abstract “value” or “importance” of constitutional rights are not a permissible element of compensatory damages in such cases.

B

[16] Respondent further argues that the challenged instructions authorized a form of “presumed” damages—a remedy that is both compensatory in nature and traditionally part of the range of tort law remedies. Alternatively, respondent argues that the erroneous instructions were at worst harmless error.

[17] Neither argument has merit. Presumed damages are a substitute for ordinary compensatory damages, not a supplement for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. See *Carey*, 435 U.S. at 262; *cf. Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 760-761 (1985) (opinion of Powell, J.); *Gertz v. Robert Welch, Inc., supra*, at 349. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby

compensate for harms that may be impossible to measure. As we earlier explained, the instructions at issue in this case did not serve this purpose, but instead called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values. Since such damages are wholly divorced from any compensatory purpose, they cannot be justified as presumed damages. Moreover, no rough substitute for compensatory damages was required in this case, since the jury was fully authorized to compensate respondent for both monetary and nonmonetary harms caused by petitioners' conduct.

Justice Brennan and Justice Stevens join the opinion of the Court and also join Justice Marshall's opinion concurring in the judgment.

Justice Marshall, with whom Justice Brennan, Justice Blackmun, and Justice Stevens join, concurring in the judgment.

[18] I agree with the Court that this case must be remanded for a new trial on damages. Certain portions of the Court's opinion, however, can be read to suggest that damages in § 1983 cases are necessarily limited to "out-of-pocket loss," "other monetary harms," and "such injuries as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering.'" See *ante*, at 307. I do not understand the Court so to hold, and I write separately to emphasize that the violation of a constitutional right, in proper cases, may itself constitute a compensable injury.

[19] The appropriate starting point of any analysis in this area is this Court's opinion in *Carey v. Piphus*, 435 U.S. 247 (1978). In *Carey*, we recognized that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Id.* at 254; see *ante* at 306-307. We explained, however, that application of that principle to concrete cases was not a simple matter. 435 U.S. at 257. "It is not clear," we stated, "that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case." *Id.* at 258. Rather, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in various branches of tort law." *Id.* at 259.

[20] Applying those principles, we held in *Carey* that substantial damages should not be awarded where a plaintiff has been denied procedural due process but has made no further showing of compensable damage. We repeated, however, that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264-265. We referred to cases that support the award of substantial damages simply upon a showing that a plaintiff was wrongfully deprived of the right to vote, without requiring any further demonstration of damages. *Id.* at 264-265, n.22.

[21] Following *Carey*, the Courts of Appeals have recognized that invasions of constitutional rights sometimes cause injuries that cannot be redressed by a wooden application of common-law damages rules. In *Hobson v. Wilson*, 237 U.S. App. D.C. 219, 275-281, 737 F.2d 1, 57-63 (1984), *cert. denied*, 470 U.S. 1084 (1985), which the Court cites, *ante*, at 309, and n.13, plaintiffs claimed that defendant Federal Bureau of Investigation agents had invaded their First Amendment rights to assemble for peaceable political protest, to associate with others to engage in political expression, and to speak on public issues free of unreasonable government interference. The District Court found that the defendants had succeeded in diverting plaintiffs from, and impeding them in, their protest activities. The Court of Appeals for the District of Columbia Circuit held that that injury to a First Amendment-protected interest could itself constitute compensable injury wholly apart from any "emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish" suffered by plaintiffs. 237 U.S. App. D.C. at 280, 737 F.2d at 62 (footnotes omitted). The

court warned, however, that that injury could be compensated with substantial damages only to the extent that it was “reasonably quantifiable”; damages should not be based on “the so-called inherent value of the rights violated.” *Ibid.*

[22] I believe that the *Hobson* court correctly stated the law. When a plaintiff is deprived, for example, of the opportunity to engage in a demonstration to express his political views, “[it] is facile to suggest that no damage is done.” *Dellums v. Powell*, 184 U.S. App. D.C. 275, 303, 566 F.2d 167, 195 (1977). Loss of such an opportunity constitutes loss of First Amendment rights “in their most pristine and classic form.” *Ibid.*, quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). There is no reason why such an injury should not be compensable in damages. At the same time, however, the award must be proportional to the actual loss sustained.

[23] The instructions given the jury in this case were improper because they did not require the jury to focus on the loss actually sustained by respondent. Rather, they invited the jury to base its award on speculation about “the importance of the right in our system of government” and “the role which this right has played in the history of our republic,” guided only by the admonition that “[in] one sense, no monetary value we place on Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation.” App. 96. These instructions invited the jury to speculate on matters wholly detached from the real injury occasioned respondent by the deprivation of the right. Further, the instructions might have led the jury to grant respondent damages based on the “abstract value” of the right to procedural due process—a course directly barred by our decision in *Carey*.

[24] The Court therefore properly remands for a new trial on damages. I do not understand the Court, however, to hold that deprivations of constitutional rights can never themselves constitute compensable injuries. Such a rule would be inconsistent with the logic of *Carey*, and would defeat the purpose of § 1983 by denying compensation for genuine injuries caused by the deprivation of constitutional rights.



[Memphis Community School District v. Stachura – Audio and Transcript of Oral Argument](#)

Footnotes

8. *Carey* recognized that “the task ... of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right” is one “of some delicacy.” *Id.* at 258. We also noted that “the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another.” *Id.* at 264-265. See also *Hobson v. Wilson*, 237 U.S. App. D.C. at 279-281, 737 F.2d at 61-63. This “delicate” task need not be undertaken here. None of the parties challenges the portion of the jury instructions that permitted recovery for actual harm to respondent, and the instructions that are challenged simply do not authorize compensation for injury. We therefore hold only that damages based on the “value” or “importance” of constitutional rights are not authorized by § 1983, because they are not truly compensatory. [↩](#)

Notes on *Memphis Community School District v. Stachura*

1. After [Stachura](#), may the plaintiff seek compensation for the loss of his constitutional right as a separate category of damages?

2. May a person convicted based upon evidence obtained in violation of the Fourth Amendment recover damages for his arrest, conviction and incarceration? In [*Townes v. City of New York*](#), 176 F.3d 138 (2d Cir. 1999), Townes was stopped while a passenger in a taxicab, which led to the discovery of two loaded handguns and cocaine. After the trial court denied his motion to suppress, Townes pled guilty to weapons and drug possession charges. Over two years later, the court of appeals reversed Townes' conviction on the ground that the officers lacked probable cause to stop and search the taxicab, and the indictment was dismissed. Townes brought a Section 1983 action for violation of his Fourth Amendment rights and sought damages for harm he suffered as a result of his arrest, conviction and incarceration. The court of appeals held that Townes failed to state a claim that the unconstitutional stop and search was a proximate cause of the damages he sought:

The fruit of the poisonous tree doctrine cannot link the unreasonable seizure and search to Townes's conviction and incarceration because this evidentiary doctrine is inapplicable to civil § 1983 actions. The fruit of the poisonous tree doctrine is calculated "to deter future unlawful police conduct" and protect liberty by creating an incentive—avoidance of suppression of illegally seized evidence—for state actors to respect the constitutional rights of suspects. Here the deterrence objective has already been achieved (though late) by the rulings [reversing the trial judge's denial of the motion to suppress]; allowing this and other § 1983 actions to proceed solely on a fruit of the poisonous tree theory of damages would vastly overdeter state actors. and would distort basic tort principles of proximate causation.

Civil actions brought under § 1983 are analogous to state common law tort actions, serving primarily the tort objective of compensation. The fruit of the poisonous tree doctrine, however, disregards traditional causation analysis to serve different objectives. To extend the doctrine to § 1983 actions would impermissibly recast the relevant proximate cause inquiry to one of taint and attenuation....

In a § 1983 suit, constitutionally invalid police conduct that by itself causes little or no harm is assessed on ordinary principles of tort causation and entails little or nominal damages. The fruit of the poisonous tree doctrine is not available to elongate the chain of causation.

The next inquiry is whether Townes's conviction and incarceration were proximately (or legally) caused by the defendants' constitutional torts. It is arguable that such seizures and searches could foreseeably cause the discovery of inculpatory evidence, but as a matter of law, the unconstitutional seizure and search of Townes's person was not a proximate cause of his conviction because of (at least) one critical circumstance: the trial court's refusal to suppress the evidence, which is an intervening and superseding cause of Townes's conviction.

Townes is foreclosed from recovery for a second, independent reason: the injury he pleads (a violation of his Fourth Amendment right to be free from unreasonable searches and seizures) does not fit the damages he seeks (compensation for his conviction and incarceration).... The evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all.

No Fourth Amendment value would be served if Townes, who illegally possessed firearms and narcotics, reaps the financial benefit he seeks. Townes has already reaped an enormous benefit by reason of the illegal seizure and search to which he was subjected: his freedom. Now Townes seeks damages to compensate him for his conviction and time served, on top of the benefit he enjoys as a result of the suppression. That remedy would vastly overdeter police officers and would result in a wealth transfer that "is peculiar, if not perverse."

Townes, 176 F.3d at 145-48. What damages, if any, may Townes recover? May a party recover damages when

he is interrogated without benefit of *Miranda* warnings? See [California Attorneys for Criminal Justice v. Butts](#), 195 F.3d 1039 (9th Cir. 1999). If so, what is the measure of damages?

3. Does *Stachura* bar courts in Section 1983 actions from ever permitting the jury to presume damages from the constitutional violation? See [Walje v. City of Winchester](#), 827 F.2d 10, 13 (6th Cir. 1987) (“[G]eneral damages may be appropriate [for violation of plaintiff’s First Amendment rights] because injury was likely to have occurred, but the specific elements of the damage were difficult to pinpoint because of the nature of the injury.... [T]his form of general damage award is commonly granted in actions for common law speech torts. The *Stachura* Court admonished us that ... it is proper to look to common law tort principles in granting presumed damages in cases where specific damages are difficult to establish.”); [18 U.S.C. § 2520](#) (damages for interception or disclosure of wire, oral or electronic communication in violation of federal statute are the greater of a) actual damages suffered by the plaintiff and any profits made by violator, or b) statutory damages of whichever is the greater of \$100 a day for each day of the violation, or \$10,000).
4. Is the jury in a Section 1983 action always entitled to award only nominal damages to the plaintiff if the jury finds a violation of the Constitution? In [Westcott v. Crinklaw](#), 133 F.3d 658 (8th Cir. 1998), Vivian Westcott filed a Section 1983 action seeking damages after an Omaha police officer shot her husband to death during an attempted burglary. The trial judge instructed the jury, “If you find for the plaintiff, but find that the loss resulting from Arden Westcott’s death has no monetary value, then you must return a verdict for the plaintiff in the nominal amount of \$1.00.” *Id.* at 661 n.4. The jury returned a verdict for Westcott but awarded only one dollar in damages. The court of appeals reversed, finding that the trial judge erred when it gave the nominal damages instruction:

In general, there are three situations in which a jury may reasonably conclude that compensatory damages are inappropriate despite a finding that excessive force was used. First, when there is evidence that both justifiable and unjustifiable force might have been used and the injury may have resulted from the use of justifiable force.... Second, when the plaintiff’s evidence concerning injury is not credible.... Third, when the plaintiff’s injuries have no monetary value or are insufficient to justify with reasonable certainty.... If, however, it is clear from the undisputed evidence that a plaintiff’s injuries were caused by a defendant’s use of force, then the jury’s failure to award some compensatory damages should be set aside and a new trial ordered.

* * * * *

It is undisputed that Westcott received fatal injuries, and the parties stipulated to funeral expenses of \$3262.64. There was no issue of injury, and the court therefore erred in instructing the jury on nominal damages.

Westcott, 133 F. 3d at 661-62.

5. Congress limited the damages remedy available to prisoners when it enacted the [Prison Litigation Reform Act of 1995](#) (PLRA). 42 U.S.C. § 1997e(e) provides that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”
 - a. In [Harris v. Garner](#), 190 F.3d 1279 (11th Cir. 1999), a male inmate of Georgia’s Dooly State Prison filed a Section 1983 action seeking damages suffered when members of the prison’s “Tactical Squad” subjected him to a body cavity search in the presence of female staff and forced him to “dry shave” with an unlubricated razor. The court of appeals upheld dismissal of the claim for damages, holding that the “dry shave” did not satisfy the physical injury requirement of the PRLA:

Section 1997e(e) does not define “physical injury.” Wade asks us to interpret this part of the statute to mean that *any* allegation of physical injury is sufficient, including physical manifestations of purely mental or emotional injury. But we think such an interpretation would undermine the statute’s essential purpose—“to curtail frivolous and abusive prisoner litigation.” [citation omitted]. Congress was clearly trying to preclude some part of the litigation routinely pursued by prison inmates from being brought, and Wade’s reading of the statute would almost render the congressional exclusion an empty set. Further, allowing prisoners to surmount this new statutory hurdle with purely trivial allegations of physical injury would make no sense in light of our basic understanding that “routine discomfort is part of the penalty that criminal offenders pay for their offenses against society.” *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed.2d 156 (1992) (citation and internal quotation marks omitted).

We therefore join the Fifth Circuit in fusing the physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court in *Hudson* for analyzing claims brought under the Eighth Amendment for cruel and unusual punishment, and hold that in order to satisfy section 1997e(e) the physical injury must be more than de minimis, but need not be significant.

Harris, 190 F.3d at 1286. Having found that because of the absence of physical injury Wade could not recover damages in a Section 1983 action for the mental or emotional injuries caused by the violation of his constitutional rights, the court next addressed whether the PLRA was constitutional:

Wade argues that the statutory bar to claims not involving physical injury amounts to a denial of due process under the Fifth Amendment. Courts and commentators have approached the issue of whether Congress can tailor jurisdiction so as to preclude all effective remedies for a claimed constitutional violation with so much dodging and trepidation that the D.C. Circuit has been led to write that “it has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.” [citation omitted]. And we think that if section 1997e(e) actually precluded *all* effective judicial review, the statute would raise constitutional questions that would be, at the very least troublesome. Because we find that the statute is best read as only a limitation on a damages remedy, however, we need not address the vexing jurisdictional question today.

Despite Wade’s ringing invocation of *Marbury v. Madison*, that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” [citation omitted], this case is not about a denial of the law’s protection. What this issue boils down to is whether or not the Constitution of the United States mandates a tort remedy for every constitutional violation; and the answer is certainly that it does not.

Whatever our ultimate resolution of Congress’ power to restrict judicial enforcement of federal rights, it is clear that Congress has wide latitude to decide how violations of those rights shall be remedied. In this case, Congress has chosen to enforce prisoners’ constitutional rights through suits for declaratory and injunctive relief, and not through actions for damages. It is true that practical application of the congressional scheme will mean that some plaintiffs will be without any relief. [citation omitted]. But “the Constitution does not demand an individually effective remedy for every constitutional violation.” ... If it did, we would have to rule unconstitutional our doctrines of absolute and qualified immunity.

Harris, 190 F.3d at 1287-89. See also [Davis v. District of Columbia](#), 158 F.3d 1342 (D.C. Cir. 1998) (PLRA

is rationally related to legitimate government interest in cutting back meritless prisoner litigation and therefore satisfies Equal Protection Clause of United States Constitution). Could Wade obtain injunctive relief? See Chapter VI(B), *infra*.

- b. Does the PLRA bar an action for nominal damages? In *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998), the court of appeals held that the district court had properly dismissed a claim for damages filed by an inmate complaining of disclosure of his medical record that indicated that plaintiff was dying of AIDS, because the suit did not allege any physical injury within the meaning of the PLRA. The court then considered whether the PLRA barred a suit for nominal damages:

The interpretive issue posed by § 1997e(e) is clearly harder here than for punitive damages. The theory of such a lawsuit dispenses with any need for injury other than the deprivation of the right itself ... and prisoners are presumably a good deal less likely to embark on a lawsuit if there is no prospect of a pecuniary reward. But Davis never sought nominal damages.... Accordingly ... we still find nothing in his complaint that can survive the pleading stage.

Davis, 158 F.3d at 1349. See also [Harris v. Garner](#), 190 F.3d 1279, 1288 n.9 (11th Cir. 1999) ("We express no view on whether section 1997e(e) would bar an action for nominal damages that are normally available for the violation of certain absolute constitutional rights without any showing of actual injury.").

6. In [Farrar v. Hobby](#), 506 U.S. 103 (1992), the United States Supreme Court held that a plaintiff who recovers nominal damages is a "prevailing party" eligible for recovery of attorney's fees under the [Civil Rights Attorney's Fees Awards Act of 1976](#), 42 U.S.C. § 1988 ("In any action or proceeding to enforce a provision of section[] 1983 ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."):

[A] judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party.... No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant. A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.

Farrar, 506 U.S. at 112-13. While finding that a plaintiff who recovers nominal damages is a prevailing party, the Court further ruled that fact that only nominal damages were awarded could affect the reasonableness of any fee award:

Where recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." ... [T]he awarding of nominal damages ... highlights the plaintiff's failure to prove actual, compensable injury.... When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief ... the only reasonable fee is usually no fee at all.

Farrar, 506 U.S. at 114-15. Should the recovery of only nominal damages always dictate that the reasonable attorney fee is no fee at all? If attorney's fees are recoverable, may defense counsel apprise the jury that if it awards nominal damages, plaintiff may seek attorney's fees? See [Brooks v. Cook](#), 938 F.2d 1048 (9th Cir. 1991).

SMITH v. WADE, 461 U.S. 30 (1983)

Justice Brennan delivered the opinion of the Court.

[1] We granted certiorari in this case, 456 U.S. 924 (1982), to decide whether the District Court for the Western District of Missouri applied the correct legal standard in instructing the jury that it might award punitive damages under 42 U.S.C. § 1983 (1976 ed., Supp. V). The Court of Appeals for the Eighth Circuit sustained the award of punitive damages. *Wade v. Haynes*, 663 F.2d 778 (1981). We affirm.

I

[2] The petitioner, William H. Smith, is a guard at Algoa Reformatory, a unit of the Missouri Division of Corrections for youthful first offenders. The respondent, Daniel R. Wade, was assigned to Algoa as an inmate in 1976. In the summer of 1976 Wade voluntarily checked into Algoa's protective custody unit. Because of disciplinary violations during his stay in protective custody, Wade was given a short term in punitive segregation and then transferred to administrative segregation. On the evening of Wade's first day in administrative segregation, he was placed in a cell with another inmate. Later, when Smith came on duty in Wade's dormitory, he placed a third inmate in Wade's cell. According to Wade's testimony, his cellmates harassed, beat, and sexually assaulted him.

[3] Wade brought suit under 42 U.S.C. § 1983 against Smith and four other guards and correctional officials, alleging that his Eighth Amendment rights had been violated. At trial his evidence showed that he had placed himself in protective custody because of prior incidents of violence against him by other inmates. The third prisoner whom Smith added to the cell had been placed in administrative segregation for fighting. Smith had made no effort to find out whether another cell was available; in fact there was another cell in the same dormitory with only one occupant. Further, only a few weeks earlier, another inmate had been beaten to death in the same dormitory during the same shift, while Smith had been on duty. Wade asserted that Smith and the other defendants knew or should have known that an assault against him was likely under the circumstances.

[4] During trial, the District Judge entered a directed verdict for two of the defendants. He instructed the jury that Wade could make out an Eighth Amendment violation only by showing "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." Tr. 639. Further, because of Smith's qualified immunity as a prison guard, see *Procunier v. Navarette*, 434 U.S. 555 (1978), the judge instructed the jury that Wade could recover only if the defendants were guilty of "gross negligence" (defined as "a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act") or "[egregious] failure to protect" (defined as "a flagrant or remarkably bad failure to protect") *Wade*. Tr. 641-642. He reiterated that Wade could not recover on a showing of simple negligence. *Id.* at 644.

[5] The District Judge also charged the jury that it could award punitive damages on a proper showing:

"If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a *reckless or callous disregard of, or indifference to, the rights or safety of others*, then you may assess punitive or exemplary damages in addition to any award of actual damages.

[6] The jury returned verdicts for two of the three remaining defendants. It found Smith liable, however,

and awarded \$25,000 in compensatory damages and \$5,000 in punitive damages. The District Court entered judgment on the verdict, and the Court of Appeals affirmed. *Wade v. Haynes*, 663 F.2d 778 (1981).

[7] In this Court, Smith attacks only the award of punitive damages. He does not challenge the correctness of the instructions on liability or qualified immunity, nor does he question the adequacy of the evidence to support the verdict of liability for compensatory damages.

II

[8] Section 1983 is derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13. It was intended to create “a species of tort liability” in favor of persons deprived of federally secured rights. *Carey v. Phipps*, 435 U.S. 247, 253 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). We noted in *Carey* that there was little in the section’s legislative history concerning the damages recoverable for this tort liability, 435 U.S. at 255. In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute. *Id.* at 253-264. We have done the same in other contexts arising under § 1983, especially the recurring problem of common-law immunities.^[9]

[9] Smith correctly concedes that “punitive damages are available in a ‘proper’ § 1983 action....” *Carlson v. Green*, 446 U.S. 14, 22 (1980); Brief for Petitioner 8. Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court. It was likewise generally established that individual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants. See also *Scott v. Donald*, 165 U.S. 58, 77-89 (1897) (punitive damages for constitutional tort). Further, although the precise issue of the availability of punitive damages under § 1983 has never come squarely before us, we have had occasion more than once to make clear our view that they are available; indeed, we have rested decisions on related questions on the premise of such availability.^[10]

[10] Smith argues, nonetheless, that this was not a “proper” case in which to award punitive damages. More particularly, he attacks the instruction that punitive damages could be awarded on a finding of reckless or callous disregard of or indifference to Wade’s rights or safety. Instead, he contends that the proper test is one of actual malicious intent—“ill will, spite, or intent to injure.”^[11] Brief for Petitioner 9. He offers two arguments for this position: first, that actual intent is the proper standard for punitive damages in all cases under § 1983; and second, that even if intent is not always required, it should be required here because the threshold for punitive damages should always be higher than that for liability in the first instance. We address these in turn.

III

[11] Smith does not argue that the common law, either in 1871 or now, required or requires a showing of actual malicious intent for recovery of punitive damages. See Tr. of Oral Arg. 5-6, 9.

[12] Perhaps not surprisingly, there was significant variation (both terminological and substantive) among American jurisdictions in the latter 19th century on the precise standard to be applied in awarding punitive damages—variation that was exacerbated by the ambiguity and slipperiness of such common terms as “malice” and “gross negligence.” Most of the confusion, however, seems to have been over the degree of negligence, recklessness, carelessness, or culpable indifference that should be required—not over whether actual intent was essential. On the contrary, the rule in a large majority of jurisdictions was that punitive

damages (also called exemplary damages, vindictive damages, or smart money) could be awarded without a showing of actual ill will, spite, or intent to injure.

[13] This Court so stated on several occasions, before and shortly after 1871.

* * * * *

254, 280 (1964).

We note in passing that it appears quite uncertain whether even Justice Rehnquist's dissent ultimately agrees with Smith's view that "ill will, spite, or intent to injure" should be required to allow punitive damages awards. Justice Rehnquist consistently confuses, and attempts to blend together, the quite distinct concepts of *intent to cause injury*, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other. For instance, his dissent purports to base its analysis on the "fundamental distinction" between "wrongful motive, actual intention to inflict harm or *intentional doing of an act known to be unlawful*," versus "very careless or negligent conduct," *post* at 60-61 (emphasis added). Yet in the same paragraph, the dissent inaccurately recharacterizes the first element of this distinction as "acts that are intentionally harmful," requiring "inquiry into the actor's subjective motive and purpose." *Post* at 63-64. Consciousness of consequences or of wrongdoing, of course, does not require injurious intent or motive; it is equally consistent with indifference toward or disregard for consequences. This confusion of standards continues throughout the opinion. Justice Rehnquist's dissent frequently uses such phrases as "intent to injure" or "evil motive"; yet at several points it refers more broadly to "subjective mental state" or like phrases, and expressly includes consciousness (as opposed to intent) in its reasoning. *Post* at 63, n.3, 71-72, n.7, 72-73. More telling, perhaps, is its citation of cases and treatises, which frequently and consistently includes authority supporting (at most) a consciousness requirement rather than the "actual intent" standard for which the opinion purports to argue elsewhere. See, e. g., *post* at 76-77, n.10, 78-84, n.12.

[14] The large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent; they permitted punitive awards on variously stated standards of negligence, recklessness, or other culpable conduct short of actual malicious intent.^[12]

[15] The same rule applies today. The Restatement (Second) of Torts (1979), for example, states: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or *his reckless indifference to the rights of others*." § 908(2) (emphasis added); see also *id.* Comment b. Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.

[16] The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action. Smith offers us no persuasive reason to the contrary.

[17] Smith's argument, which he offers in several forms, is that an actual-intent standard is preferable to a recklessness standard because it is less vague. He points out that punitive damages, by their very nature, are not awarded to compensate the injured party. He concedes, of course, that deterrence of future egregious conduct is a primary purpose of both § 1983 and of punitive damages. But deterrence, he contends, cannot be achieved unless the standard of conduct sought to be deterred is stated with sufficient clarity to enable potential defendants to conform to the law and to avoid the proposed sanction. Recklessness or callous indifference, he argues, is too uncertain a standard to achieve deterrence rationally and fairly. A prison guard, for example, can be expected to know whether he is acting with actual ill will or intent to injure, but not whether he is being reckless or callously indifferent.

[18] Smith's argument, if valid, would apply to ordinary tort cases as easily as to § 1983 suits; hence, it hardly presents an argument for adopting a different rule under § 1983. In any event, the argument is unpersuasive.

While, arguendo, an intent standard may be easier to understand and apply to particular situations than a recklessness standard, we are not persuaded that a recklessness standard is too vague to be fair or useful. In the *Milwaukee* case, 91 U.S. 489 (1876), we adopted a recklessness standard rather than a gross negligence standard precisely because recklessness would better serve the need for adequate clarity and fair application. Almost a century later, in the First Amendment context, we held that punitive damages cannot be assessed for defamation in the absence of proof of “knowledge of falsity or reckless disregard for the truth.” *Gertz*, 418 U.S. at 349. Our concern in *Gertz* was that the threat of punitive damages, if not limited to especially egregious cases, might “inhibit the vigorous exercise of First Amendment freedoms,” *ibid.*—a concern at least as pressing as any urged by Smith in this case. Yet we did not find it necessary to impose an actual-intent standard there. Just as Smith has not shown why § 1983 should give higher protection from punitive damages than ordinary tort law, he has not explained why it gives higher protection than we have demanded under the First Amendment.

[19] More fundamentally, Smith’s argument for certainty in the interest of deterrence overlooks the distinction between a standard for punitive damages and a standard of liability in the first instance. Smith seems to assume that prison guards and other state officials look mainly to the standard for punitive damages in shaping their conduct. We question the premise; we assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law—both out of devotion to duty, and in the interest of avoiding liability for compensatory damages. At any rate, the conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance. The need for exceptional clarity in the standard for punitive damages arises only if one assumes that there are substantial numbers of officers who will not be deterred by compensatory damages; only such officers will seek to guide their conduct by the punitive damages standard. The presence of such officers constitutes a powerful argument against raising the threshold for punitive damages.

[20] In this case, the jury was instructed to apply a high standard of constitutional right (“physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities”). It was also instructed, under the principle of qualified immunity, that Smith could not be held liable at all unless he was guilty of “a callous indifference or a thoughtless disregard for the consequences of [his] act or failure to act,” or of “a flagrant or remarkably bad failure to protect” Wade. These instructions are not challenged in this Court, nor were they challenged on grounds of vagueness in the lower courts. Smith’s contention that this recklessness standard is too vague to provide clear guidance and reasonable deterrence might more properly be reserved for a challenge seeking different standards of liability in the first instance. As for punitive damages, however, in the absence of any persuasive argument to the contrary based on the policies of § 1983, we are content to adopt the policy judgment of the common law—that reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law, should be sufficient to trigger a jury’s consideration of the appropriateness of punitive damages. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting).

IV

[21] Smith contends that even if § 1983 does not ordinarily require a showing of actual malicious intent for an award of punitive damages, such a showing should be required in this case. He argues that the deterrent and punitive purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability in the first instance.

* * * * *

[22] This argument incorrectly assumes that, simply because the instructions specified the same threshold of liability for punitive and compensatory damages, the two forms of damages were equally available to the plaintiff. The argument overlooks a key feature of punitive damages—that they are never awarded as of right, no matter how egregious the defendant’s conduct. “If the plaintiff proves sufficiently

serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award." D. DOBBS, LAW OF REMEDIES 204 (1973) (footnote omitted). Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. Hence, it is not entirely accurate to say that punitive and compensatory damages were awarded in this case on the same standard. To make its punitive award, the jury was required to find not only that Smith's conduct met the recklessness threshold (a question of ultimate fact), but also that his conduct merited a punitive award of \$5,000 in addition to the compensatory award (a discretionary moral judgment).

[23] Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability.

[24] This common-law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault. ^[13]

[25] As with his first argument, Smith gives us no good reason to depart from the common-law rule in the context of § 1983. He argues that too low a standard of exposure to punitive damages in cases such as this threatens to undermine the policies of his qualified immunity as a prison guard. The same reasoning would apply with at least as much force to, for example, the First Amendment and common-law immunities involved in the defamation cases described above. In any case, Smith overstates the extent of his immunity. Smith is protected from liability for mere negligence because of the need to protect his use of discretion in his day-to-day decisions in the running of a correctional facility. See generally *Procunier v. Navarette*, 434 U.S. 555 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975). But the immunity on which Smith relies is coextensive with the interest it protects. ^[14] The very fact that the privilege is qualified reflects a recognition that there is no societal interest in protecting those uses of a prison guard's discretion that amount to reckless or callous indifference to the rights and safety of the prisoners in his charge. Once the protected sphere of privilege is exceeded, we see no reason why state officers should not be liable for their reckless misconduct on the same basis as private tortfeasors. ^[15]

Justice Rehnquist, with whom the Chief Justice and Justice Powell join, dissenting.

[26] In my view, a forthright inquiry into the intent of the 42d Congress and a balanced consideration of the public policies at issue compel the conclusion that the proper standard for an award of punitive damages under § 1983 requires at least some degree of bad faith or improper motive on the part of the defendant.

II

[27] At bottom, this case requires the Court to decide when a particular remedy is available under § 1983. Until today, *ante*, at 34-35, n.2, the Court has adhered, with some fidelity, to the scarcely controversial principle that its proper role in interpreting § 1983 is determining what the 42d Congress intended. That § 1983 is to be interpreted according to this basic principle of statutory construction, 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 45.05 (4th ed. 1972), is clearly demonstrated by our many decisions relying upon the plain language of the section. See, e.g., *Parratt v. Taylor*, 451 U.S. 527, 534 (1981); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). The Court's opinion purports to pursue an inquiry into legislative intent, yet relies heavily upon state-court decisions decided well after the 42d Congress adjourned, see *ante* at 48, n.13. I find these cases unilluminating, at least in part because I am unprepared to attribute to the 42d Congress the truly extraordinary foresight that the Court seems to think it had. The reason our earlier decisions interpreting § 1983 have relied upon common-law decisions is simple: Members of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its Members. The decisions of state courts decided well after 1871, while of some academic interest, are largely irrelevant to what Members of the 42d Congress intended by way of a standard for punitive damages.

[28] In an apparent attempt to justify its novel approach to discerning the intent of a body that deliberated more than a century ago, the Court makes passing reference to our decisions relating to common-law immunities under § 1983. These decisions provide no support for the Court's analysis, since they all plainly evidence an attempt to discern the intent of the 42d Congress, albeit indirectly, by reference to the common-law principles known to Members of that body.

III

[29] The Court also purports to rely on decisions, handed down in the second half of the last century by this Court, in drawing up its rule that mere recklessness will support an award of punitive damages. In fact, these decisions unambiguously support an actual-malice standard.

[30] In addition, the decisions rendered by state courts in the years preceding and immediately following the enactment of § 1983 attest to the fact that a solid majority of jurisdictions took the view that the standard for an award of punitive damages included a requirement of ill will. To be sure, a few jurisdictions followed a broader standard; a careful review of the decisions at the time uncovers a number of decisions that contain some reference to "recklessness." And equally clearly, in more recent years many courts have adopted a standard including "recklessness" as the minimal degree of culpability warranting punitive damages.

IV

[31] Even apart from this historical background, I am persuaded by a variety of additional factors that the 42d Congress intended a "wrongful intent" requirement. As mentioned above, punitive damages are not, and never have been, a favored remedy. In determining whether Congress, not bound by *stare decisis*, would have embraced this often-condemned doctrine, it is worth considering the judgment of one of the most respected

commentators in the field regarding the desirability of a legislatively enacted punitive damages remedy: “It is probable that, in the framing of a model code of damages to-day for use in a country unhampered by legal tradition, the doctrine of exemplary damages would find no place.” C. MCCORMICK, LAW OF DAMAGES 276 (1935).

[32] Plainly, the statutory language itself provides absolutely no support for the cause of action for punitive damages that the Court reads into the provision. Indeed, it merely creates “[liability] to the party injured ... for redress.” “Redress” means “[reparation] of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.” 8 OXFORD ENGLISH DICTIONARY 310 (1933). And, as the Court concedes, punitive damages are not “reparation” or “compensation”; their very purpose is to punish, not to compensate. If Congress meant to create a right to recover punitive damages, then it chose singularly inappropriate words: both the reference to injured parties and to redress suggests compensation, and not punishment.

[33] Other statutes roughly contemporaneous with § 1983 illustrate that if Congress wanted to subject persons to a punitive damages remedy, it did so explicitly.

[34] In the light of the foregoing indications, it is accurate to say that the foundation upon which the right to punitive damages under § 1983 rests is precarious, at the best. Given the extraordinary diffidence and obliqueness with which the right was granted—if it was—it seems more than a little unusual to read that grant as incorporating the most expansive of the available views as to the standard for punitive damages. Given the legislative ambiguity, the sensible approach to the problem would be an honest recognition that, if we are to infer a right to punitive damages, it should be a restrained one, reflecting the Legislature’s approach in creating the right. And surely, the right ought to be limited by the view of punitive damages that the Members of the 42d Congress would have had—not by what some state courts have done a century later.

V

[35] Finally, even if the evidence of congressional intent were less clearcut, I would be persuaded to resolve any ambiguity in favor of an actual-malice standard. It scarcely needs repeating that punitive damages are not a “favorite of the law,” *see supra*, at 58, owing to the numerous persuasive criticisms that have been leveled against the doctrine. The majority reasons that these arguments apply to all awards of punitive damages, not just to those under § 1983; while this is of course correct, it does little to reduce the strength of the arguments, and, if they are persuasive, we should not blindly follow the mistakes other courts have made.

[36] Much of what has been said above regarding the failings of a punitive damages remedy is equally appropriate here. It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like “reckless indifference” gives free reign to the biases and prejudices of juries. In short, there are persuasive reasons not to create a new punitive damages remedy unless it is clear that Congress so intended.

[37] This argument is particularly powerful in a case like this, where the uncertainty resulting from largely random awards of punitive damages will have serious effects upon the performance by state and local officers of their official duties. One of the principal themes of our immunity decisions is that the threat of liability must not deter an official’s “willingness to execute his office with the decisiveness and the judgment required by the public good.” *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). To avoid stifling the types of initiative and decisiveness necessary for the “government to govern,” *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting), we have held that officials will be liable for compensatory damages only for certain

types of conduct. Precisely the same reasoning applies to liability for punitive damages. Because punitive damages generally are not subject to any relation to actual harm suffered, and because the recklessness standard is so imprecise, the remedy poses an even greater threat to the ability of officials to take decisive, efficient action. After the Court's decision, governmental officials will be subjected to the possibility of damages awards unlimited by any harm they may have caused or the fact they acted with unquestioned good faith: when swift action is demanded, their thoughts likely will be on personal financial consequences that may result from their conduct—but whose limits they cannot predict—and not upon their official duties. It would have been difficult for the Court to have fashioned a more effective Damoclean sword than the open-ended, standardless, and unpredictable liability it creates today.

[38] Moreover, notwithstanding the Court's inability to discern them, there are important distinctions between a right to damages under § 1983 and a similar right under state tort law. A leading rationale seized upon by proponents of punitive damages to justify the doctrine is that “the award is ... a covert response to the legal system's overt refusal to provide financing for litigation.” D. DOBBS, *LAW OF REMEDIES* 221 (1973); K. REDDEN, *PUNITIVE DAMAGES* § 2.4(C) (1980). Yet, 42 U.S.C. § 1988 (1976 ed., Supp. V) provides not just a “covert response” to plaintiffs' litigation expenses but an explicit provision for an award to the prevailing party in a § 1983 action of “a reasonable attorney's fee as part of the costs.” By permitting punitive damages as well as attorney's fees, § 1983 plaintiffs, unlike state tort law plaintiffs, get not just one windfall but two—one for them, and one for their lawyer. This difference between the incentives that are present in state tort actions, and those in § 1983 actions, makes the Court's reliance upon the standard for punitive damages in the former entirely inapposite: in fashioning a new financial lure to litigate under § 1983 the Court does not act in a vacuum, but, by adding to existing incentives, creates an imbalance of inducements to litigate that may have serious consequences.

[39] The staggering effect of § 1983 claims upon the workload of the federal courts has been decried time and again. The torrent of frivolous claims under that section threatens to incapacitate the judicial system's resolution of claims where true injustice is involved; those claims which truly warrant redress are in a very real danger of being lost in a sea of meritless suits. Yet, apparently oblivious to this, the Court today reads into the silent, inhospitable terms of § 1983 a remedy that is designed to serve as a “bounty” to encourage private litigation. DOBBS, *supra*, at 221. In a time when the courts are flooded with suits that do not raise colorable claims, in large part because of the existing incentives for litigation under § 1983, it is regrettable that the Court should take upon itself, in apparent disregard for the likely intent of the 42d Congress, the legislative task of encouraging yet more litigation. There is a limit to what the federal judicial system can bear.

[40] Finally, by unquestioningly transferring the standard of punitive damages in state tort actions to *federal* § 1983 actions, the Court utterly fails to recognize the fundamental difference that exists between an award of punitive damages by a federal court, acting under § 1983, and a similar award by a state court acting under prevailing local laws. While state courts may choose to adopt such measures as they deem appropriate to punish officers of the jurisdiction in which they sit, the standards they choose to adopt can scarcely be taken as evidence of what it is appropriate for a federal court to do. See *Edelman v. Jordan*, 415 U.S. 651, 677, n.19 (1974). When federal courts enforce punitive damages awards against local officials they intrude into sensitive areas of sovereignty of coordinate branches of our Nation, thus implicating the most basic values of our system of federalism. Moreover, by yet further distorting the incentives that exist for litigating claims against local officials in federal court, as opposed to state courts, the Court's decision makes it even more difficult for state courts to attempt to conform the conduct of state officials to the Constitution.

I dissent.

Justice O'Connor, dissenting.

[41] Although I agree with the result reached in Justice Rehnquist's dissent, I write separately because I

cannot agree with the approach taken by either the Court or Justice Rehnquist. Both opinions engage in exhaustive, but ultimately unilluminating, exegesis of the common law of the availability of punitive damages in 1871. Although both the Court and Justice Rehnquist display admirable skills in legal research and analysis of great numbers of musty cases, the results do not significantly further the goal of the inquiry: to establish the intent of the 42d Congress. In interpreting § 1983, we have often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. See, e.g., *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *Carey v. Piphus*, 435 U.S. 247, 255 (1978). This approach makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly in a case like this one, in which those interpreting the common law of 1871 must resort to dictionaries in an attempt to translate the language of the late 19th century into terms that judges of the late 20th century can understand, see *ante*, at 39-41, n.8; 61-64, nn.3, 4, and in an area in which the courts of the earlier period frequently used inexact and contradictory language, see *ante*, at 45-47, n.12, we cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions. The battle of the string citations can have no winner.

[42] Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying § 1983 to determine which rule best accords with those policies. In *Fact Concerts*, we identified the purposes of § 1983 as pre-eminently to compensate victims of constitutional violations and to deter further violations. 453 U.S. at 268. See also *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey v. Piphus*, *supra*, at 254-257, and n.9. The conceded availability of compensatory damages, particularly when coupled with the availability of attorney's fees under § 1988, completely fulfills the goal of compensation, leaving only deterrence to be served by awards of punitive damages. We must then confront the close question whether a standard permitting an award of unlimited punitive damages on the basis of recklessness will chill public officials in the performance of their duties more than it will deter violations of the Constitution, and whether the availability of punitive damages for reckless violations of the Constitution in addition to attorney's fees will create an incentive to bring an ever-increasing flood of § 1983 claims, threatening the ability of the federal courts to handle those that are meritorious. Although I cannot concur in Justice Rehnquist's wholesale condemnation of awards of punitive damages in any context or with the suggestion that punitive damages should not be available even for intentional or malicious violations of constitutional rights, I do agree with the discussion in Part V of his opinion of the special problems of permitting awards of punitive damages for the recklessness of public officials. Since awards of compensatory damages and attorney's fees already provide significant deterrence, I am persuaded that the policies counseling against awarding punitive damages for the recklessness of public officials outweigh the desirability of any incremental deterrent effect that such awards may have. Consequently, I dissent.



[Smith v. Wade – Audio and Transcript of Oral Argument](#)

Footnotes

9. Justice Rehnquist's dissent faults us for referring to modern tort decisions in construing § 1983. Its argument rests on the unstated and unsupported premise that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve. *Post*, at 65-68; see also *post*, at 92-93 (O'Connor, J., dissenting). The dissents are correct, of course, that when the language of the section and its legislative history provide no clear answer,

we have found useful guidance in the law prevailing at the time when § 1983 was enacted; but it does not follow that that law is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general tort law had changed substantially in the intervening century (which is not the case here), we might be highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine. See *Carey v. Piphus*, 435 U.S. 247, 257-258 (1978) (“[Over] the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well”) (footnote omitted); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 231-232 (1970) (Brennan, J., concurring and dissenting); *Pierson*, *supra*, at 555 (citing modern authority for “the prevailing view in this country”); *Wood*, *supra*, at 318-319, and n.9; *Tenney*, *supra*, at 375, and n.5. Indeed, in *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted, 424 U.S. at 421-422. Under the dissents’ view, *Imbler* was wrongly decided. [↵](#)

10. *Newport v. Fact Concerts, Inc.*, *supra*, for example, we held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under § 1983. A significant part of our reasoning was that deterrence of constitutional violations would be adequately accomplished by allowing punitive damages awards directly against the responsible individuals:

Similarly, in *Carlson v. Green*, 446 U.S. 14 (1980), we stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones. *Id.* at 22, and n.9. See also *Adickes v. S.H. Kress & Co.*, *supra*, at 233 (Brennan, J., concurring and dissenting); *Carey v. Piphus*, *supra*, at 257, n.11; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (punitive damages available under 42 U.S.C. § 1981). [↵](#)

11. *Smith* uses the term “actual malice” to refer to the standard he would apply. While the term may be an appropriate one, we prefer not to use it, simply to avoid the confusion and ambiguity that surrounds the word “malice.” See n.8, *infra*. Indeed, as *Smith* recognizes, this Court has used the very term “actual malice” in the defamation context to refer to a recklessness standard. Brief for Petitioner 8-9; see *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-252 (1974); *New York Times Co. v. Sullivan*, 376 U.S. [↵](#)
12. Justice Rehnquist’s assertion that a “solid majority of jurisdictions” required actual malicious intent, *post* at 84, is simply untrue. In fact, there were fairly few jurisdictions that imposed such a requirement, and fewer yet that adhered to it consistently. Justice Rehnquist’s attempt to establish this proposition with case citations, *post* at 78-84, n.12, does not offer him substantial support. Because the point is not of controlling significance, see n.2, *supra*, we will not tarry here to analyze his citations case-by-case or State-by-State, but will only summarize the main themes. [↵](#)
13. “Moreover, after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.” *Carlson*, 446 U.S. at 22, n.9. [↵](#)
14. As we noted *supra*, at 33-34, *Smith* does not challenge the instruction on qualified immunity. We therefore

assume for purposes of this case that the instruction was correct. See generally, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978). [↴](#)

15. We reject Justice Rehnquist’s argument, *post*, at 92, that it somehow makes a difference that this suit was brought in federal court—as though it were inappropriate or unseemly that federal courts dare to enforce federal rights vigorously. Indeed, one wonders whether Justice Rehnquist would complain as loudly if this § 1983 suit had been brought in state court, as it could have been. Although Justice Rehnquist casts his argument as an attack on meddling by federal courts, the true thrust of his complaint seems to be against federal law—i.e., the Civil Rights Act of 1871. We have explained at length why we think that the policies of that statute call for our holding today. [↴](#)

Notes on *Smith v. Wade*

1. In [Kolstad v. American Dental Association](#), 527 U.S. 526 (1999), the Supreme Court elaborated on the degree of culpability that must be proven to obtain punitive damages in civil rights cases. The claim for punitive damages in *Kolstad* arose under the [Civil Rights Act of 1991](#), 42 U.S.C. § 1981a(b)(1); this Act authorizes punitive damages in claims for employment discrimination under [Title VII of the Civil Rights Act of 1964](#), 42 U.S.C. § 2000e *et seq.*, as well as under the [American Disabilities Act of 1990](#), 42 U.S.C. § 12101 *et seq.*, where the defendant engaged in discrimination “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” The *Kolstad* Court found that Congress borrowed the punitive damages standard in the statute from the Court’s decision in [Smith v. Wade](#). It granted certiorari to determine whether in order to recover punitive damages under the statute, plaintiff is required to prove not only prohibited intentional discrimination, but must further demonstrate that the discrimination was “egregious.” The Court held that section 1981a(b)(1) does not demand proof of “egregious” misconduct:

The terms “malice” and “reckless” ultimately focus on the actor’s state of mind.... While egregious misconduct is evidence of the requisite mental state ... § 1981a does not ... require a showing of egregious or outrageous discrimination independent of the employer’s state of mind.

§ 1981’s focus on the employer’s state of mind gives some effect to Congress’ apparent intent to narrow the class of cases for which punitive awards are available to a subset of those involving intentional discrimination. The employer must act with “malice or with reckless indifference to [the plaintiff’s] federally protected rights.” § 1981a(b)(1) (emphasis added). The terms “malice” or “reckless indifference” pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.

Applying this standard in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.

There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational defense or other statutory exception to liability.

Kolstad, 527 U.S. at 535-37.

2. Where the standard of culpability necessary to prove a violation of the Constitution is intent or recklessness, does proof of the deprivation of a constitutional right likewise discharge the burden of proof necessary to an award of punitive damages? See [*Iacobucci v. Boulter*](#), 193 F.3d 14, 26 (1st Cir. 1999) (“We realize that the district court instructed the jury to determine whether Boulter had acted intentionally or recklessly in arresting Iacobucci, and that the jury ... found that Boulter’s conduct fit that proscribed category. This mens rea finding, however, does not clear the way for punitive damages. The state of mind required to make out a cognizable section 1983 claim (at least one grounded in false arrest) differs importantly from that required to justify punitive damages. The former requirement relates only to the conduct, not to the consequences; that is, it entails an intent to do the act, not to effect a civil rights violation.”); [*Hernandez-Tirado v. Artau*](#), 874 F.2d 866, 870 (1st Cir. 1989) (“Although Artou’s dismissal of Hernandez was an “intentional” tort, the dismissal was negligent in respect to the existence of a federally protected right. This ‘negligence’ is sufficient for purposes of liability for damages.... Artau *should* have known that his conduct was wrongful; but in the context of conduct that is not, on its face, obviously wrongful, that is insufficient to justify the punitive damages award.”).
3. Will a finding that defendant does not have qualified immunity satisfy the reckless indifference precondition to punitive damages? See [*Iacobucci v. Boulter*](#), 193 F.3d 14, 26 n.8 (1st Cir. 1999) (“In assaying qualified immunity, we inquired into whether Boulter’s presumed belief that probable cause existed was objectively reasonable. The focus of punitive damages, however, is subjective.”); [*Soderbeck v. Burnett County, Wis.*](#), 752 F.2d 285, 290-92 (7th Cir. 1985) (Punitive damages are not recoverable, even where reasonable official should have known that conduct violated Constitution and thus is not immune from compensatory damages, unless defendant actually knew actions were forbidden. However, it is not necessary that defendant knew that his conduct violated federal Constitution so long as he knew it violated some law). Under the trial court’s charge in *Smith*, if the jury found Smith violated the Eighth Amendment and was not immune, could the jury have found that plaintiff did not prove reckless indifference necessary to qualify for punitive damages?
4. May punitive damages be awarded if the jury does not give the plaintiff compensatory damages? See [*Davis v. Locke*](#), 936 F.2d 1208, 1214 (11th Cir. 1991) (“In this circuit, ‘punitive damages may be awarded in a § 1983 action even without actual loss.’”); [*Erwin v. County of Manitowoc*](#), 872 F.2d 1292, 1299 (7th Cir. 1989) (“Although state law may not allow punitive damages without a compensatory award, under federal law, when a jury finds a constitutional violation under a § 1983 claim, it may award punitive damages even when it does not award compensatory damages.”). If the jury awards nominal damages, must any punitive damage recovery be proportional in amount to the nominal damages? See [*Edwards v. Jewish Hospital of St. Louis*](#), 855 F.2d 1345, 1352 (8th Cir. 1988) (“While we do not disagree [that the amount of a punitive damages award must bear a reasonable relationship to the amount of compensatory damages awarded], such a general statement has no application to an award of nominal damages. To apply the proportionality rule to a nominal damages award would invalidate most punitive damages awards because only very low punitive damage awards could be said to bear a reasonable relationship to the amount of a nominal damages award. Consequently, in those cases where the trial court has awarded nominal damages and punitive damages, we rely and give great deference to the trial court’s discretion as to the amount of punitive damages award it has permitted to stand. We will only reverse where it has been demonstrated that the trial court has abused its discretion.”).
5. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the United States Supreme Court held that punitive damages may not be recovered against municipalities under Section 1983. The Court reasoned that at the time that Congress enacted Section 1983, it was well understood that municipal corporations were

immune from punitive damages. The Court also resuscitated the failed Sherman Amendment; it found the absence of any provision for punitive damages in the Amendment, as well as the arguments that the Amendment would place undue financial burdens on local governments and unfairly punish taxpayers, as evidence that Congress did not intend to displace the common law immunity from damages when it enacted Section 1983. Finally, the Court concluded that considerations of public policy do not countenance rejection of the common law immunity of municipalities from punitive damages:

Regarding retribution, it remains true that an award of punitive damages against a municipality “punishes” only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct.

To the extent that the purposes of § 1983 have any bearing on this punitive rationale, they do not alter our analysis. The court previously has indicated that punitive damages might be awarded in appropriate circumstances in order to punish violations of constitutional rights, *Carey v. Piphus*, 435 U.S. 247, 257, n.11 (1978), but it has never suggested that punishment is as prominent a purpose under the statute as are compensation and deterrence.

[T]he deterrence rationale of § 1983 does not justify making punitive damages available against a municipality.

First, it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive damage awards could be assessed based upon the wealth of their municipality. Indemnification may not be available to the municipality under local law, and even if it were, officials likely will not be able themselves to pay such sizeable awards. Thus, assuming, *arguendo*, that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is uncertain.

There also is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public exorcism of those who were elected, will not occur unless punitive damages are awarded against the municipality.... [T]he compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office.

Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based upon his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations.

Finally, although the benefits associated with awarding punitive damages against municipalities under § 1983 are of doubtful character, the costs may be very real. In light of the Court's decision last term in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the § 1983 damages remedy may now be available for violations of federal statutory as well as constitutional law.... Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities.

City of Newport, 453 U.S. at 267-70.

- a. In *Cornwell v. City of Riverside*, 896 F.2d 398 (9th Cir. 1990), the court of appeals held that no federal policy

precludes a municipality from paying a punitive damages judgment assessed against its employees:

It is well argued on behalf of Cornwell that a prohibition on indemnification would be in harmony with the Court's analysis of punitive damages. Such a result, however, is not compelled by what the Court has said [in *City of Newport*]. When the city decides that it is in its best interest to pay, the taxpayers have decided through their representatives that it is to their benefit as taxpayers to help out the officers....

If § 1983 were construed to prohibit a municipality from paying punitive damages, there would be occasions when civil rights plaintiffs would go unsatisfied because the individual defendants lack the assets to pay. If § 1983 were construed to mean that the successful plaintiff had the option to accept or reject punitive damages that the municipality was paying on behalf of employees, the plaintiff would have an extraordinary weapon with which to negotiate with individual defendants. We do not believe we should add an additional remedy to those already provided the civil rights plaintiff.

Cornwell, 896 F. 2d at 400.

- b. May the finder of fact consider the existence of an indemnity agreement in fixing the amount of punitive damages against individual local officials? See *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997) ("Although we do not decide the question whether a fact-finder can rely upon the existence of an indemnity agreement in order to *increase* an award of punitive damages, we rule that a fact-finder can properly consider the existence of such an agreement as obviating the need to determine whether a defendant's limited financial circumstances justifies some *reduction* in the amount that otherwise would be awarded. It would be entirely inappropriate for a defendant to raise the issue of his limited financial resources if there existed an indemnity agreement placing the burden of paying the award on someone else's shoulders.").

B. Equitable Relief

Introduction to Equitable Relief

1. Why would a plaintiff seek equitable relief under Section 1983?
2. How should courts apply the general standards governing the awarding of equitable relief where the plaintiff has proven a constitutional violation?
 - a. Is the remedy at law generally adequate to redress deprivations of a constitutional right? See [Elrod v. Burns](#), 427 U.S. 347, 373 (1976) (“the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).
 - b. Is any legal remedy available where the State itself is responsible for the invasion of constitutional liberties? See [Rum Creek Coal Sales, Inc. v. Caperton](#), 926 F.2d 356, 362 (4th Cir. 1991) (“[T]he conclusion that, in most circumstances, ‘the possibility that adequate compensatory ... relief will be available at a later date ... weighs heavily against a claim of irreparable harm’ [citation omitted] is not present here. The ... narrowing of remedies available under § 1983 limits the Company’s ability to obtain damages [against the West Virginia State Police].”; [United States v. State of New York](#), 708 F.2d 92, 93 (2d Cir. 1983) (Irreparable harm suffered where Eleventh Amendment forecloses federal court damage action against State, even where state law damage action is available). See also [Quern v. Jordan](#), 440 U.S. 332, 345 (1979) (“Nor does our reaffirmance of *Edelman v. Jordan* render § 1983 meaningless insofar as States are concerned. See *Ex Parte Young*, 209 U.S. 123 (1908)”).
 - c. Is there an adequate remedy at law where the individual government official has qualified immunity? See [Blum v. Schlegel](#), 830 F. Supp. 712, 728 (W.D.N.Y. 1993) (irreparable injury demonstrated where defendant shielded from damages liability by qualified immunity).
 - d. May the government ever successfully argue that the hardship of enjoining the government from contravening the constraints of the Constitution outweighs the hardship of relegating the plaintiff to a damage remedy? See [Owen v. City of Independence, Missouri](#), 445 U.S. 622, 649 (1980) (“[A] municipality has no ‘discretion’ to violate the Federal Constitution; its dictates are absolute and imperative.”).
 - e. Are there ever circumstances where the public interest favors permitting the government to continue to transgress constitutional norms?
3. What standards for the issuance of equitable relief did the Court apply in Part II of the majority opinion in [Rizzo v. Goode](#), 432 U.S. 362 (1976) (Chapter II(C), *infra*). What additional criteria did the Court apply in assessing the propriety of injunctive relief for the constitutional violations in *Rizzo*?
4. In [Mitchum v. Foster](#), 407 U.S. 225 (1972), the Court held that Section 1983 is one of the expressly authorized exceptions to the federal anti-injunction statute, which provides in pertinent part that a federal court “may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of

Congress.” [28 U.S.C. § 2283](#). While finding that Section 1983 conferred authority upon federal courts to issue injunctions against pending state proceedings, the Court made clear that “[i]n so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger v. Harris*”

Mitchum, 407 U.S. at 225.

In *Younger v. Harris*, 401 U.S. 37 (1971) the Court held that considerations of comity barred federal courts from enjoining pending state criminal prosecutions absent extraordinary circumstances:

The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief....

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of “comity,” that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as “Our Federalism.” ... What the concept [represents] is a system in which there is sensitivity to the legitimate interests of both the State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 43-44. See also [Samuels v. Mackell](#), 401 U.S. 66, 73 (1971) (the “same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory injunction, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.”). The *Younger* Court held that the mere fact that the statute that is the subject of the criminal prosecution is on its face unconstitutional does not merit an injunction against a good-faith prosecution, presumably because the Section 1983 plaintiff may raise the constitutional issue as a defense to the state court criminal proceeding. The scope of the *Younger* bar to interference with pending state proceedings has been the subject of considerable Supreme Court attention. See MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, FEES AND DEFENSES, §§ 14.6-14.11.

ASHCROFT v. MATTIS, 431 U.S. 171 (1977)



Missouri State Trooper Car. [Bill Kast, Flickr](#)

Per Curiam

[1] Appellee's 18-year-old son was shot and killed by police while attempting to escape arrest. Appellee filed suit under 42 U.S.C. § 1983 against the police officers in the United States District Court for the Eastern District of Missouri. He sought to recover damages, and also to obtain a declaratory judgment that the Missouri statutes authorizing the police action were unconstitutional.^[1] The District Court held that a defense of good faith had been established, and denied both forms of relief. No appeal was taken from the denial of damages, but appellee did seek review of the denial of declaratory relief. The Eighth Circuit held that declaratory relief was available and remanded for consideration of the merits of the constitutional issue. *Mattis v. Schnarr*, 502 F. 2d 588 (1974).

[2] On remand, appellee filed an amended complaint, in which he made no claim for damages. The Missouri Attorney General was allowed to intervene in defense of the statutes, and the case was then submitted on stipulated facts. The District Court upheld the statutes, *Mattis v. Schnarr*, 404 F. Supp. 643 (1975), but was reversed by a divided Court of Appeals, *sitting en banc*, 547 F.2d 1007 (1976). The Attorney General brought an appeal under 28 U.S.C. § 1254(2) from the holding that the state statutes were unconstitutional.

[3] Although we are urged to consider the merits of the Court of Appeals' holding, we are unable to do so, because this suit does not now present a live "case or controversy." This suit was brought to determine the police officers' liability for the death of appellee's son. That issue has been decided, and there is no longer any possible basis for a damages claim. Nor is there any possible basis for a declaratory judgment. For a declaratory judgment to issue, there must be a dispute which "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). See also *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Here, the District Court was asked to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith. No "present right" of appellee was at stake. Indeed, appellee's primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's

death was wrongful.^[2] Appellee's Motion to Affirm 5-6, n.1. Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot.

[4] The judgment of the Court of Appeals is vacated, and the case is remanded with instructions to direct the District Court to dismiss the second amended complaint.

It is so ordered.

Footnotes

1. These statutes permit police to use deadly force in apprehending a person who has committed a felony, following notice of the intent to arrest. Mo. Rev. Stat. §§ 559.040 and 544.190 (1969); see *Mattis v. Schnarr*, 502 F.2d 588, 591, and n.4 (CA8 1974). [↓](#)
2. The second amended complaint also alleges that appellee has another son who “if ever arrested or brought under an attempt at arrest on suspicion of a felony, might flee or give the appearance of fleeing, and would therefore be in danger of being killed by these defendants or other police officers.” 3 App. in *Mattis v. Schnarr*, No. 75-1849 (CA8), p. 5 (emphasis added). Such speculation is insufficient to establish the existence of a present, live controversy. [↓](#)

Notes on *Ashcroft v. Mattis*

1. After [Ashcroft](#), is there any way to challenge the constitutionality of the Missouri statute authorizing state police officers to use deadly force against a fleeing felon following notice of arrest?
 - a. Is there any circumstance under which the shooting officer's reliance on the Missouri statute would not confer qualified immunity in an action for damages against the police officers?
 - b. What would be the outcome if plaintiff brought a damage action against the State? Against the shooting officers in their official capacities? Against the legislators who passed the statute?
 - c. Is there any circumstance under which a case or controversy would exist if the plaintiff sought equitable relief? Even if the fleeing felon survived the shooting, could he establish a live case or controversy for an action for a declaratory judgment? For an injunction against use of deadly force should plaintiff in the future commit a felony, flee and disregard the police officers' notice of intent to arrest?
2. In [American Federation of Railroad Police, Inc. \(AFRP\), v. National Railroad Passenger Corp. \(AMTRAK\)](#), 832 F.2d 14 (2d Cir. 1987), the union representing policemen employed by Amtrak brought an action under Section 1983 seeking a declaratory judgment that Amtrak's policy of ejecting homeless persons from Penn Station in New York violated the constitutional rights of the homeless as well as requesting an injunction restraining Amtrak from requiring the policemen to carry out the policy. The court of appeals affirmed the district court's dismissal of the complaint:

AFRP's claim that Amtrak's policy exposes its members to physical injury is based on the premise that the persons Amtrak policemen seek to eject from Penn Station will respond with violence. The premise is insufficient to support a claim on which relief can be granted. Violent resistance to police

orders would of course be unlawful, and no basis has been presented for believing that the routine response of a homeless person to an ejection order would be violence.

AFRP also alleges that Amtrak's policy "is unreasonably causing AFRP member AMTRAK police employees emotional injury, pain and suffering." Such a claim is too abstract to give AFRP standing to invoke the jurisdiction of the federal court.... The principal impetus for this lawsuit ... is the apprehension that the policemen may be exposed to liability for violating the civil rights of the persons ejected from the station. The complaint does not allege that any AFRP member has been sued or threatened with suit. In the circumstances, this claim is based on a series of speculations, including the hypothesis that an ejected person will bring suit; that all defenses, including that of qualified immunity, will fail; and that Amtrak would fail to honor its bylaw-undertaking to indemnify an officer for legal expenses and liability incurred as a result of his good faith compliance with Amtrak instructions. Reliance on such a series of speculative premises reveals a lack of the concreteness necessary to present a genuine case or controversy.

The doctrine of standing in the federal courts, which has its principal roots in Article III of the Constitution, generally prohibits a plaintiff from asserting another person's legal rights [P]rudential considerations lead us to deny a party standing to pursue a claim of a nonparty unless, *inter alia*, the plaintiff "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." [citation omitted].

AFRP's attempt to assert the rights of the homeless does not meet this test. As noted above, the main impetus of this suit is the policemen's fear of incurring liability for violating the civil rights of those ejected. The concern that policemen not be held liable, however, would be allayed just as well by a ruling that AFRP does *not* violate homeless persons' constitutional rights as by a ruling that the policy is unconstitutional. Accordingly, there is no reasonable basis for expecting AFRP to press the rights of the homeless with the necessary vigor, and we conclude that AFRP lacks standing to assert those rights.

AFRP, 832 F.2d at 16-18; *but see Harley v. Schuylkill*, 476 F. Supp. 191, 194 (E.D. Pa. 1979) ("The duty to refrain from acting in a manner which would deprive another of constitutional rights is a duty created and imposed by the constitution itself. It is logical to believe that the concurrent right is also one which is created and secured by the constitution. Therefore, we hold that the right to refuse to perform an unconstitutional act is a right 'secured by the Constitution' within the meaning of § 1983.").

3. The Supreme Court ultimately addressed the constitutionality of state statutes authorizing the use of deadly force to prevent the escape of a fleeing felon in [Tennessee v. Garner](#), 471 U.S. 1 (1984). Unlike *Ashcroft*, the action for damages in *Garner* arose out of a shooting by City of Memphis—rather than State—police officers pursuant to departmental policy and the Tennessee statute authorizing use of deadly force against fleeing felons. Plaintiff not only sued the individual officers involved in the shooting, but also named the Police Department and City of Memphis as defendants. As in *Ashcroft*, the officers were granted qualified immunity by virtue of their reliance on the state statute. However, because the local entity defendants were not entitled to assert immunity, the Court proceeded to assess the constitutionality of the City policy and, in turn the Tennessee statute. The Court held that under the Constitution, deadly force may not be used "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. Will it always be possible to adjudicate the constitutionality of a state statute by suing a local governmental entity for damages?

4. Could *Mattis* establish standing to challenge the constitutionality of the Missouri statute on the ground that his claim is “capable of repetition yet evading review?” See [Friends of Earth v. Laidlaw Environmental Servs.](#), 528 U.S. 167, 191 (2000) (“[I]f a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a judicial forum.”).

***CITY OF LOS ANGELES v. LYONS*, 461 U.S. 95 (1983)**



Left: Officer Gater. [PicClick](#) Middle: L.A. police badge. [SOG Military Collectables](#). [Pinterest](#).; Right: chokehold diagram



Left: Chokehold. [Republic Reporters New York](#).; Middle: carotid artery diagram; Right: police apply carotid artery hold

Justice White delivered the opinion of the Court.

[1] The issue here is whether respondent Lyons satisfied the prerequisites for seeking injunctive relief in the Federal District Court.

I

[2] This case began on February 7, 1977, when respondent, Adolph Lyons, filed a complaint for damages, injunction, and declaratory relief in the United States District Court for the Central District of California. The defendants were the City of Los Angeles and four of its police officers. The complaint alleged that on October 6, 1976, at 2 a.m., Lyons was stopped by the defendant officers for a traffic or vehicle code violation and that although Lyons offered no resistance or threat whatsoever, the officers, without provocation or justification, seized Lyons and applied a “chokehold”^[3]—either the “bar arm control” hold or the “carotid-artery control” hold or both—rendering him unconscious and causing damage to his larynx. Counts I through IV of the complaint sought damages against the officers and the City. Count V, with which we are principally concerned here, sought a preliminary and permanent injunction against the City barring the use of the control holds. That count alleged that the City’s police officers, “pursuant to the authorization, instruction and encouragement of Defendant City of Los Angeles, regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever,” that numerous persons have been injured as the result of the application of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that Lyons “justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse.” Lyons alleged the threatened impairment of rights protected by the First, Fourth, Eighth, and Fourteenth Amendments. Injunctive relief was sought against the use of the control holds “except in situations where the proposed victim of said control reasonably appears to be threatening the immediate use of deadly force.” Count VI sought declaratory relief against the City, *i.e.*, a judgment that use of the chokeholds absent the threat of immediate use of deadly force is a *per se* violation of various constitutional rights.

[3] The District Court found that Lyons had been stopped for a traffic infringement and that without provocation or legal justification the officers involved had applied a “Department-authorized chokehold which resulted in injuries to the plaintiff.” The court further found that the department authorizes the use of the holds in situations where no one is threatened by death or grievous bodily harm, that officers are insufficiently trained, that the use of the holds involves a high risk of injury or death as then employed, and that their continued use in situations where neither death nor serious bodily injury is threatened “is unconscionable in a civilized society.” The court concluded that such use violated Lyons’ substantive due process rights under the Fourteenth Amendment. A preliminary injunction was entered enjoining “the use of both the carotid artery and bar arm holds under circumstances which do not threaten death or serious bodily injury.” An improved training program and regular reporting and recordkeeping were also ordered.^[4] The Court of Appeals affirmed in a brief *per curiam* opinion stating that the District Court had not abused its discretion in entering a preliminary injunction. 656 F.2d 417 (1981). We granted certiorari, 455 U.S. 937 (1982), and now reverse.

II

[4] Since our grant of certiorari, circumstances pertinent to the case have changed. Originally, Lyons’ complaint alleged that at least two deaths had occurred as a result of the application of chokeholds by the police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May 1982, there had been five more such deaths. On May 6, 1982, the Chief of Police in Los Angeles prohibited the use of the bar-arm chokehold in any circumstances. A few days later, on May 12, 1982, the Board of Police

Commissioners imposed a 6-month moratorium on the use of the carotid artery chokehold except under circumstances where deadly force is authorized.

[5] Based on these events, on June 3, 1982, the City filed in this Court a memorandum suggesting a question of mootness, reciting the facts but arguing that the case was not moot. Lyons in turn filed a motion to dismiss the writ of certiorari as improvidently granted. We denied that motion but reserved the question of mootness for later consideration. 457 U.S. 1115 (1982).

[6] In his brief and at oral argument, Lyons has reasserted his position that in light of changed conditions, an injunctive decree is now unnecessary because he is no longer subject to a threat of injury. He urges that the preliminary injunction should be vacated. The City, on the other hand, while acknowledging that subsequent events have significantly changed the posture of this case, again asserts that the case is not moot because the moratorium is not permanent and may be lifted at any time.

[7] We agree with the City that the case is not moot, since the moratorium by its terms is not permanent. Intervening events have not “irrevocably eradicated the effects of the alleged violation.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). We nevertheless hold, for another reason, that the federal courts are without jurisdiction to entertain Lyons’ claim for injunctive relief.

III

[8] It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *Jenkins v. McKeithen*, 395 U.S. 411, 421-425 (1969) (opinion of Marshall, J.). Plaintiffs must demonstrate a “personal stake in the outcome” in order to “assure that concrete adverseness which sharpens the presentation of issues” necessary for the proper resolution of constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Abstract injury is not enough. The plaintiff must show that he “has sustained or is immediately in danger of sustaining some direct injury” as the result of the challenged official conduct and the injury or threat of injury must be both “real and immediate,” not “conjectural” or “hypothetical.”

[9] In *O’Shea v. Littleton*, 414 U.S. 488 (1974), we dealt with a case brought by a class of plaintiffs claiming that they had been subjected to discriminatory enforcement of the criminal law. Among other things, a county magistrate and judge were accused of discriminatory conduct in various respects, such as sentencing members of plaintiff’s class more harshly than other defendants.

[10] [W]e observed that “[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.” *Id.* at 495-496. Past wrongs were evidence bearing on “whether there is a real and immediate threat of repeated injury.” *Id.* at 496. But the prospect of future injury rested “on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners.” *Ibid.* The most that could be said for plaintiffs’ standing was “that if [plaintiffs] proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed.” *Id.*, at 497. We could not find a case or controversy in those circumstances: the threat to the plaintiffs was not “sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses....” *Id.* at 496. It was to be assumed that “plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.” *Id.* at 497.

[11] Another relevant decision for present purposes is *Rizzo v. Goode*, 423 U.S. 362 (1976), a case in which plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and against city residents in general. The Court reiterated the holding in *O'Shea* that past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy. The claim of injury rested upon “what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman’s perception” of departmental procedures. 423 U.S. at 372. This hypothesis was “even more attenuated than those allegations of future injury found insufficient in *O'Shea* to warrant [the] invocation of federal jurisdiction.” *Ibid*. The Court also held that plaintiffs’ showing at trial of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief.

* * * * *

IV

[12] No extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons’ standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

[13] In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner. Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City’s policy. If, for example, chokeholds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the City’s policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation.

[14] Under *O'Shea* and *Rizzo*, these allegations were an insufficient basis to provide a federal court with jurisdiction to entertain Count V of the complaint.^[5]

* * * * *

[15] For several reasons—each of them infirm, in our view—the Court of Appeals thought reliance on *O'Shea* and *Rizzo* was misplaced and reversed the District Court.

[16] First, the Court of Appeals thought that Lyons was more immediately threatened than the plaintiffs in those cases since, according to the Court of Appeals, Lyons need only be stopped for a minor traffic violation to be subject to the strangleholds. But even assuming that Lyons would again be stopped for a traffic or other violation in the reasonably near future, it is untenable to assert, and the complaint made no such allegation, that strangleholds are applied by the Los Angeles police to every citizen who is stopped or

arrested regardless of the conduct of the person stopped. We cannot agree that the “odds,” 615 F.2d, at 1247, that Lyons would not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief. We note that five months elapsed between October 6, 1976, and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police.

[17] Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.

[18] Second, the Court of Appeals viewed *O’Shea* and *Rizzo* as cases in which the plaintiffs sought “massive structural” relief against the local law enforcement systems and therefore that the holdings in those cases were inapposite to cases such as this where the plaintiff, according to the Court of Appeals, seeks to enjoin only an “established,” “sanctioned” police practice assertedly violative of constitutional rights. *O’Shea* and *Rizzo*, however, cannot be so easily confined to their facts. If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October 1976, then he has not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice.

[19] The Court of Appeals also asserted that Lyons “had a live and active claim” against the City “if only for a period of a few seconds” while the stranglehold was being applied to him and that for two reasons the claim had not become moot so as to disentitle Lyons to injunctive relief: First, because under normal rules of equity, a case does not become moot merely because the complained of conduct has ceased; and second, because Lyons’ claim is “capable of repetition but evading review” and therefore should be heard. We agree that Lyons had a live controversy with the City. Indeed, he still has a claim for damages against the City that appears to meet all Art. III requirements. Nevertheless, the issue here is not whether that claim has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum. The equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help in this respect, for Lyons’ lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued.

[20] The rule that a claim does not become moot where it is capable of repetition, yet evades review, is likewise inapposite. Lyons’ claim that he was illegally strangled remains to be litigated in his suit for damages; in no sense does that claim “evade” review. Furthermore, the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). As we have indicated, Lyons has not made this demonstration.

[21] The record and findings made on remand do not improve Lyons’ position with respect to standing. The District Court, having been reversed, did not expressly address Lyons’ standing to seek injunctive relief, although the City was careful to preserve its position on this question. There was no finding that Lyons faced a real and immediate threat of again being illegally choked. The City’s policy was described as authorizing the use of the strangleholds “under circumstances where no one is threatened with death or grievous bodily harm.” That policy was not further described, but the record before the court contained the department’s existing policy with respect to the employment of chokeholds. Nothing in that policy, contained in a Police Department manual, suggests that the chokeholds, or other kinds of force for that matter, are authorized absent some resistance or other provocation by the arrestee or other suspect. On the contrary, police officers

were instructed to use chokeholds only when lesser degrees of force do not suffice and then only “to gain control of a suspect who is violently resisting the officer or trying to escape.” App. 230.

[22] Our conclusion is that the Court of Appeals failed to heed *O’Shea*, *Rizzo*, and other relevant authority, and that the District Court was quite right in dismissing Count V.

V

[23] Lyons fares no better if it be assumed that his pending damages suit affords him Art. III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a “likelihood of substantial and immediate irreparable injury.” *O’Shea v. Littleton*, 414 U.S. at 502. The speculative nature of Lyons’ claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.

[24] Nor will the injury that Lyons allegedly suffered in 1976 go unrecompensed; for that injury, he has an adequate remedy at law. Contrary to the view of the Court of Appeals, it is not at all “difficult” under our holding “to see how anyone can ever challenge police or similar administrative practices.” 615 F.2d at 1250. The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there.

[25] Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.

[26] We decline the invitation to slight the preconditions for equitable relief; for as we have held, recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States’ criminal laws in the absence of irreparable injury which is both great and immediate.

[27] As we noted in *O’Shea*, 414 U.S. at 503, withholding injunctive relief does not mean that the “federal law will exercise no deterrent effect in these circumstances.” If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983. Furthermore, those who deliberately deprive a citizen of his constitutional rights risk conviction under the federal criminal laws. *Ibid*.

[28] Beyond these considerations the state courts need not impose the same standing or remedial requirements that govern federal-court proceedings. The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court, absent far more justification than Lyons has proffered in this case.

Justice Marshall, with whom Justice Brennan, Justice Blackmun, and Justice Stevens join, dissenting.

[29] The District Court found that the city of Los Angeles authorizes its police officers to apply life-threatening chokeholds to citizens who pose no threat of violence, and that respondent, Adolph Lyons, was subjected to such a chokehold. The Court today holds that a federal court is without power to enjoin the enforcement of the city’s policy, no matter how flagrantly unconstitutional it may be. Since no one can show

that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The city is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result. I dissent from this unprecedented and unwarranted approach to standing.

* * * * *

I

A

[30] Respondent Adolph Lyons is a 24-year-old Negro male who resides in Los Angeles. According to the uncontradicted evidence in the record, at about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.

* * * * *

B

[31] Although the city instructs its officers that use of a chokehold does not constitute deadly force, since 1975 no less than 16 persons have died following the use of a chokehold by an LAPD police officer. Twelve have been Negro males. The evidence submitted to the District Court established that for many years it has been the official policy of the city to permit police officers to employ chokeholds in a variety of situations where they face no threat of violence. In reported "altercations" between LAPD officers and citizens the chokeholds are used more frequently than any other means of physical restraint. Between February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations.

[32] It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death. Chokeholds are intended to bring a subject under control by causing pain and rendering him unconscious. Depending on the position of the officer's arm and the force applied, the victim's voluntary or involuntary reaction, and his state of health, an officer may inadvertently crush the victim's larynx, trachea, or hyoid. The result may be death caused by either cardiac arrest or asphyxiation. An LAPD officer described the reaction of a person to being choked as "[doing] the chicken," Exh. 44, p. 93, in reference apparently to the reactions of a chicken when its neck is wrung. The victim experiences extreme pain. His face turns blue as he is deprived of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly.

[33] Although there has been no occasion to determine the precise contours of the city's chokehold policy, the evidence submitted to the District Court provides some indications. LAPD Training Officer Terry Speer testified that an officer is authorized to deploy a chokehold whenever he "*feels* that there's about to

be a bodily attack made on him.” App. 381 (emphasis added). A training bulletin states that “[control] holds ... allow officers to subdue any resistance by the suspects.” Exh. 47, p. 1 (emphasis added). In the proceedings below the city characterized its own policy as authorizing the use of chokeholds “to gain control of a suspect who is violently resisting the officer or trying to escape,” to “subdue any resistance by the suspects,” and to permit an officer, “where ... resisted, but *not necessarily threatened with serious bodily harm or death*, ... to subdue a suspect who forcibly resists an officer.” (Emphasis added.)

* * * * *

III

[34] Since Lyons’ claim for damages plainly gives him standing, and since the success of that claim depends upon a demonstration that the city’s chokehold policy is unconstitutional, it is beyond dispute that Lyons has properly invoked the District Court’s authority to adjudicate the constitutionality of the city’s chokehold policy. The dispute concerning the constitutionality of that policy plainly presents a “case or controversy” under Art. III. The Court nevertheless holds that a federal court has no power under Art. III to adjudicate Lyons’ request, in the same lawsuit, for injunctive relief with respect to that very policy. This anomalous result is not supported either by precedent or by the fundamental concern underlying the standing requirement. Moreover, by fragmenting a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this Court’s traditional conception of standing and of the remedial powers of the federal courts.

A

[35] It is simply disingenuous for the Court to assert that its decision requires “[no] extension” of *O’Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976). *Ante*, at 105. In contrast to this case *O’Shea* and *Rizzo* involved disputes focusing solely on the threat of future injury which the plaintiffs in those cases alleged they faced. In *O’Shea* the plaintiffs did not allege past injury and did not seek compensatory relief. In *Rizzo*, the plaintiffs sought only declaratory and injunctive relief and alleged past instances of police misconduct only in an attempt to establish the substantiality of the threat of future injury. There was similarly no claim for damages based on past injuries in *Ashcroft v. Mattis*, 431 U.S. 171 (1977), or *Golden v. Zwickler*, 394 U.S. 103 (1969), on which the Court also relies.

[36] These decisions do not support the Court’s holding today. As the Court recognized in *O’Shea*, standing under Art. III is established by an allegation of “‘threatened or actual injury.’” 414 U.S. at 493, *quoting Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973) (emphasis added). *See also* 414 U.S. at 493, n.2. Because the plaintiffs in *O’Shea*, *Rizzo*, *Mattis*, and *Zwickler* did not seek to redress past injury, their standing to sue depended entirely on the risk of future injury they faced. Apart from the desire to eliminate the possibility of future injury, the plaintiffs in those cases had no other personal stake in the outcome of the controversies.

[37] By contrast, Lyons’ request for prospective relief is coupled with his claim for damages based on past injury. In addition to the risk that he will be subjected to a chokehold in the future, Lyons has suffered past injury. Because he has a live claim for damages, he need not rely solely on the threat of future injury to establish his personal stake in the outcome of the controversy. In the cases relied on by the majority, the Court simply had no occasion to decide whether a plaintiff who has standing to litigate a dispute must clear a separate standing hurdle with respect to each form of relief sought.^[6]

B

[38] The Court's decision likewise finds no support in the fundamental policy underlying the Art. III standing requirement—the concern that a federal court not decide a legal issue if the plaintiff lacks a sufficient “personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions.” *Baker v. Carr*, 369 U.S. at 204. As this Court stated in *Flast v. Cohen*, 392 U.S. 83, 101 (1968), “the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” See also *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (standing requirement ensures that “the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action”).

[39] Because Lyons has a claim for damages against the city, and because he cannot prevail on that claim unless he demonstrates that the city's chokehold policy violates the Constitution, his personal stake in the outcome of the controversy adequately assures an adversary presentation of his challenge to the constitutionality of the policy. Moreover, the resolution of this challenge will be largely dispositive of his requests for declaratory and injunctive relief. No doubt the requests for injunctive relief may raise additional questions. But these questions involve familiar issues relating to the appropriateness of particular forms of relief, and have never been thought to implicate a litigant's standing to sue. The denial of standing separately to seek injunctive relief therefore cannot be justified by the basic concern underlying the Art. III standing requirement.

C

[40] By fragmenting the standing inquiry and imposing a separate standing hurdle with respect to each form of relief sought, the decision today departs significantly from this Court's traditional conception of the standing requirement and of the remedial powers of the federal courts. We have never required more than that a plaintiff have standing to litigate a claim. Whether he will be entitled to obtain particular forms of relief should he prevail has never been understood to be an issue of standing. In determining whether a plaintiff has standing, we have always focused on his personal stake in the outcome of the controversy, not on the issues sought to be litigated, *Flast v. Cohen*, *supra*, at 99, or the “precise nature of the relief sought.” *Jenkins v. McKeithen*, 395 U.S. at 423 (opinion of Marshall, J., joined by Warren, C. J., and Brennan, J.).

[41] The Court's fragmentation of the standing inquiry is also inconsistent with the way the federal courts have treated remedial issues since the merger of law and equity. The federal practice has been to reserve consideration of the appropriate relief until after a determination of the merits, not to foreclose certain forms of relief by a ruling on the pleadings. The prayer for relief is no part of the plaintiff's cause of action. See 2A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* para. 8.18, p. 8-216, and n.13 (1983) (Moore), and cases cited therein; C. Wright, A. MILLER, & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2664 (1983) (Wright, Miller, & Kane). Rather, “[the usual rule is] that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).

IV

[42] Apart from the question of standing, the only remaining question presented in the petition for certiorari is whether the preliminary injunction issued by the District Court must be set aside because it “[constitutes] a substantial interference in the operation of a municipal police department.” Pet. for Cert. I. In my view it does not.

[43] The principles of federalism simply do not preclude the limited preliminary injunction issued in this case. Unlike the permanent injunction at issue in *Rizzo*, the preliminary injunction involved here entails no federal supervision of the LAPD’s activities. The preliminary injunction merely forbids the use of chokeholds absent the threat of deadly force, permitting their continued use where such a threat does exist. This limited ban takes the form of a preventive injunction, which has traditionally been regarded as the least intrusive form of equitable relief. Moreover, the city can remove the ban by obtaining approval of a training plan. Although the preliminary injunction also requires the city to provide records of the uses of chokeholds to respondent and to allow the court access to such records, this requirement is hardly onerous, since the LAPD already maintains records concerning the use of chokeholds.

V

[44] Apparently because it is unwilling to rely solely on its unprecedented rule of standing, the Court goes on to conclude that, even if Lyons has standing, “[the] equitable remedy is unavailable.” *Ante*, at 111. The Court’s reliance on this alternative ground is puzzling for two reasons.

[45] If, as the Court says, Lyons lacks standing under Art. III, the federal courts have no power to decide his entitlement to equitable relief on the merits. Under the Court’s own view of Art. III, the Court’s discussion in Part V is purely an advisory opinion.

[46] In addition, the question whether injunctive relief is available under equitable principles is simply not before us. We granted certiorari only to determine whether Lyons has standing and whether, if so, the preliminary injunction must be set aside because it constitutes an impermissible interference in the operation of a municipal police department. We did not grant certiorari to consider whether Lyons satisfies the traditional prerequisites for equitable relief. See n.22, *supra*.

[47] Even if the issue had been properly raised, I could not agree with the Court’s disposition of it. With the single exception of *Rizzo v. Goode*, *supra*, all of the cases relied on by the Court concerned injunctions against state criminal proceedings. The rule of *Younger v. Harris*, 401 U.S. 37 (1971), that such injunctions can be issued only in extraordinary circumstances in which the threat of injury is “great and immediate,” *id.* at 46, reflects the venerable rule that equity will not enjoin a criminal prosecution, the fact that constitutional defenses can be raised in such a state prosecution, and an appreciation of the friction that injunctions against state judicial proceedings may produce. See *ibid.*; *Steffel v. Thompson*, 415 U.S. 452, 462 (1974); 28 U.S.C. § 2283.

[48] Our prior decisions have repeatedly emphasized that where an injunction is not directed against a state criminal or quasi-criminal proceeding, “the relevant principles of equity, comity, and federalism” that underlie the *Younger* doctrine “have little force.”

[49] If the preliminary injunction granted by the District Court is analyzed under general equitable principles, rather than the more stringent standards of *Younger v. Harris*, it becomes apparent that there is no rule of law that precludes equitable relief and requires that the preliminary injunction be set aside.

"In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown v. Chote*, 411 U.S. 452, 457 (1973).

[50] The District Court concluded, on the basis of the facts before it, that Lyons was choked without provocation pursuant to an unconstitutional city policy. *Supra* at 119. Given the necessarily preliminary nature of its inquiry, there was no way for the District Court to know the precise contours of the city's policy or to ascertain the risk that Lyons, who had alleged that the policy was being applied in a discriminatory manner, might again be subjected to a chokehold. But in view of the Court's conclusion that the unprovoked choking of Lyons was pursuant to a city policy, Lyons has satisfied "the usual basis for injunctive relief, 'that there exists some cognizable danger of recurrent violation.'" *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 59 (1975), quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The risk of serious injuries and deaths to other citizens also supported the decision to grant a preliminary injunction. Courts of equity have much greater latitude in granting injunctive relief "in furtherance of the public interest than ... when only private interests are involved." *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937). See Wright, Miller, & Kane § 2948; 7 Moore para. 65.04[1]. In this case we know that the District Court would have been amply justified in considering the risk to the public, for after the preliminary injunction was stayed, five additional deaths occurred prior to the adoption of a moratorium. See n.3 *supra*. Under these circumstances, I do not believe that the District Court abused its discretion.

[51] Indeed, this Court has approved of a decision that directed issuance of a permanent injunction in a similar situation. See *Lankford v. Gelston*, 364 F.2d 197 (CA4 1966), cited with approval in *Allee v. Medrano*, 416 U.S. 802, 816, n.9 (1974). See n.15 *supra*. In *Lankford*, citizens whose houses had been searched solely on the basis of uncorroborated, anonymous tips sought injunctive relief. The Fourth Circuit, sitting en banc, held that the plaintiffs were entitled to an injunction against enforcement of the police department policy authorizing such searches, even though there was no evidence that their homes would be searched in the future. Lyons is no less entitled to seek injunctive relief. To hold otherwise is to vitiate "one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable." *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902).

[52] Here it is unnecessary to consider the propriety of a permanent injunction. The District Court has simply sought to protect Lyons and other citizens of Los Angeles pending a disposition of the merits. It will be time enough to consider the propriety of a permanent injunction when and if the District Court grants such relief.

VI

[53] The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future. The Chief Justice asked in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 419 (1971) (dissenting opinion), "what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive"? His answer was that it would be "easy to predict our collective wrath and outrage." *Ibid*. We now learn that wrath and outrage cannot be translated into an order to cease the unconstitutional practice, but only an award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate. Under the view expressed by the majority today, if the police adopt a policy of "shoot to kill," or a policy of shooting 1 out of 10 suspects, the federal courts will be powerless to enjoin its continuation. Cf. *Linda R.S. v. Richard D.*, 410 U.S. at 621 (White, J., dissenting). The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.



[City of Los Angeles v. Lyons – Audio and Transcript of Oral Argument](#)

Footnotes

3. The police control procedures at issue in this case are referred to as “control holds,” “chokeholds,” “strangleholds,” and “neck restraints.” All these terms refer to two basic control procedures: the “carotid” hold and the “bar arm” hold. In the “carotid” hold, an officer positioned behind a subject places one arm around the subject’s neck and holds the wrist of that arm with his other hand. The officer, by using his lower forearm and bicep muscle, applies pressure concentrating on the carotid arteries located on the sides of the subject’s neck. The “carotid” hold is capable of rendering the subject unconscious by diminishing the flow of oxygenated blood to the brain. The “bar arm” hold, which is administered similarly, applies pressure at the front of the subject’s neck. “Bar arm” pressure causes pain, reduces the flow of oxygen to the lungs, and may render the subject unconscious. [↴](#)
4. By its terms, the injunction was to continue in force until the court approved the training program to be presented to it. It is fair to assume that such approval would not be given if the program did not confine the use of the strangleholds to those situations in which their use, in the view of the District Court, would be constitutional. Because of successive stays entered by the Court of Appeals and by this Court, the injunction has not gone into effect. [↴](#)
5. As previously indicated, *supra*, at 98, Lyons alleged that he feared he would be choked in any future encounter with the police. The reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant. Of course, emotional upset is a relevant consideration in a damages action. [↴](#)
6. The Court’s reliance on *Rizzo* is misplaced for another reason. In *Rizzo* the Court concluded that the evidence presented at trial failed to establish an “affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [defendants].” 423 U.S. at 371. Because the misconduct being challenged was, in the Court’s view, the result of the behavior of unidentified officials not named as defendants rather than any policy of the named defendants—the City Managing Director, and the Police Commissioner, *id.* at 372—the Court had “serious doubts” whether a case or controversy existed between the plaintiffs and those defendants. Here, by contrast, *Lyons* has clearly established a case or controversy between himself and the city concerning the constitutionality of the city’s policy. See *supra* at 120-122. In *Rizzo* the Court specifically distinguished those cases where a case or controversy was found to exist because of the existence of an official policy responsible for the past or threatened constitutional deprivations. 423 U.S. at 373-374, distinguishing *Hague v. CIO*, 307 U.S. 496 (1939); *Allee v. Medrano*, 416 U.S. 802 (1974); *Lankford v. Gelston*, *supra*. [↴](#)

Notes on *City of Los Angeles v. Lyons*

1. A study of neck compression holds published in the [July 1983 FBI LAW ENFORCEMENT BULLETIN](#) yielded the following conclusions:

Because of the organs involved, neck holds must be considered potentially lethal whenever applied. Officers using this hold should have proper training in its use and effects. Police officers should have continual inservice training and practice in the use of the carotid sleeper. They should not use or be instructed in the use of the choke hold other than to demonstrate its potential lethal effect. Officers should recognize that death can result if the carotid sleeper is incorrectly applied, and there may also be instances where sudden and unexpected deaths occur when the carotid sleeper is properly used.

Donald T. Reay, M.D. and Richard L. Mathers, [Physiological Effects Resulting From Use of Neck Holds](#), FBI LAW ENFORCEMENT BULLETIN (July 1983) at 15.

2. How did the Court apply the general standards for injunctive relief to Lyons' constitutional claim?
3. Did Lyons satisfy the requisites to an Article III case or controversy set forth in [Rizzo v. Goode](#)? Are there any circumstances under which a plaintiff may have standing to enjoin future police misconduct?
 - a. In [Kolender v. Lawson](#), 461 U.S. 352 (1983), Edward Lawson brought a civil action seeking a mandatory injunction to restrain enforcement of the California statute that made it a misdemeanor for one "[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when request by any police officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." [California Penal Code Ann. § 647\(e\)](#) (West 1970). Finding the statute unconstitutionally vague on its face, the Supreme Court upheld the lower courts' injunction against enforcement of the act. In a footnote, the Court addressed Lawson's standing to seek an injunction:

The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e).

Kolender, 461 U.S. at 355 n.3 (citations omitted). See also *Wooley v. Maynard*, 430 U.S. 705, 712 (1977) (three successive criminal prosecutions in five weeks for covering up the state motto "Live Free or Die" on license plates established credible threat of future prosecutions sufficient to justify equitable relief for invasion of First Amendment right to refrain from speaking).

- b. In [Nava v. City of Dublin](#), 121 F. 3d 453 (9th Cir. 1997), California Highway Patrol (CHP) Officer Williams had stopped Randolph Bennett for illegally walking on the shoulder of a state highway. When Bennett resisted attempts to remove him from the shoulder, CHP Officer Whitty arrived at the scene and applied a carotid hold, causing Bennett to lose consciousness and die. Nava, Bennett's son, sued the CHP, its Commissioner and CHP Officers Williams and Whitty seeking both damages and an injunction. The jury found that Officer Whitty, acting pursuant to the policy promulgated by the CHP Commissioner, had deprived Bennett of his constitutional rights by use of excessive force and awarded \$470,000 in compensatory and punitive damages. The district court, concluding that the carotid hold

is deadly force and that CHP policy authorized use of the hold when deadly force is not justified, issued a permanent injunction banning the CHP from authorizing its officers to apply the carotid hold unless application of the chokehold is necessary to prevent death or serious bodily harm to an officer or third party. The court of appeals concluded that Nava did have standing to seek injunctive relief. Although Nava could not establish that he was likely to suffer future injury from the CHP's administration of a chokehold, the Ninth Circuit had created an exception to this requirement where a plaintiff has standing to bring an action for damages and the claim for injunctive relief "involve[s] the same operative facts and legal theory." *Smith v. City of Fontana*, 818 F.2d 1411, 1423 (9th Cir. 1987). However, the court further held that because Nava was no more likely to be subjected to deadly force than any other citizen of California, he could not establish the likelihood of substantial and immediate irreparable injury required to procure equitable relief.

- c. In *Hodgers-Durgin v. De LaVina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999), two innocent motorists who had been stopped by roving agents of the United States Border Patrol sought injunctive relief to restrain such stops as violative of the Fourth Amendment. The Court of Appeals for the Ninth Circuit overruled *Nava* and other prior cases that had held that standing to seek damages created standing to seek equitable relief, deeming these decisions inconsistent with *Lyons*. *Id.* at 1040 n.1. However, the court reasoned that plaintiffs had satisfied the case or controversy requirement of Article III:

This case is notably different from *Lyons* in that plaintiffs did nothing illegal to prompt the stops by the border patrol. Unlike in *Lyons*, in this case it is uncontested that both plaintiffs engaged in entirely innocent conduct, and there is no tenable argument that plaintiffs should avoid driving near the Mexican border in order to avoid another stop by the Border Police. Further, unlike in *Lyons*, in this case there is no string of contingencies necessary to produce an injury. In *Lyons*, further injury would have required another stop by the police, followed by post-stop behavior culminating in a chokehold. In this case, another stop of the sort alleged by plaintiffs would itself constitute further injury.

Hodgers-Durgin, 199 F.3d at 1041-42. While accepting that plaintiffs had standing under Article III, the court held that because each plaintiff had been stopped only once in ten years, they "have not demonstrated sufficient likelihood of injury to warrant equitable relief." *Id.* at 1044. The court noted that other persons not named as plaintiffs—one who was stopped by Border Patrol agents at least four times between 1992 and 1995 and another who had been stopped "on more occasions than he could remember"—might be able to establish the probability of harm essential to obtain equitable relief. *Id.* at 1045. See also *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1993) (Article III standing is present where "numerous instances of police misconduct have occurred in a small six by seven block area, some minority residents of the area have been mistreated by deputies more than once, and many victims purportedly did nothing to warrant detention or apprehension prior to the mistreatment.").

Finally, the court of appeals held that the inability of the named plaintiffs to prove a likelihood of future injury made the claim for declaratory relief unripe:

Ripeness doctrine protects against premature adjudication of suits in which declaratory relief is sought. [citation omitted] In suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness doctrine serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief. As the Supreme Court recently wrote, translating the language of injunctions and imminency into the language of declaratory judgments and ripeness, "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at

all.” *Texas v. United States*, 523 U.S. 296, 118 S. Ct. 1257, 1259, 140 L. Ed.2d 406 (1988) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S. Ct. 3325, 87 L. Ed.2d 409 (1985) (internal quotations omitted)). Whether the named plaintiffs are likely to be stopped again by the Border Patrol is simply too speculative to warrant an equitable judicial remedy, including declaratory relief, that would require, or provide a basis for requiring, that the Border Patrol change its practices.

Hodgers-Durgin, 199 F.3d at 1044.

- d. In [Curtis v. City of New Haven](#), 726 F.2d 65 (2d Cir. 1984), the court of appeals held that two citizens, who had obtained damage verdicts against the City arising out of the use of mace, did not have standing to obtain an injunction limiting the use of mace to circumstances approved in the International Association of Chiefs of Police guidelines:

Tacitly conceding the overwhelming impact of *Lyons* on the issue of standing, plaintiffs ... claim that the purpose of injunctive relief here is to protect them not as prospective arrestees but as inhabitants of a community in which a hazardous substance is being randomly applied to innocent and uninvolved civilians. Plaintiffs contend that when mace is sprayed, it affects not only the target but also innocent third parties in the area and the police themselves....

The argument is ingenious, but we do not believe that the impact of *Lyons* can so easily be avoided. While a chokehold and mace obviously have different effects, *Lyons* is not fairly distinguishable from this case. Plaintiffs concede that, under their theory, any resident of New Haven could bring suit to enjoin the police department's use of mace. This would appear to be true whether or not the resident had actually been injured or was likely to be injured in the future. *Lyons*, however, dispels the notion that any resident can seek an injunction to prohibit police activity. [citation omitted] Even under plaintiff's theory, they would have the burden of showing that they, as distinguished from the general citizenry of New Haven, are likely to suffer injury from mace in the future as opposed to having a "mere interest" in the claim.

Curtis, 726 F.2d at 68-69.

- e. In [Washington v. Vogel](#), 156 F.R.D. 676 (M.D. Fla. 1994), the Florida State Conference of the NAACP Branches filed a Section 1983 action to enjoin the policy of targeting African Americans and Hispanics for pretextual traffic stops on Interstate 95 in Volusia County, Florida, allegedly for the purpose of seizing cash from persons stopped. The trial court recognized that because individual motorists would be unable to prove a threat of future injury, unless the NAACP had standing to seek an injunction on behalf of its members, "this Court is powerless on the present record to enter an injunction against the alleged police practices at issue." *Id.* at 681. Nonetheless, the court held that the NAACP lacked standing to assert a claim for injunctive relief on behalf of its membership because it was not proven that any particular member faced a real and immediate threat of again being subjected to a pretextual stop.
4. In [County of Riverside v. McClaughlin](#), 500 U.S. 44 (1990), four persons detained in the Riverside County Jail sought injunctive relief requiring the county to provide prompt probable cause hearings to persons arrested without a warrant. The trial court certified a class composed of all present and future prisoners at the jail and all future detainees who have been or may be denied prompt probable cause hearings. The County appealed from the district court's issuance of a preliminary injunction that ordered a judicial determination of probable cause within 36 hours of any warrantless arrest. The County argued that the named plaintiffs lacked standing because it was too late for them to receive a prompt hearing and they could not establish

that they would suffer a future violation of the Constitution by being denied a prompt probable cause hearing following a warrantless arrest. The Court rejected the County's contention:

Plaintiffs alleged in their complaint that they were suffering a direct and current injury as a result of this detention, and would continue to suffer that injury until they received the probable cause determination to which they were entitled. Plainly, plaintiffs' injury was at that moment capable of being redressed through injunctive relief. This case is easily distinguished from *Lyons*, in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint.

It is true, of course, that the claims of the named plaintiffs have been rendered moot; eventually, they either received probable cause hearings or were released. Our cases leave no doubt, however, that by obtaining class certification, plaintiffs preserved the merits of the controversy for our review. In factually similar cases we have held that "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." [citation omitted] That the class was not certified until after the named plaintiff's claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." [citation omitted] In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution.

County of Riverside, 500 U.S. at 51-52. May victims of government misconduct always establish Article III standing by filing their claim as a class action? See [Sosna v. Iowa](#), 419 U.S. 393, 402-03 (1975) ("[T]he judicial power of Art. III courts extends only to 'cases and controversies' specified in that Article. There must . . . be a named plaintiff who has such a case or controversy at the time the complaint is filed."); [Warth v. Seldin](#), 422 U.S. 490, 502 (1975) ("Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other members of the class,'" citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); Cf. [Lewis v. Casey](#), 518 U.S. 343, 349 (1996) (Proof of two instances of deprivation of prisoners' constitutional right of access to court insufficient to sustain systemwide injunction in class action on behalf of all adult prisoners incarcerated in State of Arizona Department of Corrections. "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of political branches, to shape the institutions of government in such a fashion as to comply with the laws and Constitution.").

5. Is equitable relief available whenever the plaintiff proves that the constitutional harm was inflicted pursuant to a governmental policy? Compare [Deshawn E. by Charlotte E. v. Safir](#), 156 F. 3d 340, 344-45 (2nd Cir. 1998) ("[T]his case is distinguishable from *Lyons* because, in *Lyons*, there was no proof of a pattern of illegality as the police had discretion to decide if they were going to apply a choke hold and there was no formal policy which sanctioned the application of the choke hold. In contrast, the challenged interrogation methods in this case are officially endorsed policies; there is a likelihood of recurrence because the Squad's activities are authorized by a written memorandum of understanding between the Corporation Counsel and the Police Commissioner.") with [Nava v. City of Dublin](#), 121 F.3d 453, 459 (9th Cir. 1997) ([T]he district court assigns unwarranted legal significance to the existence of departmental policy. The Supreme Court recognized in *Lyons* that even if the LAPD maintained a clearly unconstitutional blanket policy of authorizing its officers to apply a chokehold to any citizen with whom they have an encounter, *Lyons* would also have to allege that he would *have* another encounter with police in order to establish a real and immediate threat of future injury.") and [Robinson v. City of Chicago](#), 868 F. 2d 959, 966 (7th Cir. 1989) ("Richardson does allege that the City had a written policy authorizing officers to detain persons for investigation. . . . Yet, as with the *Lyons* plaintiffs ... Richardson ... can[not] allege that it is reasonably likely that [he] will again encounter the police.").

6. What alternative did the Court suggest for restraining the unconstitutional use of chokeholds?

7. The availability of injunctive relief also may be limited by federal statute.

- a. In the Prison Litigation Reform Act (PLRA), Congress provided that in any civil action relating to prison conditions:

The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). The PLRA similarly constrains the issuance of preliminary injunctive relief, 18 U.S.C. § 3626(a)(2); limits the courts' power to order release of prisoners, 18 U.S.C. § 3626(a)(3); and provides for the termination of prospective relief. 18 U.S.C. § 3626(b). *See also Farmer v. Brennan*, 511 U.S. 825, 847 (1994) ("When a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them.").

- b. The Tax Anti-Injunction Act, 28 U.S.C. § 1341 provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Supreme Court has held that principles of comity likewise bar federal courts from rendering declaratory judgments as well as damages in actions challenging the constitutionality of state tax laws where plain, adequate and complete remedies lie under state law. *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

8. Given that the Chief of Police had issued a blanket prohibition against the use of the bar-arm chokehold, why did the City argue that the claim for injunctive relief was not moot? Why did the Court find that the Chief of Police's order did not moot the claim for injunctive relief?

In [*Friends of Earth v. Laidlaw Environmental Servs.*](#), 528 U.S. 167, 188-90 (2000), the Court held that a citizen group's action for civil penalties payable to the government under the Clean Water Act was not rendered moot by a wastewater treatment plant owner's post-suit compliance with permit requirements:

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." [citation omitted] "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" [citation omitted] In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." [citation omitted] The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.... By contrast ... it is the plaintiff's burden to establish standing by

demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue....

C. Attorney's Fees

Introduction to Attorney's Fees

1. In [Alyeska Pipeline Service Co. v. Wilderness Society](#), 421 U.S. 240 (1975), the Court held that absent express congressional authorization, the equitable power of courts did not encompass awarding attorney's fees to litigants who successfully represent the public interest. Congress responded by passage of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides in pertinent part:

In any action or proceeding to enforce a provision of section ... 1983 ... of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs....

A plaintiff who prevails "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. No. 94-1011, p. 4 (1986) (*quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). On the other hand, the courts are to award fees to a prevailing defendant only "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." [Christiansburg Garment Co. v. Equal Opportunity Employment Commission](#), 434 U.S. 412, 421 (1978); H.R. Rep. No. 94-1558, p. 7 (1976). For an analysis of the limited circumstances under which fees have been denied to plaintiffs or awarded to defendants, see Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation*, Section 10:3 (Fourth Edition).

2. While fee awards may not be entered against persons protected by absolute legislative immunity—which bars actions for legal as well as equitable relief—fees may be assessed when prospective equitable relief is entered against state and local officials acting in a prosecutorial capacity. [Supreme Court of Virginia v. Consumers Union of the United States](#), 446 U.S. 719 (1981). In [Pulliam v. Allen](#), 466 U.S. 522 (1984), the Court held that judges who were found liable for declaratory and injunctive relief are not immunized from attorney's fees. However, Congress responded by amending Section 1988 to provide, "in any action brought against a judicial official for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." [42 U.S.C. § 1988](#). The Eleventh Amendment does not bar an award of fees when prospective relief is ordered against a state governmental entity via an action against a state official in her official capacity. *Hutto v. Finney* 437 U.S. 678 (1978). On the other hand, the state is not responsible for fees following a successful Section 1983 action against the officer in her personal capacity. *Kentucky v. Graham*, 473 U.S. 159, 168 (1985) ("Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity as ultimate insurer. Instead, fee liability runs with merits liability; if federal law does not make the government substantively liable on a *respondeat superior* basis, the government similarly is not liable for fees on that basis under § 1988.").
3. In [Texas Teachers Assn. v. Garland School Dist.](#), 489 U.S. 782 (1988), the Court set forth the general standard defining when a party would be deemed to be "prevailing" for purposes of Section 1988. Rejecting the court of appeals' formulation that plaintiff must succeed on the "central issue" in the litigation to be eligible for an award of attorney's fees, the Court prescribed the following test:

We think the language of *Nadeau v. Helgemoe*, quoted in our opinion in *Hensley*, adequately

captures the inquiry which should be made in determining whether a civil rights plaintiff is a prevailing party within the meaning of § 1988. If the plaintiff has succeeded on “any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,” the plaintiff has crossed the threshold to a fee award of some kind. The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas Teachers Assn., 489 U.S. at 791-92.

- a. A party may recover fees where relief has been obtained through settlement or a consent decree, even absent a formal judicial declaration that a government official violated plaintiff’s federally guaranteed rights. [Maher v. Gagne](#), 448 U.S. 122, 129 (1980). On the other hand, the party seeking fees must obtain some relief on the merits of a claim to recover fees. No fees may be awarded where the plaintiff merely secures appellate reversal of directed verdicts entered in favor of the defense and the case is remanded for a new trial. [Hanrahan v. Hampton](#), 446 U.S. 754 (1980) (per curiam). In addition, plaintiff is not a prevailing party where the court finds that a prisoner has suffered a deprivation of constitutional rights but a) exonerates defendants from liability for damages because of qualified immunity, and b) declines to order injunctive and declaratory relief because the plaintiff’s release from prison rendered the claim for equitable relief moot. [Hewitt v. Helms](#), 482 U.S. 755 (1987). See also [Rhodes v. Stewart](#), 488 U.S. 1, 3 (1988) (per curiam) (Modification of prison policies effected by declaratory judgment “could not in any way have benefitted either plaintiff, one of whom was dead and the other released.”).
- b. In [Farrar v. Hobby](#), 506 U.S. 103 (1992), plaintiff sued under Section 1983 for \$17 million dollars in money damages. The jury found that defendant Hobby had deprived Farrar of a constitutional right but that Hobby’s conduct was not a proximate cause of any damages. After the district court entered a judgement against Hobby for nominal damages, it awarded him \$280,000 in attorney’s fees. The court of appeals reversed the fee award, holding that Farrar was not a prevailing party under Section 1988. The Supreme Court held that Farrar satisfied the prevailing party” requirement of Section 1988:

[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some of the relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought ... or comparable relief through a consent decree or settlement.... Only under these circumstances can civil rights litigation effect “the material alteration of the legal relationship of the parties” and thereby transform the plaintiff into a prevailing party.

We ... hold that a plaintiff who wins nominal damages is a prevailing party under § 1988.... A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant’s behavior for the plaintiff’s benefit by forcing the defendant to pay an amount of money he otherwise would not pay.

Farrar, 506 U.S. at 111-13. The Court’s analysis in *Farrar* generated a split in the circuits over the viability of the “catalyst test,” which granted prevailing party status to plaintiffs “if its “ends are accomplished as the result of the litigation even without formal judicial recognition,” there is a “causal connection” between the plaintiff’s lawsuit and the defendant’s actions providing relief to the plaintiff, and the defendant’s actions were “required by law.” [Morris v. City of West Palm Beach](#), 194 F.3d 1203 (11th Cir. 1999). Compare [S-1 & S-2 v. State Board of Education](#), 21 F.3d 49 (4th Cir. 1994) (en banc) (*Farrar* precludes catalyst theory) with *Morris*, 21 F.3d at 1206-07 and cases cited at 1206 n.5 (*Farrar* does not bar the catalyst test).

4. The Supreme Court set forth the general approach to calculation of the fee award in [*Hensley v. Eckerhart*](#), 461 U.S. 424, 433-34 (1983):

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the the hours worked and rates claimed. Where documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." ... Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

The reasonable hourly rate is to be determined by prevailing market rates in the community and is not to be reduced when plaintiff was represented by a non-profit legal services organization. [*Blum v. Stenson*](#), 465 U.S. 886, 892-96 (1984). Nor does a contingent fee agreement cap the fees recoverable under Section 1988. [*Blanchard v. Bergeron*](#), 489 U.S. 87 (1989).

The *Hensley* Court also described how the fee award should be assessed where the plaintiff prevails on some but not all of the claims:

In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants ... counsel's work on one claim will be unrelated to his work on another claim.... The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit....

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. [T]he most critical factor is the degree of success obtained.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.

Hensley, 461 U.S. at 434-36.

5. In [*City of Riverside v. Rivera*](#), 477 U.S. 561 (1986), plaintiffs recovered \$13,300 in damages for constitutional

violations after city police officers, acting without a warrant or sufficient cause, broke up a party using tear gas and excessive physical force. The defendants appealed from the lower courts' award of attorney's fees totaling \$245,456.25. The Supreme Court affirmed the fee award, rejecting defendants' argument that attorney's fees must be proportionate to the amount of damages recovered:

As an initial matter, we reject the notion that a civil action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See *Carey v. Phipps*, 435 U.S. 247, 266 (1978). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damage awards.

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.... These victims ordinarily cannot afford to purchase legal services at the rate set by the private market. Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.

A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonable expended on a case.

City of Riverside, 477 U.S. at 574-78.

6. While holding that a plaintiff who recovers nominal damages is a prevailing party under Section 1988, the Court, in a 5-4 opinion in [Farrar v. Hobby](#), 506 U.S. 103 (1992), affirmed the denial of attorney's fees on a separate ground:

Although the "technical" nature of a nominal damages award . . . does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988. Once the civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award "Where recovery of private damages is the purpose of civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought."

In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.... When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief the only reasonable fee is usually no fee at all.

Farrar, 506 U.S. at 114-15. Justice O'Connor, one of the five votes supporting the majority, wrote a concurring opinion in which she endorsed the following approach:

In the context of this litigation, the technical or *de minimis* nature of Joseph Farrar's victory is readily apparent: He asked for a bundle and got a pittance.... That is not to say that *all* nominal damage awards are *de minimis*. Nominal relief does not necessarily a nominal victory make.... But a substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical.

The difference between the amount recovered and the damages sought is not the only consideration. [T]he courts also must look to other factors. One is the significance of the legal issue on which the plaintiff claims to have prevailed. Respondent was just one of six defendants and the only one not found to have engaged in a conspiracy. If recovering one dollar from the least culpable defendant and nothing from the rest legitimately can be labeled a victory—and I doubt that it can—surely it is a hollow one....

Given that Joseph Farrar got *some* of what he wanted his success might be considered material if it accomplished some public goal. Section 1988 is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory. Yet one searches these facts in vain for the public purpose this litigation might have served.

Farrar, 506 U.S. at 120-22 (O'Connor, J. concurring). Does *Farrar* bar an award of attorney's fees in every Section 1983 case where plaintiff recovers only nominal damages? See [Brandau v. State of Kansas](#), 168 F.3d 1179, 1181-83 (10th Cir. 1999); [LeBlanc-Sternberg v. Fletcher](#), 143 F.3d 748, 758-63 (2d Cir. 1998). What strategies may plaintiff's counsel adopt to maximize the chances of recovering attorney's fees if the jury awards nominal damages?

7. In the Prison Litigation Reform Act of 1995, Congress significantly limited the fees that may be awarded to attorneys who file Section 1983 actions on behalf of prisoners. [42 U.S.C. § 1997e\(d\)](#). See *Collins v. Montgomery Cty. Bd. Of Prison Inspectors*, 176 F.3d 681 (3rd Cir. 1999) (en banc) (equally divided court affirming lower court decision that limitation of fees to 150% of judgment does not violate equal protection).
8. The cost of hiring expert witnesses is not recoverable under Section 1988. [West Virginia Univ. Hospitals, Inc. v. Casey](#), 499 U.S. 83 (1991) (disallowing reimbursement for fees paid to experts in excess of \$100,000). Instead, as part of the costs taxed pursuant to 28 U.S.C. § 1920, plaintiff may recover only the statutory witness fee authorized by 28 U.S.C. § 1821(b). "A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time occupied in going to and returning from the place of attendance."

EVANS v. JEFF D., 475 U.S. 717 (1986)

Justice Stevens delivered the opinion of the Court.

[1] The Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) provides that "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee" in enumerated civil rights actions. 90 Stat. 2641, 42 U.S.C. § 1988. In *Maher v. Gagne*, 448 U.S. 122 (1980), we held that fees *may* be assessed against state officials after a case has been settled by the entry of a consent decree. In this case, we consider the question whether

attorney's fees *must* be assessed when the case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party's fees or costs. We hold that the District Court has the power, in its sound discretion, to refuse to award fees.

I

[2] The petitioners are the Governor and other public officials of the State of Idaho responsible for the education and treatment of children who suffer from emotional and mental handicaps. Respondents are a class of such children who have been or will be placed in petitioners' care.

[3] On August 4, 1980, respondents commenced this action by filing a complaint against petitioners in the United States District Court for the District of Idaho. The factual allegations in the complaint described deficiencies in both the educational programs and the health care services provided respondents. These deficiencies allegedly violated the United States Constitution, the Idaho Constitution, four federal statutes, and certain provisions of the Idaho Code. The complaint prayed for injunctive relief and for an award of costs and attorney's fees, but it did not seek damages.

[4] On the day the complaint was filed, the District Court entered two orders, one granting the respondents leave to proceed in forma pauperis, and a second appointing Charles Johnson as their next friend for the sole purpose of instituting and prosecuting the action. At that time Johnson was employed by the Idaho Legal Aid Society, Inc., a private, nonprofit corporation that provides free legal services to qualified low-income persons. Because the Idaho Legal Aid Society is prohibited from representing clients who are capable of paying their own fees, it made no agreement requiring any of the respondents to pay for the costs of litigation or the legal services it provided through Johnson. Moreover, the special character of both the class and its attorney-client relationship with Johnson explains why it did not enter into any agreement covering the various contingencies that might arise during the course of settlement negotiations of a class action of this kind.

[5] In March 1983, one week before trial, petitioners presented respondents with a new settlement proposal. As respondents themselves characterize it, the proposal "offered virtually all of the injunctive relief [they] had sought in their complaint." Brief for Respondents 5. See App. 89. The Court of Appeals agreed with this characterization, and further noted that the proposed relief was "more than the district court in earlier hearings had indicated it was willing to grant." 743 F.2d 648, 650 (CA9 1984). As was true of the earlier partial settlement, however, petitioners' offer included a provision for a waiver by respondents of any claim to fees or costs. Originally, this waiver was unacceptable to the Idaho Legal Aid Society, which had instructed Johnson to reject any settlement offer conditioned upon a waiver of fees, but Johnson ultimately determined that his ethical obligation to his clients mandated acceptance of the proposal. The parties conditioned the waiver on approval by the District Court.

[6] After the stipulation was signed, Johnson filed a written motion requesting the District Court to approve the settlement "except for the provision on costs and attorney's fees," and to allow respondents to present a bill of costs and fees for consideration by the court. App. 87. At the oral argument on that motion, Johnson contended that petitioners' offer had exploited his ethical duty to his clients—that he was "forced," by an offer giving his clients "the best result [they] could have gotten in this court or any other court," to waive his attorney's fees. The District Court, however, evaluated the waiver in the context of the entire settlement and rejected the ethical underpinnings of Johnson's argument. Explaining that although petitioners were "not willing to concede that they were obligated to [make the changes in their practices required by the stipulation], ... they were willing to do them as long as their costs were outlined and they didn't face additional costs," it concluded that "it doesn't violate any ethical considerations for an attorney to give up his attorney fees

in the interest of getting a better bargain for his [clients]." *Id.* at 93. Accordingly, the District Court approved the settlement and denied the motion to submit a costs bill.

[7] When respondents appealed from the order denying attorney's fees and costs, petitioners filed a motion requesting the District Court to suspend or stay their obligation to comply with the substantive terms of the settlement. Because the District Court regarded the fee waiver as a material term of the complete settlement, it granted the motion. The Court of Appeals, however, granted two emergency motions for stays requiring enforcement of the substantive terms of the consent decree pending the appeal. More dramatically, after ordering preliminary relief, it invalidated the fee waiver and left standing the remainder of the settlement; it then instructed the District Court to "make its own determination of the fees that are reasonable" and remanded for that limited purpose. 743 F.2d at 652.

[8] In explaining its holding, the Court of Appeals emphasized that Rule 23(e) of the Federal Rules of Civil Procedure gives the court the power to approve the terms of all settlements of class actions, and that the strong federal policy embodied in the Fees Act normally requires an award of fees to prevailing plaintiffs in civil rights actions, including those who have prevailed through settlement. The court added that "[when] attorney's fees are negotiated as part of a class action settlement, a conflict frequently exists between the class lawyers' interest in compensation and the class members' interest in relief." 743 F.2d at 651-652. "To avoid this conflict," the Court of Appeals relied on Circuit precedent which had "disapproved simultaneous negotiation of settlements and attorney's fees" absent a showing of "unusual circumstances." *Id.*, at 652. In this case, the Court of Appeals found no such "unusual circumstances" and therefore held that an agreement on fees "should not have been a part of the settlement of the claims of the class." *Ibid.*

II

[9] The disagreement between the parties and *amici* as to what exactly is at issue in this case makes it appropriate to put certain aspects of the case to one side in order to state precisely the question that the case does present.

[10] To begin with, the Court of Appeals' decision rested on an erroneous view of the District Court's power to approve settlements in class actions. Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed.

[11] The question we must decide, therefore, is whether the District Court had a duty to reject the proposed settlement because it included a waiver of statutorily authorized attorney's fees.

[12] That duty, whether it takes the form of a general prophylactic rule or arises out of the special circumstances of this case, derives ultimately from the Fees Act rather than from the strictures of professional ethics. Although respondents contend that Johnson, as counsel for the class, was faced with an "ethical dilemma" when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interests between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do not believe that the "dilemma" was an "ethical" one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no ethical obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial, Johnson's decision to recommend acceptance was consistent with the highest standards of our profession. The District Court, therefore, correctly concluded that approval of the settlement involved no breach of ethics in this case.

[13] The defect, if any, in the negotiated fee waiver must be traced not to the rules of ethics but to the Fees Act. Following this tack, respondents argue that the statute must be construed to forbid a fee waiver that is the product of “coercion.” They submit that a “coercive waiver” results when the defendant in a civil rights action (1) offers a settlement on the merits of equal or greater value than that which plaintiffs could reasonably expect to achieve at trial but (2) conditions the offer on a waiver of plaintiffs’ statutory eligibility for attorney’s fees. Such an offer, they claim, exploits the ethical obligation of plaintiffs’ counsel to recommend settlement in order to avoid defendant’s statutory liability for its opponents’ fees and costs.

[14] The question this case presents, then, is whether the Fees Act requires a district court to disapprove a stipulation seeking to settle a civil rights class action under Rule 23 when the offered relief equals or exceeds the probable outcome at trial but is expressly conditioned on waiver of statutory eligibility for attorney’s fees. For reasons set out below, we are not persuaded that Congress has commanded that all such settlements must be rejected by the District Court. Moreover, on the facts of record in this case, we are satisfied that the District Court did not abuse its discretion by approving the fee waiver.

III

[15] The text of the Fees Act provides no support for the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits. On the contrary, the language of the Act, as well as its legislative history, indicates that Congress bestowed on the “prevailing party” (generally plaintiffs) a statutory eligibility for a discretionary award of attorney’s fees in specified civil rights actions. It did not prevent the party from waiving this eligibility anymore than it legislated against assignment of this right to an attorney, such as effectively occurred here. Instead, Congress enacted the fee-shifting provision as “an integral part of the remedies necessary to obtain” compliance with civil rights laws, S. Rep. No. 94-1011, p. 5 (1976), to further the same general purpose—promotion of respect for civil rights—that led it to provide damages and injunctive relief. The statute and its legislative history nowhere suggest that Congress intended to forbid all waivers of attorney’s fees—even those insisted upon by a civil rights plaintiff in exchange for some other relief to which he is indisputably not entitled—anymore than it intended to bar a concession on damages to secure broader injunctive relief. Thus, while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney’s fees.

[16] In fact, we believe that a general proscription against negotiated waiver of attorney’s fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement.

[17] Most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package. If fee waivers cannot be negotiated, the settlement package must either contain an attorney’s fee component of potentially large and typically uncertain magnitude, or else the parties must agree to have the fee fixed by the court. Although either of these alternatives may well be acceptable in many cases, there surely is a significant number in which neither alternative will be as satisfactory as a decision to try the entire case.

[18] The adverse impact of removing attorney’s fees and costs from bargaining might be tolerable if the uncertainty introduced into settlement negotiations were small. But it is not. The defendants’ potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits.

[19] The unpredictability of attorney's fees may be just as important as their magnitude when a defendant is striving to fix its liability. Unlike a determination of costs, which ordinarily involve smaller outlays and are more susceptible of calculation, see *Marek v. Chesny*, 473 U.S. at 7, "[there] is no precise rule or formula" for determining attorney's fees, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Among other considerations, the district court must determine what hours were reasonably expended on what claims, whether that expenditure was reasonable in light of the success obtained, see *id.* at 436, 440, and what is an appropriate hourly rate for the services rendered. Some District Courts have also considered whether a "multiplier" or other adjustment is appropriate. The consequence of this succession of necessarily judgmental decisions for the ultimate fee award is inescapable: a defendant's liability for his opponent's attorney's fees in a civil rights action cannot be fixed with a sufficient degree of confidence to make defendants indifferent to their exclusion from negotiation. It is therefore not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants. Respondents' own waiver of attorney's fees and costs to obtain settlement of their educational claims is eloquent testimony to the utility of fee waivers in vindicating civil rights claims. We conclude, therefore, that it is not necessary to construe the Fees Act as embodying a general rule prohibiting settlements conditioned on the waiver of fees in order to be faithful to the purposes of that Act.

IV

[20] The question remains whether the District Court abused its discretion in this case by approving a settlement which included a complete fee waiver.

[21] The Court of Appeals, respondents, and various *amici* supporting their position, however, suggest that the court's authority to pass on settlements, typically invoked to ensure fair treatment of class members, must be exercised in accordance with the Fees Act to promote the availability of attorneys in civil rights cases. Specifically, respondents assert that the State of Idaho could not pass a valid statute precluding the payment of attorney's fees in settlements of civil rights cases to which the Fees Act applies. See Brief for Respondents 24, n.22. From this they reason that the Fees Act must equally preclude the adoption of a uniform state-wide policy that serves the same end, and accordingly contend that a consistent practice of insisting on a fee waiver as a condition of settlement in civil rights litigation is in conflict with the federal statute authorizing fees for prevailing parties, including those who prevail by way of settlement.^[1]

Remarkably, there seems little disagreement on these points. Petitioners and the *amici* who support them never suggest that the district court is obligated to place its stamp of approval on every settlement in which the plaintiffs' attorneys have agreed to a fee waiver. The Solicitor General, for example, has suggested that a fee waiver need not be approved when the defendant had "no realistic defense on the merits," Brief for United States as *Amicus Curiae* Supporting Reversal 23, n.9; see *id.* at 26-27,^[2] or if the waiver was part of a "vindictive effort ... to teach counsel that they had better not bring such cases," Tr. of Oral Arg. 22.

[22] We find it unnecessary to evaluate this argument, however, because the record in this case does not indicate that Idaho has adopted such a statute, policy, or practice. Nor does the record support the narrower proposition that petitioners' request to waive fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against Idaho. It is true that a fee waiver was requested and obtained as a part of the early settlement of the education claims, but we do not understand respondents to be challenging that waiver, see Tr. of Oral Arg. 31-32, and they have not offered to prove that petitioners' tactics in this case merely implemented a routine state policy designed to frustrate the objectives of the Fees Act. Our own examination of the record reveals no such policy.

[23] In light of the record, respondents must—to sustain the judgment in their favor—confront the District Court’s finding that the extensive structural relief they obtained constituted an adequate quid pro quo for their waiver of attorney’s fees.^[3]

The Court of Appeals did not overturn this finding. Indeed, even that court did not suggest that the option of rejecting the entire settlement and requiring the parties either to try the case or to attempt to negotiate a different settlement would have served the interests of justice. Only by making the unsupported assumption that the respondent class was entitled to retain the favorable portions of the settlement while rejecting the fee waiver could the Court of Appeals conclude that the District Court had acted unwisely.

[24] What the outcome of this settlement illustrates is that the Fees Act has given the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial. For aught that appears, it was the “coercive” effect of respondents’ statutory right to seek a fee award that motivated petitioners’ exceptionally generous offer. Whether this weapon might be even more powerful if fee waivers were prohibited in cases like this is another question,^[4] but it is in any event a question that Congress is best equipped to answer. Thus far, the Legislature has not commanded that fees be paid whenever a case is settled. Unless it issues such a command, we shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on case-by-case basis, in the light of all the relevant circumstances.^[5]

In this case, the District Court did not abuse its discretion in upholding a fee waiver which secured broad injunctive relief, relief greater than that which plaintiffs could reasonably have expected to achieve at trial.^[6]

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice Brennan, with whom Justice Marshall and Justice Blackmun join, dissenting.

[25] Ultimately, enforcement of the laws is what really counts. It was with this in mind that Congress enacted the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (Act or Fees Act). Congress authorized fee shifting to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases. Because today’s decision will make it more difficult for civil rights plaintiffs to obtain legal assistance, a result plainly contrary to Congress’ purpose, I dissent.

I

[26] The Court begins its analysis by emphasizing that neither the language nor the legislative history of the Fees Act supports “the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits.” *Ante* at 730. I agree. There is no evidence that Congress gave the question of fee waivers any thought at all. However, the Court mistakenly assumes that this omission somehow supports the conclusion that fee waivers are permissible. On the contrary, that Congress did not specifically consider the issue of fee waivers tells us absolutely nothing about whether such waivers ought

to be permitted. It is black letter law that “[in] the absence of specific evidence of Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind [the] provision “

[27] Accordingly, the first and most important question to be asked is what Congress’ purpose was in enacting the Fees Act. We must then determine whether conditional fee waivers are consistent with this purpose.

II

[28] The Court asserts that Congress authorized fee awards “to further the same general purpose—promotion of respect for civil rights—that led it to provide damages and injunctive relief.” *Ante* at 731. The attorney’s fee made available by the Act, we are told, is simply an addition to “the arsenal of remedies available to combat violations of civil rights.” *Ante* at 732.

[29] Obviously, the Fees Act is intended to “promote respect for civil rights.” Congress would hardly have authorized fee awards in civil rights cases to promote respect for the securities laws. But discourse at such a level of generality is deceptive. The question is *how* did Congress envision that awarding attorney’s fees would promote respect for civil rights? Without a clear understanding of the way in which Congress intended for the Fees Act to operate, we cannot even begin responsibly to go about the task of interpreting it. In theory, Congress might have awarded attorney’s fees as simply an additional form of make-whole relief, the threat of which would “promote respect for civil rights” by deterring potential civil rights violators. If this were the case, the Court’s equation of attorney’s fees with damages would not be wholly inaccurate. However, the legislative history of the Fees Act discloses that this is not the case. Rather, Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as “private attorneys general,” vindicating the public interest.

[30] Before the late 1960’s, the concept of fee shifting in public interest litigation was virtually nonexistent. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (*per curiam*), this Court was called upon to interpret the attorney’s fee provision of Title II of the then recently enacted Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b). We held that a prevailing plaintiff should ordinarily recover fees unless special circumstances rendered such an award unjust. Noting that “[when] the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law,” we recognized that “[a] Title II suit is thus private in form only.” *Newman*, 390 U.S. at 401. If a plaintiff obtains relief, he “does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” *Id.* at 402 (footnote omitted). We recognized further that the right to recover attorney’s fees was conferred by Congress to ensure that this private public-enforcement mechanism would operate effectively:

“If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.” *Ibid.* (footnote omitted).

[31] *Newman* interpreted the fee provision of Title II as intended to bridge the gap between the desire of an individual who has been deprived of a federal right to see that right vindicated and the financial ability of that individual to do so. More importantly, *Newman* recognized that Congress did not erect this bridge solely, or even primarily, to confer a benefit on such aggrieved individuals. Rather, Congress sought to capitalize on the happy coincidence that encouraging private actions would, in the long run, provide effective public

enforcement of Title II. By ensuring that lawyers would be willing to take Title II cases, Congress made the threat of a lawsuit for violating Title II real, thereby deterring potential violators.

[32] After *Newman*, lower courts—invoking their equitable powers to award attorney’s fees—adopted a similar rationale to award fees in cases brought under civil rights statutes that did not contain express provisions for attorney’s fees.

[33] In May 1975, this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, ruled that the equitable powers of the federal courts did not authorize fee awards on the ground that a case served the public interest. Although recognizing that “Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation,” the Court held that “congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary ... to award attorneys’ fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.” *Id.* at 263. Instead, the Court ruled, only Congress could authorize awarding fees as a means of encouraging private actions in the name of public policy. *Id.* at 269-271.

[34] In the wake of *Alyeska*, Congress acted to correct “anomalous gaps” in the availability of attorney’s fees to enforce civil rights laws, S. Rep. No. 94-1011, p. 1 (1976) (hereafter S. Rep.). See H.R. Rep. No. 94-1558, p. 2 (1976) (hereafter H.R. Rep.); 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy). Testimony at hearings on the proposed legislation disclosed that civil rights plaintiffs, “a vast majority of [whom] cannot afford legal counsel,” H.R. Rep. 1, were suffering “very severe hardships because of the *Alyeska* decision,” *id.* at 2. The unavailability of fee shifting made it impossible for legal aid services, “already short of resources,” to bring many lawsuits, and, without much possibility of compensation, private attorneys were refusing to take civil rights cases. *Id.*, at 3. See *generally* Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pts. 1-4 (1973). Congress found that *Alyeska* had a “devastating” impact on civil rights litigation, and it concluded that the need for corrective legislation was “compelling.” H.R. Rep. 3; see *also* 122 Cong. Rec., *supra*, at 31471 (remarks of Sen. Scott), 31472 (remarks of Sen. Kennedy).

[35] Accepting this Court’s invitation, see *Alyeska*, *supra*, at 269-271, Congress passed the Fees Act in order to reestablish the *Newman* regime under which attorney’s fees were awarded as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases. The legislative history manifests this purpose with monotonous clarity.

[36] [I]t was Representative Anderson, responding to a question from an opponent of the Fees Act, who summed up the reason for the legislation most effectively. He said:

“We are talking here about major civil rights laws. We have an obligation, it seems to me, as the representatives of the people, to make sure that those laws are enforced and we discharge that obligation when we make available a reasonable award of attorneys’ fees at the discretion of the court. Those of us who are interested in making sure that those laws are enforced ... are simply abetting and aiding that process of law enforcement when we agree to the provisions of this bill.” *Id.* at 35116. See *also*, e.g., *id.* at 31471 (remarks of Sen. Scott) (“Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights”), 35128 (remarks of Rep. Seiberling).

III

[37] As this review of the legislative history makes clear, then, by awarding attorney’s fees Congress sought to attract competent counsel to represent victims of civil rights violations. Congress’ primary purpose was to

enable “private attorneys general” to protect the public interest by creating economic incentives for lawyers to represent them. The Court’s assertion that the Fees Act was intended to do nothing more than give individual victims of civil rights violations another remedy is thus at odds with the whole thrust of the legislation. Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the civil rights statutes over and above the value of a civil rights remedy to a particular plaintiff.

[38] I have gone to great lengths to show how the Court mischaracterizes the purpose of the Fees Act because the Court’s error leads it to ask the wrong question. Having concluded that the Fees Act merely creates another remedy to vindicate the rights of individual plaintiffs, the Court asks whether negotiated waivers of statutory attorney’s fees are “invariably inconsistent” with the availability of such fees as a remedy for individual plaintiffs. *Ante* at 732. Not surprisingly, the Court has little difficulty knocking down this frail straw man. But the proper question is whether permitting negotiated fee waivers is consistent with Congress’ goal of attracting competent counsel. It is therefore necessary to consider the effect on this goal of allowing individual plaintiffs to negotiate fee waivers.

A

[39] Permitting plaintiffs to negotiate fee waivers in exchange for relief on the merits actually raises two related but distinct questions. First, is it permissible under the Fees Act to negotiate a settlement of attorney’s fees simultaneously with the merits? Second, can the “reasonable attorney’s fee” guaranteed in the Act be waived? As a matter of logic, either of these practices may be permitted without also permitting the other. For instance, one could require bifurcated settlement negotiations of merits and fees but allow plaintiffs to waive their fee claims during that phase of the negotiations. Alternatively, one could permit simultaneous negotiation of fees and merits but prohibit the plaintiff from waiving statutory fees. This latter possibility exists because there is a range of “reasonable attorney’s fees” consistent with the Fees Act in any given case. *Cf. Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433-437 (1983); H.R. Rep. 8-9; S. Rep. 6; see generally *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 716-720 (CA5 1974) (listing relevant factors).

[40] More importantly, since simultaneous negotiation and waiver may have different effects on the congressional policy of encouraging counsel to accept civil rights cases, each practice must be analyzed independently to determine whether or not it is consistent with the Fees Act. Unfortunately, the Court overlooks the logical independence of simultaneous negotiation and waiver and assumes that there cannot be one without the other. See *ante* at 734-738, and n.28. As a result, the Court’s discussion conflates the different effects of these practices, and its opinion is of little use in coming to a fair resolution of this case. An independent examination leads me to conclude: (1) that plaintiffs should not be permitted to waive the “reasonable fee” provided by the Fees Act; but (2) that parties may undertake to negotiate their fee claims simultaneously with the merits so long as whatever fee the parties agree to is found by the court to be a “reasonable” one under the Fees Act.

B

1

[41] It seems obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney’s fees will diminish lawyers’ expectations of receiving fees and decrease

the willingness of lawyers to accept civil rights cases. Even the Court acknowledges “the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers’ expectations of statutory fees in civil rights cases.” *Ante* at 741-742, n.34. The Court tells us, however, that “[comment] on this issue” is “premature at this juncture” because there is not yet supporting “documentation.” *Ibid*. The Court then goes on anyway to observe that “as a practical matter the likelihood of this circumstance arising is remote.” *Ibid*.

[42] I must say that I find the Court’s assertions somewhat difficult to understand. To be sure, the impact of conditional fee waivers on the availability of attorneys will be less severe than was the restriction on fee awards created in *Alyeska*. However, that experience surely provides an indication of the immediate hardship suffered by civil rights claimants whenever there is a reduction in the availability of attorney’s fee awards.^[7] Moreover, numerous courts and commentators have recognized that permitting fee waivers creates disincentives for lawyers to take civil rights cases and thus makes it more difficult for civil rights plaintiffs to obtain legal assistance.

* * * * *

[43] But it does not require a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only common sense. Assume that a civil rights defendant makes a settlement offer that includes a demand for waiver of statutory attorney’s fees. The decision whether to accept or reject the offer is the plaintiff’s alone, and the lawyer must abide by the plaintiff’s decision. See, e.g., ABA, Model Rules of Professional Conduct 1.2(a) (1984); ABA, Model Code of Professional Responsibility EC 7-7 to EC 7-9 (1982). As a formal matter, of course, the statutory fee belongs to the plaintiff, *ante* at 730, and n.19, and thus technically the decision to waive entails a sacrifice only by the plaintiff. As a practical matter, however, waiver affects only the lawyer. Because “a vast majority of the victims of civil rights violations” have no resources to pay attorney’s fees, H.R. Rep. 1, lawyers cannot hope to recover fees from the plaintiff and must depend entirely on the Fees Act for compensation.^[8]

The plaintiff thus has no real stake in the statutory fee and is unaffected by its waiver. See *Lipscomb v. Wise*, 643 F.2d 319, 320 (CA5 1981) (*per curiam*). Consequently, plaintiffs will readily agree to waive fees if this will help them to obtain other relief they desire. As summed up by the Legal Ethics Committee of the District of Columbia Bar:

“Defense counsel ... are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff’s lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist.” Op. No. 147, reprinted in 113 Daily Washington Reporter, *supra* n.8, at 394.

[44] Of course, from the lawyer’s standpoint, things could scarcely have turned out worse. He or she invested considerable time and effort in the case, won, and has exactly nothing to show for it. Is the Court really serious in suggesting that it takes a study to prove that this lawyer will be reluctant when, the following week, another civil rights plaintiff enters his office and asks for representation? Does it truly require that somebody conduct a test to see that legal aid services, having invested scarce resources on a case, will feel the pinch when they do not recover a statutory fee?

[45] And, of course, once fee waivers are permitted, defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss not to demand that the plaintiff waive statutory attorney’s fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client. Because waiver of fees does not affect the plaintiff, a settlement offer is not made less attractive to the plaintiff if it includes a demand that statutory fees be waived. Thus, in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees.^[9]

[46] The cumulative effect this practice will have on the civil rights bar is evident. It does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of

practicing law, and that, like other business people, they are and must be concerned with earning a living. The conclusion that permitting fee waivers will seriously impair the ability of civil rights plaintiffs to obtain legal assistance is embarrassingly obvious.

[47] Because making it more difficult for civil rights plaintiffs to obtain legal assistance is precisely the opposite of what Congress sought to achieve by enacting the Fees Act, fee waivers should be prohibited. We have on numerous prior occasions held that “a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.”

* * * * *

[48] This is simply straightforward application of the well-established principle that an agreement which is contrary to public policy is void and unenforceable.

* * * * *

[49] This all seems so obvious that it is puzzling that the Court reaches a different result. The Court’s rationale is that, unless fee waivers are permitted, “parties to a significant number of civil rights cases will refuse to settle....” *Ante*, at 736. This is a wholly inadequate justification for the Court’s result.

[50] *First*, the effect of prohibiting fee waivers on settlement offers is just not an important concern in the context of the Fees Act. I agree with the Court that encouraging settlements is desirable policy. But it is *judicially* created policy, applicable to litigation of any kind and having no special force in the context of civil rights cases. The congressional policy underlying the Fees Act is, as I have argued throughout, to create incentives for lawyers to devote time to civil rights cases by making it economically feasible for them to do so. *Supra* at 745-753. As explained above, permitting fee waivers significantly undercuts this policy. Thus, even if prohibiting fee waivers does discourage some settlements, a judicial policy favoring settlement cannot possibly take precedence over this express congressional policy. We must implement Congress’ agenda, not our own.

[51] In an attempt to justify its decision to elevate settlement concerns, the Court argues that settlement “provides benefits for civil rights plaintiffs as well as defendants and is consistent with the purposes of the Fees Act” because “[some] plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered.” *Ante* at 732-733 (*quoting Marek v. Chesny*, 473 U.S. 1, 10 (1985)); see also *ante* at 731 (legislative history does not show that Congress intended to bar “even [waivers] insisted upon by a civil rights plaintiff in exchange for some other relief to which he is indisputably not entitled...” (footnote omitted)).

[52] As previously noted, by framing the purpose of the Fees Act in very general terms, the Court merely obscures the proper focus of discussion. The Fees Act was designed to help civil rights plaintiffs in a particular way—by ensuring that there will be lawyers willing to represent them. The fact that fee waivers may produce some settlement offers that are beneficial to a few individual plaintiffs is hardly “consistent with the purposes of the Fees Act,” *ante* at 733, if permitting fee waivers fundamentally undermines what Congress sought to achieve. Each individual plaintiff who waives his right to statutory fees in order to obtain additional relief for himself makes it that much more difficult for the next victim of a civil rights violation to find a lawyer willing or able to bring his case. As obtaining legal assistance becomes more difficult, the “benefit” the Court so magnanimously preserves for civil rights plaintiffs becomes available to fewer and fewer individuals, exactly the opposite result from that intended by Congress.

[53] Moreover, I find particularly unpersuasive the Court’s apparent belief that Congress enacted the Fees Act to help plaintiffs coerce relief to which they are “indisputably not entitled.” See *ante* at 731, 732. It may be that, in particular cases, some defendants’ fears of incurring liability for plaintiff’s attorney’s fees will give plaintiffs leverage to coerce relief they do not deserve. If so, this is an unfortunate cost of a statute intended to ensure that plaintiffs can obtain the relief to which they are entitled. And it certainly is not a result we must preserve at the expense of the central purpose of the Fees Act.

[54] *Second*, even assuming that settlement practices are relevant, the Court greatly exaggerates the effect that prohibiting fee waivers will have on defendants’ willingness to make settlement offers. This

is largely due to the Court's failure to distinguish the fee waiver issue from the issue of simultaneous negotiation of fees and merits claims. *Supra* at 754. The Court's discussion mixes concerns over a defendant's reluctance to settle because total liability remains uncertain with reluctance to settle because the cost of settling is too high. See *ante* at 734-737. However, it is a prohibition on simultaneous negotiation, not a prohibition on fee waivers, that makes it difficult for the defendant to ascertain his total liability at the time he agrees to settle the merits. Thus, while prohibiting fee waivers may deter settlement offers simply because requiring the defendant to pay a "reasonable attorney's fee" increases the total cost of settlement, this is a separate issue altogether, and the Court's numerous arguments about why defendants will not settle unless they can determine their total liability at the time of settlement, *ante* at 734, 735, 736, are simply beside the point. With respect to a prohibition on fee waivers (and again merely assuming that effects on settlement are relevant), the sole question to be asked is whether the increased cost of settlement packages will prevent enough settlement offers to be a dispositive factor in this case.

[55] The Court asserts, without factual support, that requiring defendants to pay statutory fee awards will prevent a "significant number" of settlements. *Ante* at 734-735. It is, of course, ironic that the same absence of "documentation" which makes comment on the effects of permitting fee waivers "premature at this juncture," *ante* at 742, n.34, does not similarly affect the Court's willingness to speculate about what to expect if fee waivers are prohibited. Be that as it may, I believe that the Court overstates the extent to which prohibiting fee waivers will deter defendants from making settlement offers. Because the parties can negotiate a fee (or a range of fees) that is not unduly high and condition their settlement on the court's approval of this fee, the magnitude of a defendant's liability for fees in the settlement context need be neither uncertain nor particularly great. Against this, the defendant must weigh the risk of a nonnegotiated fee to be fixed by the court after a trial; as the Court reminds us, fee awards in this context may be very uncertain and, potentially, of very great magnitude. See *ante* at 734-735, nn.23, 24. Thus, powerful incentives remain for defendants to seek settlement. Moreover, the Court's decision last Term in *Marek v. Chesny*, 473 U.S. 1 (1985), provides an additional incentive for defendants to make settlement offers, namely, the opportunity to limit liability for attorney's fees if the plaintiff refuses the offer and proceeds to trial.

[56] All of which is not to deny that prohibiting fee waivers will deter some settlements; any increase in the costs of settling will have this effect. However, by exaggerating the size and the importance of fee awards, and by ignoring the options available to the parties in settlement negotiations, the Court makes predictions that are inflated. An actual disincentive to settling exists only where three things are true: (1) the defendant feels he is likely to win if he goes to trial, in which case the plaintiff will recover no fees; (2) the plaintiff will agree to relief on the merits that is less costly to the defendant than litigating the case; and (3) adding the cost of a negotiated attorney's fee makes it less costly for the defendant to litigate. I believe that this describes a very small class of cases—although, like the Court, I cannot "document" the assertion.

C

[57] I would, on the other hand, permit simultaneous negotiation of fees and merits claims, since this would not contravene the purposes of the Fees Act. Congress determined that awarding prevailing parties a "reasonable" fee would create necessary—and sufficient—incentives for attorneys to work on civil rights cases. Prohibiting plaintiffs from waiving statutory fees ensures that lawyers will receive this "reasonable" statutory fee. Thus, if fee waivers are prohibited, permitting simultaneous fees and merits negotiations will not interfere with the Act; the lawyer will still be entitled to and will still receive a reasonable attorney's fee. Indeed, permitting simultaneous negotiations in such circumstances may even enhance the effectiveness of the Fees Act by making it easier for a lawyer to dispose of his cases more quickly. This frees up the lawyer's time to take other cases and may enhance his reputation as an effective advocate who quickly obtains relief for clients.

IV

[58] Although today's decision will undoubtedly impair the effectiveness of the private enforcement scheme Congress established for civil rights legislation, I do not believe that it will bring about the total disappearance of "private attorneys general." It is to be hoped that Congress will repair this Court's mistake. In the meantime, other avenues of relief are available. The Court's decision in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers. Indeed, several Bar Associations have already declared it unethical for defense counsel to seek fee waivers. See Committee on Professional Ethics of the Association of the Bar of the City of New York, Op. No. 82-80 (1985); District of Columbia Legal Ethics Committee, Op. No. 147, *supra* n.8, 113 Daily Washington Law Reporter, at 389. Such efforts are to be commended and, it is to be hoped, will be followed by other state and local organizations concerned with respecting the intent of Congress and with protecting civil rights.

[59] In addition, it may be that civil rights attorneys can obtain agreements from their clients not to waive attorney's fees.^[10] Such agreements simply replicate the private market for legal services (in which attorneys are not ordinarily required to contribute to their client's recovery^[11]) and thus will enable civil rights practitioners to make it economically feasible—as Congress hoped—to expend time and effort litigating civil rights claims.

[60] During the floor debates over passage of the Fees Act, Senator Hugh Scott reminded the Congress in terms that might well have been addressed to the Court today that "we must bear in mind at all times that rights that cannot be enforced through the legal process are valueless; such a situation breeds cynicism about the basic fairness of our judicial system. [We] must be vigilant to insure that our legal rights are not hollow ones." 122 Cong. Rec. 31471 (1976).



[Notes on Evans v. Jeff D. – Audio and Transcript of Oral Argument](#)

Footnotes

1. See Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94, reprinted in 36 Record of N.Y.C.B.A., 507, 510 (1981) ("The] long term effect of persistent demands for the waiver of statutory fees is to ... undermine efforts to make counsel available to those who cannot afford it"). *Accord*, District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 DAILY WASH. L. REP. 389, 394 (1985). National staff counsel for the American Civil Liberties Union estimates that requests for fee waivers are made in more than half of all civil rights cases litigated. See Winter, *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A. J. 23 (1982).
2. In this regard, consider the following comment in the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit:
"Against this background, it was agreed that there were certain situations in which the refusal of defense counsel to proceed except on a package basis was improper. For instance, in a Freedom of Information Act case, where a journalist was the plaintiff and either had a reasonably good case, or had won in the district court and the government was considering appeal, it would be improper for government counsel to offer to release the documents, only if plaintiff's counsel agreed to waive all attorneys fees. That situation presents a grossly unfair choice to the plaintiff and his/her counsel, and permitting such offers to be made would seriously undermine the purpose of fee shifting provisions. Moreover, it would serve no end other

than saving the government money which it would otherwise have to pay, yet any such saving is plainly at odds with the purpose for which the fee shifting statute was enacted.” 13 Bar Rep., at 6.

3. From the declarations of respondents’ counsel in the lower courts, as well as those of the District Court and the Court of Appeals, all of which are quoted in Part I, *supra*, we understand the District Court’s approval of the stipulation settling the health services claims to have rested on the determination that the provision waiving attorney’s fees and costs was fair to the class—i.e., the fee waiver was exchanged for injunctive relief of equivalent value.
4. We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers’ expectations of statutory fees in civil rights cases. If this occurred, the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the “effective access to the judicial process” for persons with civil rights grievances which the Fees Act was intended to provide. H.R. Rep. No. 94-1558, p. 1 (1976). That the “tyranny of small decisions” may operate in this fashion is not to say that there is any reason or documentation to support such a concern at the present time. Comment on this issue is therefore premature at this juncture. We believe, however, that as a practical matter the likelihood of this circumstance arising is remote. *See Moore v. National Assn. of Securities Dealers, Inc.*, 246 U.S. App. D.C. at 133, n.1, 762 F.2d, at 1112 n.1 (Wald, J., concurring in judgment).
5. “Each negotiation, like each litigant, is unique; reasonableness can only be determined by looking at the strength of the plaintiff’s case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did.” *Id.* at 134, 762 F.2d, at 1113 (Wald, J., concurring in judgment).

See also the following comment in the opinion of the Final Subcommittee Report of the Committee on Attorney’s Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit:

“[The] purpose of such settlement offers is not, in most cases, to create an attorney-client conflict, nor to punish or deter plaintiffs’ attorneys from taking on fee shifting cases. Generally speaking, the reason that defendants make such offers is to limit their total exposure.

....

“The key in these situations is whether the defendant’s offer is reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty. This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff’s attorney while providing some measure of relief to the client. In both situations, the inquiry is the same and can be decided only on a case by case basis, assessing the reasonableness of the defendant’s conduct.” 13 Bar Report, at 6.

6. Although the record in this case does not provide us with any information concerning the amount of money that had been expended on costs, it is appropriate to note that costs other than fees may also be a significant item in class-action litigation. For example, in *Moore v. National Assn. of Securities Dealers, Inc.*, *supra*, the class representative’s liability for costs amounted to over \$30,000 at the time she decided that her best interests would be served by a settlement. 246 U.S. App. D.C. at 116-117, 762 F.2d, at 1095, 1096, and n.2 (opinion of MacKinnon, J.). The interest in recovering costs already expended by a class representative may justify a refusal to accept a settlement including only prospective relief and, conversely, the interest in avoiding the additional expenditures associated with continuing the litigation may also justify accepting an otherwise doubtful settlement.

7. It is especially important to keep in mind the fragile nature of the civil rights bar. Even when attorney's fees are awarded, they do not approach the large sums which can be earned in ordinary commercial litigation. See Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA L. REV. 281, 310-315 (1977). It is therefore cost inefficient for private practitioners to devote much time to civil rights cases. Consequently, there are very few civil rights practitioners, and most of these devote only a small part of their time to such cases. Kraus, 29 VILL. L. REV. at 633-634 (citing studies indicating that less than 1% of lawyers engage in public interest practice). Instead, civil rights plaintiffs must depend largely on legal aid organizations for assistance. These organizations, however, are short of resources and also depend heavily on statutory fees. H.R. Rep. 3; Kraus, *supra*, at 634; see also, *Blum v. Stenson*, 465 U.S. 886, 894-895 (1984).
8. Nor can attorneys protect themselves by requiring plaintiffs to sign contingency agreements or retainers at the outset of the representation. Amici legal aid societies inform us that they are prohibited by statute, court rule, or Internal Revenue Service regulation from entering into fee agreements with their clients. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as Amici Curiae 10-11; Brief for Committee on Legal Assistance of the Association of the Bar of the City of New York as Amicus Curiae 12-13. Moreover, even if such agreements could be negotiated, the possibility of obtaining protection through contingency fee arrangements is unavailable in the very large proportion of civil rights cases which, like this case, seek only injunctive relief. In addition, the Court's misconceived doctrine of state sovereign immunity, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting), precludes damages suits against governmental bodies, the most frequent civil rights defendants. Finally, even when a suit is for damages, many civil rights actions concern amounts that are too small to provide real compensation through a contingency fee arrangement. Of course, none of the parties has seriously suggested that civil rights attorneys can protect themselves through private arrangements. After all, Congress enacted the Fees Act because, after *Alyeska*, it found such arrangements wholly inadequate. *Supra* at 748-751.
9. The Solicitor General's suggestion that we can prohibit waivers sought as part of a "vindictive effort" to teach lawyers not to bring civil rights cases, Tr. of Oral Arg. 22, a point that the Court finds unnecessary to consider, *ante* at 739-740, is thus irrelevant. Defendants will seek such waivers in every case simply as a matter of sound bargaining. Indeed, the Solicitor General's brief suggests that this will be the bargaining posture of the United States in the future. Brief for United States as Amicus Curiae 12-13.
10. Since Congress has not sought to regulate ethical concerns either in the Fees Act or elsewhere, the legality of such arguments is purely a matter of local law. See *Nix v. Whiteside*, *ante*, at 176 (Brennan, J., concurring in judgment).
11. One of the more peculiar aspects of the Court's interpretation of the Fees Act is that it permits defendants to require plaintiff's counsel to contribute his compensation to satisfying the plaintiff's claims. In ordinary civil litigation, no defendant would make—or sell to his adversary—a settlement offer conditioned upon the plaintiff's convincing his attorney to contribute to the plaintiff's recovery. Yet today's decision creates a situation in which plaintiff's attorneys in civil rights cases are required to do just that. Thus, rather than treating civil rights claims no differently than other civil litigation, *ante* at 733 (*quoting Marek v. Chesny*, 473 U.S. 1, 10 (1985)), the Court places such litigation in a quite unique—and unfavorable—category.