

Congress Needs to Repair the Court's Damage to § 1983

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Today it is not unusual for a § 1983 plaintiff to establish a violation of the U.S. Constitution and resulting injuries, yet be denied damages because of the Supreme Court's misinterpretation of the 1871 statute. This anomaly is the result of several defenses created by the Court, including absolute and qualified immunity, the rejection of respondeat superior liability for municipalities, and the expansion of sovereign immunity, based, in part, on a misinterpretation of the Eleventh Amendment. Several other rulings of the Court narrow the circumstances under which private parties are subject to § 1983 liability, refuse to exempt § 1983 actions from the usual preclusion rules, limit the protection of federal statutes that plaintiffs attempt to enforce through § 1983, and eliminate supervisory liability. These restrictions have contributed to the erosion of § 1983 and its effectiveness. In short, civil rights are often illusory.

Because there is little hope that the Court will become more friendly to civil rights plaintiffs in the near future, this Article proposes that Congress adopt corrective amendments to § 1983, designed to overrule several of the limiting decisions issued by the Court. The corrective amendments proposed will bring the statute closer to the broad congressional goals and purposes of Congress in adopting § 1983. They will also force courts to treat civil rights claims as though they are at least as important as, for example, tort claims against state and local government.

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I. INTRODUCTION

Section 1983 reflects the view that civil rights are important and that those rights are enforceable through the courts. Originally passed in 1871, § 1983 currently reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory *or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except 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. *For the purpose 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.*¹

Although it was passed 140 years ago, § 1983 remains very active,

¹ 42 U.S.C. § 1983 (2006). The portion in italics was added by an amendment in 1979, Pub. L. No. 96-170, and the portion underlined was added by an amendment in 1996, Pub. L. No. 104-317, § 309(c).

providing a cause of action for many lawsuits each year.² Despite its heavy use, § 1983 has been amended only twice, first in 1979 to subject the District of Columbia to actions brought under § 1983, and second in 1996, to provide judges some protection from injunctive relief after the decision in *Pulliam v. Allen*.³ The “guts” of this statute can be reduced to a few words: “Every person who, under color of [state law], ... 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”⁴ Very simply, the language seems to provide a cause of action for anyone who has been deprived of rights protected by the Federal Constitution and laws, with full relief available. Section 1983 does not create substantive rights; rather, it provides a cause of action to enforce federally-created rights found in the Constitution and statutes. While conduct violating these federally-created rights may also violate state law and trigger state law claims, Congress identified the need for federal law to supplement any protections available under state law.⁵

Despite its seemingly broad language, § 1983 was relatively inactive during its first fifty years, with only twenty-one reported cases decided under the section between 1871 and 1920.⁶ This was due, at least in part, to the Court's narrow interpretation of constitutional provisions providing for individual rights. In 1961, the Court clarified that state officials who violated state law, while depriving an individual of rights protected by the Federal Constitution, acted “under color of” state law.⁷ The Court in *Monroe* also limited the use of § 1983 by interpreting the term “person” to refer to natural persons only, to the exclusion of municipalities.⁸ Nearly twenty years after *Monroe*, § 1983 was given a bit of a boost when, in *Maine v. Thiboutot*, the Court held that “laws” as used in § 1983 embraces a claim that the defendants violated the Social Security Act.⁹ As the Warren Court expanded the

² U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CIVIL CASES COMMENCED BY NATURE OF SUIT AND DISTRICT DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 31, 2009 34, available at www.ca7.uscourts.gov/rpt/2009_report.pdf (2009).

³ *Pulliam v. Allen*, 466 U.S. 522 (1984) (holding that a judicial officer acting in her judicial capacity is not immune from prospective injunctive relief in an action brought pursuant to § 1983).

⁴ 42 U.S.C. § 1983 (2006).

⁵ *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (noting the evidence before Congress that showed the unwillingness of many states to enforce their laws, the Court said the “federal remedy is supplementary to the state remedy”). Even where states have enforceable laws and their courts are not hostile, § 1983 is often preferred because a prevailing plaintiff, since 1976, is usually entitled to fees pursuant to 42 U.S.C. § 1988 (2006).

⁶ Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

⁷ *Monroe*, 365 U.S. at 238–39.

⁸ *Id.* at 191. This portion of the opinion in *Monroe* was overruled seventeen years later in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

⁹ *Maine v. Thiboutot*, 448 U.S. 1, 6 (1980) (relying on both the “plain language” of § 1983 and earlier cases implicitly recognizing that § 1983 encompasses violations of federal statutes as well as

constitutional protection of individual rights between 1953 and 1969,¹⁰ § 1983 was utilized more frequently. Possibly because of the increased use of § 1983 to enforce these broader constitutional protections, in 1974 the Court provided executive officials with qualified immunity from liability for damages under § 1983.¹¹ In the same year, in *Edelman v. Jordan*, the Court made it clear that § 1983 does not abrogate the Eleventh Amendment immunity protecting states from liability for damages in federal actions.¹² The Court's assault on § 1983 continues to the present.

Part II of this Article addresses, in greater detail, the Court's decisions significantly restricting the scope of § 1983 and the relief it provides. Part III explores parallel limitations resulting from the Court's interpretation of key constitutional and statutory provisions from 1972 to the present. Part IV discusses possible congressional amendments to § 1983 that would more effectively protect the rights of individuals, both constitutional and statutory.

II. DECISIONS OF THE COURT INTERPRETING § 1983 NARROWLY

Following is a list of the Court's holdings that have significantly limited the effectiveness of § 1983 in serving as the vehicle for private litigation designed to enforce federal constitutional and statutory rights:

- (a) providing (i) absolute immunity from liability for state and local governmental officials performing legislative functions;¹³ and (ii) absolute immunity from liability for damages for state and local governmental officials performing judicial and quasi-judicial functions, including the prosecutorial function;¹⁴
- (b) providing qualified immunity from liability for damages to state and local governmental officials performing other functions;¹⁵
- (c) excluding *respondeat superior* liability under § 1983 for municipalities whose officials acting under color of law

the Constitution).

¹⁰ While the Warren Court is most frequently criticized for its expansion of the rights of the accused in criminal cases, it decided a number of civil cases that expanded constitutional rights. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Monroe v. Pape*, 365 U.S. 167 (1961); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹¹ *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

¹² *Edelman v. Jordan*, 415 U.S. 651, 674-77 (1974).

¹³ See *infra* Part II.A.1.

¹⁴ *Id.*

¹⁵ See *infra* Part II.A.2.

- violate the constitutional or statutory rights of individuals, i.e., the municipality is liable only if the challenged action was taken pursuant to municipal policy;¹⁶
- (d) extending to states and state agencies Eleventh Amendment protection from a judgment for damages that would be satisfied from the state treasury;¹⁷
 - (e) limiting or abandoning supervisory liability;¹⁸
 - (f) imposing a “plausibility” pleading requirement that subjects more claims to dismissal for failure to state a claim;¹⁹
 - (g) making it more difficult to establish that action is taken under “color” of state or local law, specifically where a private party is authorized by law to take the challenged action or granted a license by government knowing it will exercise and use the license in a manner that would not be allowed if the government engaged in the action;²⁰
 - (h) establishing constitutional “guidelines” designed to limit the amount of an award of punitive damages;²¹
 - (i) limiting the use of § 1983 to enforce federal statutes to circumstances where Congress, in clear and unambiguous terms, creates rights enforceable under § 1983; and²²
 - (j) subjecting § 1983 actions to the statutory “full faith and credit”²³ provision and thereby opening the possibility that § 1983 plaintiffs could be bound by, for example, the constitutional rulings of state courts in criminal cases.²⁴

These holdings have effectively made constitutional rights “second-class rights” when compared to rights created by the common law.²⁵ Each of these holdings will be examined below.

¹⁶ See *infra* Part II.B.1.

¹⁷ See *infra* Part II.B.2.

¹⁸ See *infra* Part II.C.

¹⁹ *Id.*

²⁰ See *infra* Part II.D.

²¹ See *infra* Part II.E.

²² See *infra* Part II.F.

²³ 28 U.S.C. § 1738 (2006).

²⁴ See *infra* Part II.G.

²⁵ As discussed in Part III, *infra*, the Court's limiting interpretation of § 1983 is only part of the story because the Court has been narrowing the scope of the constitutional provisions that plaintiffs frequently seek to enforce through § 1983, including the First, Fourth, Eighth, and Fourteenth Amendments.

A. Immunity of Individual Government Officials

State and local government officials can be sued for damages in their individual capacity under § 1983.²⁶ When such officials are sued in their individual capacity, their personal assets are at risk.²⁷ Thus, such government officials can be held personally liable in damages for actions taken in their official capacity.²⁸ When state and local government officials are sued in their official capacity for damages, the claim is deemed to be against the governmental entity, not the individual, for the purposes of § 1983.²⁹ The following two subsections address two types of immunity from damages when state and local government officials are sued in their individual capacity, absolute and qualified. In general, the Supreme Court has assumed that Congress intended to import the common law immunities enjoyed by government officials into § 1983.³⁰

1. Absolute Immunity

With the exception of the President, who enjoys absolute immunity from damages for all official acts,³¹ absolute immunity is assigned to government officials based on the function performed when engaged in the challenged conduct, rather than their title or position.³² Government officials performing the legislative function are entitled to absolute immunity, as demonstrated by *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, where the Court held that the Virginia Supreme Court acts in a legislative capacity in promulgating the Virginia Code of Professional Responsibility governing attorneys.³³ Members of a committee of the California legislature were entitled to absolute immunity when sued by an individual challenging the actions of the committee.³⁴ In holding that the defendants were entitled to absolute legislative immunity, the Court relied in part on the spirit of the speech or debate clause in the U.S. Constitution.³⁵ This absolute legislative immunity extends to other officials, such as counsel to a congressional

²⁶ *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

²⁷ *See id.*

²⁸ *Id.* at 25–29

²⁹ *Brandon v. Holt*, 469 U.S. 464, 470–71 (1985).

³⁰ *Scheuer v. Rhodes*, 416 U.S. 232, 243–45 (1974) (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

³¹ *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). *But see Clinton v. Jones*, 520 U.S. 681, 692–95 (1997) (holding that the President's immunity from suit for damages does not apply to unofficial acts).

³² *Butz v. Economou*, 438 U.S. 478, 506 (1978).

³³ *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734 (1980).

³⁴ *Tenney v. Brandhove*, 341 U.S. 367, 377–79 (1951).

³⁵ *Id.* at 372–73 (quoting U.S. CONST. art. I, § 6, cl. 2).

subcommittee, committee staff, and congressional aides, when their challenged conduct is within the sphere of legislative activity.³⁶ In another case, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court extended absolute legislative immunity to members of a regional planning agency for actions taken in a legislative capacity.³⁷

Relying on these decisions of the Supreme Court, lower federal courts extended this absolute immunity to state and local government officials when actions taken in their legislative capacity are challenged.³⁸ In *Bogan v. Scott-Harris*, the Supreme Court approved the extension of absolute immunity to local government officials performing a legislative function.³⁹ The Court held that the mayor and a city councilmember were entitled to absolute immunity for their roles in the enactment of an ordinance that eliminated the job of a city department head who had complained about race discrimination by the city. In determining that these officials enjoyed absolute legislative immunity, the Court noted that individual hiring and firing decisions are different from the elimination of a position.⁴⁰ The Supreme Court confirmed the singular impact of the function being informed while engaged in challenged conduct when the Court held that Senator Proxmire did not enjoy absolute legislative immunity when he designated someone as the recipient of his "golden fleece award,"⁴¹ and that Representative Passman was not entitled to absolute legislative immunity in a suit alleging sex discrimination in his decision to discharge a deputy administrative assistant.⁴² In contrast to the immunity defense in other situations, absolute legislative immunity not only insulates the official from damages, but also from injunctive and declaratory relief, and attorney fees.⁴³

Absolute judicial immunity from damages in § 1983 actions can be traced to *Pierson v. Ray*, in which the Court decided that the § 1983 legislative history gave no indication that Congress intended to abolish the long-established principle of absolute judicial immunity.⁴⁴ Eleven

³⁶ *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 507 (1975).

³⁷ *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405-06 (1979).

³⁸ See, e.g., *Biblia Abierta v. Banks*, 129 F.3d 899, 905-06 (7th Cir. 1997) (extending absolute legislative immunity to city alderman whose actions in introducing and voting for zoning ordinances were challenged); *Carlos v. Santos*, 123 F.3d 61, 66 (2d Cir. 1997) (holding that decision of a town board to hold a public meeting is protected by absolute legislative immunity, regardless of the motive behind the meeting).

³⁹ *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

⁴⁰ *Id.* at 56.

⁴¹ *Hutchinson v. Proxmire*, 443 U.S. 111, 127-29 (1979).

⁴² *Davis v. Passman*, 442 U.S. 228, 236 n.11, 245-49 (1979).

⁴³ See *Consumers Union of U.S., Inc.*, 446 U.S. at 733-34 (1980).

⁴⁴ *Pierson v. Ray*, 386 U.S. 547 (1967). The long-established principle dates back to *Bradley v. Fisher*, 80 U.S. 335 (1871), which held that it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. In *Bradley*, the Court distinguished judicial actions in "excess of jurisdiction" from a "clear absence of all jurisdiction over the subject-matter," with the latter not protected by

years after the decision in *Pierson v. Ray*, the Court, in *Stump v. Sparkman*, held that an Indiana trial court judge was entitled to absolute immunity from damages in an action challenging his entry of an order approving a “tubal ligation” procedure on a fifteen-year-old female based on an ex parte petition submitted by her mother.⁴⁵ According to the Court, Judge Stump had jurisdiction to entertain the petition because the broad jurisdiction granted to circuit courts in Indiana had not been “circumscribed [by statute or case law] to foreclose consideration of a petition for authorization of a minor’s sterilization.”⁴⁶ Judge Stump engaged in a “judicial” act because approval of the petition was “a function normally performed by a judge,” and the expectation of the parties was that they were dealing with a judge “in his judicial capacity.”⁴⁷ The informality of the process was not controlling.

Stump confirms that absolute judicial immunity from damages is extremely broad, and this is further demonstrated by a subsequent case, *Mireles v. Waco*, holding that a trial court judge’s actions in ordering police officers “to forcibly and with excessive force seize and bring [an attorney] plaintiff into his courtroom” is protected by absolute judicial immunity even if the judge acted in bad faith or with malice.⁴⁸ Judges are entitled to qualified, not absolute, immunity when they make employment decisions related to their staff, as they are not performing a judicial function.⁴⁹

Based on the functional approach approved by the Court in *Butz v. Economou*,⁵⁰ absolute judicial immunity is extended to administrative law judges performing adjudicatory functions.⁵¹ The Court has been reluctant to extend absolute judicial immunity to administrative procedures that lack formality and procedural safeguards.⁵² Similarly, the Court rejected a claim of absolute judicial immunity for members of a prison disciplinary committee because of the absence of procedural safeguards and the fact that the members of the committee are subordinates of the warden, rather than independent decision makers.⁵³

Like absolute legislative immunity, judicial immunity encompasses

absolute judicial immunity. *Id.* at 351–52.

⁴⁵ *Stump v. Sparkman*, 435 U.S. 349, 351 (1978).

⁴⁶ *Id.* at 358.

⁴⁷ *Id.* at 362.

⁴⁸ *Mireles v. Waco*, 502 U.S. 9, 10–11 (1991).

⁴⁹ *Forrester v. White*, 484 U.S. 219, 230 (1988).

⁵⁰ *Butz v. Economou*, 438 U.S. 478, 519 (1978).

⁵¹ *Id.* at 514. Lower courts have extended this absolute immunity to parole board members. *See, e.g.* *Wilson v. Kelkhoff*, 86 F.3d 1438, 1444 (7th Cir. 1996). *See also* *Cleavinger v. Saxner*, 474 U.S. 193, 206–07 (1985) (holding that members of a prison Institution Discipline Committee are entitled to qualified, not absolute, immunity); *Applewhite v. Briber*, 506 F.3d 181, 182 (2d Cir. 2007) (applying absolute immunity applied to a medical review board’s decision to revoke a medical license).

⁵² *See, e.g., Butz*, 438 U.S. at 512 (1978) (noting that “safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct”).

⁵³ *Cleavinger v. Saxner*, 474 U.S. 193, 204–06 (1985).

those whose assistance is critical to the judicial function. For example, judicial immunity has been extended to law clerks,⁵⁴ contractors or employees performing a function critical to the judicial process,⁵⁵ and executive officials who obtain or execute judicial orders.⁵⁶ However, in *Antoine v. Byers & Anderson, Inc.*, the Court held that a court reporter is not automatically entitled to absolute judicial immunity where she failed to produce a transcript of a criminal trial.⁵⁷ Because of their importance to the judicial process, the Court held, in *Briscoe v. LaHue*, that witnesses who testify at trial, including police officers, are entitled to the protection of absolute judicial immunity.⁵⁸ However, a complaining witness, including a prosecuting attorney who prepares an affidavit in support of an application for an arrest warrant, is not protected by absolute judicial immunity.⁵⁹

Prosecuting attorneys, when engaged “in initiating... and in presenting the [government’s] case,” act in a quasi-judicial capacity with broad discretion and are therefore protected by absolute judicial immunity.⁶⁰ However, because this absolute immunity extends only to the prosecutorial function, the Court has addressed the extent of this function, as opposed to administrative or police-type functions, in a number of cases. For example, a prosecutor preparing for the initiation of a criminal charge or for trial is acting in her role as an advocate for the government and is entitled to absolute immunity, but when acting as an investigator, searching for evidence that will provide probable cause for an arrest, the prosecutor is acting more like a police officer with only qualified immunity.⁶¹ Further, a prosecutor’s public announcement of an indictment containing false statements is not protected by absolute immunity.⁶² Similarly, statements of a prosecutor in an affidavit supporting an application for an arrest warrant are not part of the prosecutorial function and, therefore, not protected by absolute prosecutorial immunity.⁶³ In *Burns v. Reed*, the Court refused to extend prosecutorial immunity to a prosecutor who was giving legal advice to

⁵⁴ See, e.g., *Lundahl v. Zimmer*, 296 F.3d 939 (10th Cir. 2002).

⁵⁵ See, e.g., *Williams v. Consovoy*, 453 F.3d 173, 178–79 (3d Cir. 2006) (extending judicial immunity to a private psychologist performing evaluations and making findings pursuant to a contract with an adjudicative parole board, which relies on the expertise in denying parole).

⁵⁶ See, e.g., *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 531 (8th Cir. 2005) (recognizing that absolute immunity would apply to a juvenile officer who was enforcing a valid court order, but distinguishing the situation where a juvenile officer’s conduct in obtaining a court order, such as providing inaccurate information to obtain an ex parte order, is in question).

⁵⁷ *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433–34 (1993) (noting the absence of absolute immunity for court reporters at common law). See also *Loubser v. Thacker*, 440 F.3d 439, 442 (7th Cir. 2006), *cert. denied*, 548 U.S. 907 (2006) (holding that court reporters who allegedly conspired to defraud a litigant by deliberately altering a transcript do not enjoy absolute judicial immunity).

⁵⁸ *Briscoe v. LaHue*, 460 U.S. 325, 343 (1983).

⁵⁹ *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997).

⁶⁰ *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976).

⁶¹ *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

⁶² *Id.* at 277–78.

⁶³ *Kalina*, 522 U.S. at 130–31.

the police.⁶⁴ However, the action of the prosecutor in appearing in court and presenting evidence in support of an application for a search warrant is protected by absolute immunity, even if the prosecutor deliberately misled the court.⁶⁵

Another case, *Van de Kamp v. Goldstein*, examined the circumstances under which administrative tasks fall within the scope of absolute prosecutorial immunity.⁶⁶ After a successful habeas corpus action resulting in his release from prison, Goldstein brought a § 1983 action alleging that the prosecution's failure to disclose impeachment material in his criminal trial resulted from a failure to properly train and supervise prosecutors, and to establish an information system containing potential impeachment material about informants.⁶⁷ The Court rejected an automatic exception from absolute immunity for management tasks, and held that the management tasks at issue in this case concerned how and when to make impeachment information available at trial and, therefore, were "directly connected with [a] prosecutor's basic trial advocacy duties."⁶⁸ It was obvious that the Court was reluctant to allow a § 1983 plaintiff to avoid absolute immunity simply by suing supervisors, rather than the actual trial prosecutor, and casting the claim as a failure of training or supervision. Lower federal courts have extended the absolute prosecutorial immunity to other prosecutorial-like functions, including the prosecution of disciplinary proceedings before state licensing boards.⁶⁹

2. *Qualified Immunity*

While the Supreme Court has stated that its "cases make plain that qualified immunity represents the norm" for "executive officials in general,"⁷⁰ a more accurate view of qualified immunity is that it is available to any government official whose challenged actions do not fit into any one of the functions to which the Court has assigned the protection of absolute immunity. Because the Court requires a functional approach to absolute immunity,⁷¹ the function of the government official at issue is a more accurate starting point than either the title or location within government. Not surprisingly, government officials prefer

⁶⁴ 500 U.S. 478, 496 (1991).

⁶⁵ *Id.* at 488–96.

⁶⁶ 129 S. Ct. 855 (2009).

⁶⁷ *Id.* at 858–59.

⁶⁸ *Id.* at 863.

⁶⁹ *See, e.g.,* *Disraeli v. Rotunda*, 489 F.3d 628, 632–35 (5th Cir. 2007) (entitling director of state securities board to absolute prosecutorial immunity in his role as prosecutor in a proceeding against an investment advisor).

⁷⁰ *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

⁷¹ *See Butz v. Economou*, 438 U.S. 478, 512 (1978).

absolute immunity, but if they cannot characterize their conduct as one that triggers absolute immunity, they will use qualified immunity as their second-choice defense. In short, qualified immunity is less preferred because it is available only when the right asserted is not “clearly established.”⁷² When applicable, the qualified immunity defense protects a government official from personal or individual liability for damages. While the Court has justified the creation of qualified immunity as a needed protection for government officials who must exercise discretion, and encourage them to exercise that discretion in a vigorous manner,⁷³ some lower courts have broadly construed the meaning of “discretionary” in order to expand the availability of qualified immunity.⁷⁴ Other courts enforce the distinction between discretionary and ministerial actions, denying qualified immunity when a government official is engaged in a ministerial act.⁷⁵

In addition to the perceived deterrence caused by potential personal liability resulting from a government official's exercise of discretion, the Court has identified what it calls “social costs” resulting from such claims, including the expense of litigation, the distraction of the official's attention and energy away from the duties of office, and a deterrence to qualified individuals from either seeking or accepting public office.⁷⁶ All of the concerns identified by the Court are based on assumptions, rather than empirical data.⁷⁷

The Court's current version of the qualified immunity defense does not include the subjective component, malicious intent, identified in *Wood v. Strickland*.⁷⁸ In *Harlow v. Fitzgerald*, the Court decided that the inclusion of the subjective element made it too easy for plaintiffs to avoid summary judgment on the qualified immunity defense and,

⁷² *Id.* at 479.

⁷³ *See, e.g., id.* at 506; *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974).

⁷⁴ *See, e.g., Hudson v. Hudson*, 475 F.3d 741, 744 (6th Cir. 2007) (holding that even though a state statute provides that law enforcement officers “shall arrest” one governed by a protective order if there is reasonable cause to believe the order has been violated, the reasonable cause provision introduces discretion); *Gray v. Bostic*, 458 F.3d 1295, 1303–04 (11th Cir. 2006) (holding a deputy sheriff serving as a resource officer at an elementary school was exercising discretionary authority when detaining and handcuffing a student); *DeArmon v. Burgess*, 388 F.3d 609, 612 (8th Cir. 2004) (deciding the so-called ministerial functions exception to the qualified immunity doctrine is narrow and applies only if an officer violated a statute or regulation specifying a precise action that the officer must take and state law creates the cause of action).

⁷⁵ *See, e.g., Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001) (the refusal by government officials to provide a real estate appraiser with the materials needed to apply for temporary and reciprocal licenses involve ministerial acts not protected by qualified immunity).

⁷⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

⁷⁷ If a concern about personal liability for damages really deters qualified individuals from seeking or accepting public office, there should be evidence to support the Court's assumption. If states and local governments see this as a concern, they can address it by paying judgments entered against their officials. *See, e.g., IND. CODE § 34-13-4-1* (2003) (requiring the governmental entity to pay any judgment, other than for punitive damages, and allowing the entity to pay a judgment for punitive damages if it “is in the best interest of the governmental entity”).

⁷⁸ 420 U.S. 308, 322 (1975). Government officials will not be protected by qualified immunity if (a) they knew or reasonably should have known that the action taken violated the federal rights of the plaintiff, or (b) they took the action with malicious intent to cause a deprivation of rights. *Id.*

therefore, it was abandoned.⁷⁹ After *Harlow*, in *Davis v. Scherer*, the Court made it clear that the qualified immunity defense is the same for state and local government officials as it is for federal government officials.⁸⁰ *Davis* also clarified that acting contrary to state law will not affect a state or local government official's qualified immunity defense in a § 1983 action because the focus is on whether the federal right the plaintiff seeks to enforce was clearly established at the time of the challenged action.⁸¹

Finally, even if the right asserted by the plaintiff was clearly established at the time of the challenged conduct, government officials may still be protected by qualified immunity if they can show extraordinary circumstances.⁸² For example, in a case seeking damages from the administrator of a state hospital, the Court indicated such a "professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability."⁸³

In sum, federal, state, and local government officials, who at the time of the challenged conduct were not engaged in a function that triggers absolute immunity, will be entitled to qualified immunity from individual or personal liability for damages unless the plaintiff shows that the asserted right was clearly established at the time of the challenged conduct. Of course, the parties will dispute the meaning of "clearly established." This determination is difficult because whether government officials have violated the Constitution often turns on the specific facts of the situation. For example, while it is clearly established that the Fourth Amendment prohibits unreasonable searches and seizures, whether a particular search or seizure violates the Fourth Amendment will turn on the facts. The Court made this clear in *Anderson v. Creighton*, in which it said:

[O]ur 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

⁷⁹ 457 U.S. 800, 818. See also *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (confirming that a government official's subjective belief about the legality of her conduct is not a factor); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (stating that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," i.e., a government official's knowledge that her action is unlawful makes her ineligible for the protection of qualified immunity).

⁸⁰ 468 U.S. 183, 194–95 (1984).

⁸¹ *Id.* at 194 n.12.

⁸² *Harlow*, 457 U.S. at 818–19 ("[i]f 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").

⁸³ *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). Courts have considered reliance on the advice of counsel as a factor in determining whether there are extraordinary circumstances. See, e.g., *Suciro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 234–36 (1st Cir. 2007); *Revis v. Meldrum*, 489 F.3d 273, 286–95 (6th Cir. 2007); *Cox v. Hainey*, 391 F.3d 25, 34–36 (1st Cir. 2004); *Dixon v. Wallowa Cnty.*, 336 F.3d 1013, 1019 (9th Cir. 2003).

would understand that what he is doing violates that right.⁸⁴

This creates a tension with the Court's desire to have the qualified immunity defense determined early in the case, preferably at the summary judgment stage before the government official seeking immunity expends substantial time and resources responding to discovery. If the plaintiff is required to show that the alleged Fourth Amendment right, for example, was clearly established as to her particular situation, discovery may be necessary to establish the contours of the situation. While the Court in *Crawford-El v. Britton* rejected a heightened state of mind requirement or a heightened evidentiary standard where subjective intent is an element of the underlying constitutional claim, it concluded that lower courts should limit and tailor early discovery to issues related to the qualified immunity defense.⁸⁵

The district courts' inclination to rely on holdings in their own circuit to determine whether a right is clearly established is approved by the Supreme Court.⁸⁶ It is not uncommon for the circuits to split holdings on a specific aspect of a constitutional right: the Court in *Wilson v. Layne*⁸⁷ addressed that situation indicating a right is not clearly established if plaintiffs cannot identify "any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" and fail to "identif[y] a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."⁸⁸ A split in the circuits, according to the Court, is normally an indication that the right was not clearly established at the time of the incident.⁸⁹

More recently, however, in *Hope v. Pelzer*, the Court rejected the argument that plaintiffs must point to facts in previous cases that were "materially similar" to their situation in order to avoid the qualified immunity defense.⁹⁰ Rather, the Court determined that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."⁹¹ The plaintiff need only show that government officials had a "fair warning" that their conduct violated clearly established law.⁹² In *Safford Unified School District No. 1 v. Redding*, the Court applied *Wilson* and *Hope* to find a strip search of a thirteen-year-old student violative of the Fourth Amendment as interpreted in

⁸⁴ 483 U.S. 635, 640 (1987)

⁸⁵ 523 U.S. 574, 598–600 (1998)

⁸⁶ *E.g.*, *Davis v. Scherer*, 468 U.S. 183, 192 (1984); *Butz v. Economou*, 438 U.S. 478, 488, 506 (1978); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (all approving the practice of following precedent established by lower courts in determining whether a right is clearly established).

⁸⁷ 526 U.S. 603 (1999).

⁸⁸ *Id.* at 617.

⁸⁹ *Id.* at 618.

⁹⁰ 536 U.S. 730, 753 (2002)

⁹¹ *Id.* at 741.

⁹² *Id.* at 739–40 (noting that violation of a state regulation could be a factor in determining whether the officials had a "fair warning").

*New Jersey v. T.L.O.*⁹³ Noting that the lower courts reached “divergent conclusions” regarding the application of the *T.L.O.* standard to school searches, the Court held that the school officials were entitled to qualified immunity because “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.”⁹⁴ However, the Court said it was

not suggest[ing] 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.⁹⁵

Since the “clearly established” issue raises a question of law, it is subject to *de novo* review on appeal, and the Court made it easier for defendants to prevail on the qualified immunity defense by holding that appellate courts should consider all relevant precedent, even precedent that was not presented to or considered by the trial court.⁹⁶

The Court’s interpretation of “clearly established,” along with its recognition of several defendant-friendly procedural rules addressed in the next section, has interfered significantly with the ability of plaintiffs to recover damages in § 1983 actions and frequently leaves them without a remedy, even when they establish a constitutional violation.

3. *Procedural Aspects of the Immunity Defense*

Some of the procedural aspects of the immunity defense were discussed above, in the context of describing the “clearly established” aspect of qualified immunity,⁹⁷ such as the absence of a heightened pleading requirement⁹⁸ and the limitation on discovery. There are several other procedural rules the Court has deemed applicable to the immunity defense, most of which are designed to enhance its value to government officials. First, in *Gomez v. Toledo*, the Court treated qualified immunity as an affirmative defense that must be pleaded by the

⁹³ 129 S. Ct. 2633, 2643 (2009) (applying the Fourth Amendment as interpreted in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

⁹⁴ *Safford*, 129 S. Ct. at 2644.

⁹⁵ *Id.*

⁹⁶ *Elder v. Holloway*, 510 U.S. 510, 515–16 (1994).

⁹⁷ *See supra* Part II.A.2.

⁹⁸ *But see* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (holding that a complaint, to survive a motion to dismiss, “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’”).

defendant government official in accordance with the Federal Rules of Civil Procedure.⁹⁹ When not pleaded properly, affirmative defenses may be waived; however, courts are fairly lenient in allowing defendants to raise the defense, even if omitted in the initial answer.¹⁰⁰

Second, the Court determined in *Mitchell v. Forsyth* that qualified immunity “is an *immunity from suit* rather than a mere defense to liability.”¹⁰¹ Consistent with this concept of immunity, the Court, in *Hunter v. Bryant*, also determined that immunity “ordinarily should be decided by the court long before trial,”¹⁰² meaning that defendant government officials are encouraged to raise the immunity defense either in a motion to dismiss or more commonly in a motion for summary judgment.¹⁰³

Consistent with the “immunity from suit” aspect of immunity, in *Mitchell v. Forsyth*, the Court held that a trial court order rejecting the immunity defense is immediately appealable as a “final decision.”¹⁰⁴ *Forsyth* invoked the “collateral order rule,” pursuant to which a decision is deemed final if it is separate and independent of the merits and effectively unreviewable on appeal if an immediate appeal is not allowed.¹⁰⁵ The fact that an order denying summary judgment is immediately appealable as a collateral order does not mean the defendant must appeal it at that point. Rather, the defendant may choose to wait until there is a truly final decision and then challenge the order denying immunity.¹⁰⁶ When a defendant appeals the order denying immunity immediately, as a collateral order, the trial court is divested of jurisdiction, thus delaying the progress of the suit for months, if not years.¹⁰⁷ If a government official files an immediate appeal based on *Forsyth*, the issues on appeal are limited to those raised by the immunity

⁹⁹ *Gomez*, 446 U.S. 635, 640–41 (1980). See FED. R. CIV. P. 8(c). While not at issue in *Gomez*, there is no reason why the absolute immunity defense should not be treated the same. See, e.g., *Tully v. Barada*, 599 F.3d 591, 594 (7th Cir. 2010) (“[d]efendants waived their absolute-immunity defense by failing to raise it in the district court.”).

¹⁰⁰ See, e.g., *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 305–06 (4th Cir. 2006); *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003); *Eddy v. V. I. Water & Power Auth.*, 256 F.3d 204, 207–10 (3d Cir. 2001).

¹⁰¹ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), emphasis in original. Similarly, absolute immunity is treated as an immunity from suit. *Id.* at 525.

¹⁰² *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

¹⁰³ *Behrens v. Pelletier*, 516 U.S. 299, 307–09 (1996).

¹⁰⁴ 472 U.S. at 512. Normally, 28 U.S.C. § 1291 requires a final decision before there may be an appeal.

¹⁰⁵ *Forsyth*, 472 U.S. at 526. See also *Johnson v. Fankell*, 520 U.S. 911, 916–17 (1977) (holding that the appealability of a state court order denying the immunity defense is dependent on state law).

¹⁰⁶ See, e.g., *Robbins v. Wilkie*, 433 F.3d 755, 762–63 (10th Cir. 2006); *Pearson v. Ramos*, 237 F.3d 881, 883 (7th Cir. 2001); *Ernst v. Child & Youth Servs. of Chester Cnty.*, 108 F.3d 486, 492 (3d Cir. 1997). The Court agreed to hear *Ortiz v. Jordan*, 316 F. App'x 449 (6th Cir. 2009), cert. granted, 130 S. Ct. 2371 (2010), to address the question whether a party may “appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial.”

¹⁰⁷ See, e.g., *Stewart v. Donges*, 915 F.2d 572, 574–79 (10th Cir. 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989).

defense.¹⁰⁸ However, the Court did not preclude a narrow exception where a portion of the order that is not immediately appealable is “inextricably intertwined” with the immunity decision, or where review of the portion of the decision that is not immediately appealable is “necessary to ensure meaningful review” of the immunity issue.¹⁰⁹ For example, an order granting partial summary judgment for a plaintiff determining liability on a constitutional claim was considered on appeal of an order denying summary judgment on the qualified immunity defense.¹¹⁰

In another defendant-friendly case, *Behrens v. Pelletier*, the Court held that a government official is entitled to an immediate appeal of an order denying the immunity defense, even though that defendant will have to go to trial on other claims, such as an application for prospective equitable relief, if in fact the plaintiff establishes a violation of the federal right.¹¹¹ The Court in *Behrens* also held that a government official is not limited to one collateral order appeal based on *Forsyth*.¹¹² For example, if a defendant raises the immunity defense in a motion to dismiss and immediately appeals unsuccessfully the order denying the motion to dismiss, that defendant could file another collateral order appeal, based on *Forsyth*, after a denial of a motion for summary judgment raising the immunity defense.¹¹³

Not surprisingly, the decision in *Forsyth* has raised some difficult questions where the denial of summary judgment on the immunity defense is based on unresolved factual disputes. This question arose in *Johnson v. Jones*, and the Court held that an order denying summary judgment on the immunity defense is not immediately appealable when the order addresses only a question of the sufficiency of the evidence.¹¹⁴ A year later, in *Behrens*, the Court clarified *Johnson*, stating that

determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly “separable” from the plaintiff’s claim, and hence there is no

¹⁰⁸ *Swint v. Chambers Cnty Comm’n*, 514 U.S. 35, 50–51 (1995).

¹⁰⁹ *Id.* at 51. See also *Johnson v. Jones*, 515 U.S. 304, 318–19 (1995) (recognizing that the exercise of pendent appellate jurisdiction may sometimes be appropriate).

¹¹⁰ *Mueller v. Auker*, 576 F.3d 979, 989–91 (9th Cir. 2009).

¹¹¹ 516 U.S. 299, 307, citing *Mitchell* 472 U.S. 511, 526 (1996). Note that a finding of a violation of a constitutional right, for purposes of equitable relief, is not inconsistent with a determination that a government official is entitled to immunity from individual liability for damages.

¹¹² *Behrens*, 516 U.S. at 308.

¹¹³ *Id.* at 307–09.

¹¹⁴ *Johnson*, 515 U.S. at 313.

“final decision” under *Cohen* and *Mitchell*.¹¹⁵

However, the Court held that the defendant could immediately appeal seeking review of the legal question—whether, accepting the plaintiff's version of the facts, the conduct violated clearly established law.¹¹⁶ In short, the decisions in *Johnson* and *Behrens* invite procedural disputes related to the immunity defense that effectively place the case on hold, thus delaying the plaintiff's opportunity to get to the merits and increasing the cost of litigating the case.

Another procedural dispute concerns the order in which the courts should address the issues raised when a government official asserts the qualified immunity defense. In *Saucier v. Katz*, where the plaintiff alleged the use of excessive force by a federal officer in violation of the Fourth Amendment,¹¹⁷ the Court said that the lower courts, in considering the qualified immunity defense, should first consider the threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?¹¹⁸ If the answer is no, there is no need for further inquiry relating to the defense and the plaintiff loses on the merits of that claim.¹¹⁹ However, if the answer is yes, then the court must determine whether “in light of the specific context of the case,” the force used violated a clearly established Fourth Amendment protection so that the officer was not entitled to immunity.¹²⁰ In addressing this issue, the Court said “[a]n 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.”¹²¹ This approach forced the lower courts to always make a decision on the merits of the constitutional claim. Only if the court ruled in favor of the plaintiff on that question would it be necessary to address the “clearly established” issue.

Eight years later, the Court reexamined this two-step process in *Pearson v. Callahan*,¹²² and decided to modify it. The Court recognized the two-step process was beneficial because there are cases in which there would be little if any conservation of judicial resources by beginning and ending with a discussion of the “clearly established” prong.¹²³ However, after recognizing the benefits, the Court noted that

¹¹⁵ *Behrens*, 516 U.S. at 313.

¹¹⁶ *Id.*

¹¹⁷ *Saucier v. Katz*, 533 U.S. 194, 199 (2001).

¹¹⁸ *Id.* at 201.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 205.

¹²² *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

¹²³ *Id.* at 818.

these benefits are frequently offset by other considerations.¹²⁴ These include the often unnecessary litigation of constitutional issues that wastes both courts' and parties' resources; the consideration of whether there is a constitutional violation may be short-changed where the court has already determined there was not a violation of clearly established law; and the two-step process departs from the general rule that courts should not decide constitutional questions unless it is necessary.¹²⁵ The Court then concluded that the benefits of the two-step process can be retained and the disadvantages avoided by allowing lower court judges "to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case."¹²⁶ In sum, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory."¹²⁷

B. Governmental Entity Immunity

1. *Limited Liability of Municipal Entities*

It is apparent from the discussion of individual immunities in Part II.A that it is not uncommon for a § 1983 plaintiff to establish a violation of a federal constitutional right but be denied an award of damages from the responsible individual because of absolute and/or qualified immunity. This situation would not be so devastating if the victim of unconstitutional action by a government official could recover from that official's employer, as is frequently the case when a government official engages in tortious conduct. However, while the Court in *Monell v. Department of Social Services*¹²⁸ held that a municipality is a "person" within the meaning of § 1983 and could be sued as a defendant in such an action,¹²⁹ the Court also held that municipalities could not be liable based on *respondeat superior*.¹³⁰ Rather, "[i]t is when execution of government's policy or custom, whether made by its law makers 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."¹³¹

This means a municipality can be held liable under § 1983 only (i)

¹²⁴ *Id.*

¹²⁵ *Id.* at 818–21.

¹²⁶ *Id.* at 821.

¹²⁷ *Pearson*, 129 S. Ct. at 818.

¹²⁸ 436 U.S. 658, 690 (1978).

¹²⁹ *Id.* at 691.

¹³⁰ *Id.*

¹³¹ *Id.* at 694

if one or more of its officials acted in accordance with official municipal policy in violating the plaintiff's constitutional rights, (ii) when the official responsible for the violation was one of the municipality's policymakers,¹³² or (iii) where a government acts in accordance with municipal custom— demonstrated by repetition of the same challenged misconduct over a period of time,¹³³ or by a policy or custom of inadequate training, failure to supervise, or inadequate screening of applicants for a position.¹³⁴ Establishing municipal liability based on inadequate training, failure to supervise, or inadequate screening of applicants is very difficult.¹³⁵

In *City of Los Angeles v. Heller*,¹³⁶ the Court held that a municipality is not liable for damages under § 1983 based on a policy that may cause constitutional deprivations where individual employees, acting pursuant to the deficient policy, inflicted no constitutional harm on the plaintiff.¹³⁷ Further, states and state agencies are not liable under § 1983 because the Court, in *Will v. Michigan Department of State Police*, held that neither a state, a state agency, nor a state official acting in his or her official capacity is considered a "person" subject to suit under § 1983.¹³⁸ Where a plaintiff is successful in establishing municipal liability under *Monell*, the municipality is not protected by absolute or qualified immunity.¹³⁹ However, municipal entities cannot

¹³² *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); see also *McMillian v. Monroe Cnty.*, 520 U.S. 781, 785–86 (1997) (requiring a functional analysis to determine whether the government official had policymaking authority with respect to the specific function at issue in the challenged conduct, i.e., a government official may be a policymaker with respect to some functions, but not others); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128–29 (1988) (holding that a policymaker's acquiescence to the actions of a subordinate is not necessarily sufficient to impose liability on the municipality); *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997) (holding that in a situation where a municipality does not directly violate nor authorize the deprivation of a plaintiff's rights, the courts must apply "rigorous standards of culpability and causation" in order to "ensure that the municipality is not held liable solely for the actions of its employee").

¹³³ See, e.g., *Baron v. Suffolk Cnty Sheriff's Dep't*, 402 F.3d 225, 236–41 (1st Cir. 2005) (requiring a practice or custom so widespread that municipal policymakers had actual or constructive knowledge and took no action to end the practice). But see *Rhyne v. Henderson Co.*, 973 F.2d 386, 394, 392 (5th Cir. 1992) (holding that the failure of a municipality to adopt an official policy on a particular subject may not serve as a basis for liability unless the omission "amount[s] to an intentional choice, not merely an unintentional negligent oversight").

¹³⁴ See *Brown*, 520 U.S. at 410–11 (holding that inadequate screening of an applicant's background would trigger municipal liability only where inadequate scrutiny of the applicant's background would have led a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of someone's protected constitutional rights); *Canton*, 489 U.S. at 392 (1989) (holding that a constitutional violation arises from inadequate training or supervision only where it constitutes "deliberate indifference" to the rights of the persons with whom the employees come into contact; the deliberate indifference standard is met only where "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").

¹³⁵ See, e.g., *Brown*, 520 U.S. at 405; *Canton*, 489 U.S. at 391–93.

¹³⁶ 475 U.S. 796 (1986).

¹³⁷ *Id.* at 799.

¹³⁸ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).

¹³⁹ *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

be held liable for punitive damages under § 1983.¹⁴⁰

When you combine the protection of absolute and qualified immunity with the limitations *Monell* imposes upon municipal liability, it is apparent that many victims of unconstitutional action by local governmental officials and employees are without a remedy for damages under § 1983. In Part II.B.ii below, we will see that victims of unconstitutional action by state officials and employees have even less of a chance of recovering damages under § 1983.

2. *Eleventh Amendment Protection for States and State Agencies*

The Eleventh Amendment to the U.S. Constitution states:

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.¹⁴¹

Passed in response to the Court's decision in *Chisholm v. Georgia*,¹⁴² permitting a suit by citizens of South Carolina against Georgia for the purpose of collecting a debt in a situation where Georgia had not consented to suit, the Eleventh Amendment on its face does not address § 1983 actions brought against a state by a citizen of that state. However, in *Hans v. Louisiana*,¹⁴³ the Court held that the Eleventh Amendment bars federal suits against a state by its own citizens, concluding that Article III was intended to permit states to be sued only when they consented and that the Eleventh Amendment more broadly restored the common law notion of sovereignty.¹⁴⁴ The decision in *Hans* leads to the anomalous result that constitutional rights provided by the Fourteenth Amendment, including those incorporated through the Due Process Clause, cannot be enforced in a § 1983 action, even though the primary purpose of § 1983 was to provide a cause of action against the states that were either unable or unwilling to comply with the mandates of the Fourteenth Amendment. The Court has since recognized a few ways to avoid the holding in *Hans*.

¹⁴⁰ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267–71 (1981).

¹⁴¹ U.S. CONST. amend. XI.

¹⁴² *Chisholm v. Georgia*, 2 U.S. 419 (1793).

¹⁴³ *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹⁴⁴ *See also* *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (holding that the sovereign immunity enjoyed by the states extends beyond the literal text of the Eleventh Amendment and bars federal agency adjudication of a complaint by a private party claiming an arm of the state violated a federal statute).

First, in *Ex parte Young*,¹⁴⁵ the Court held that state officials may be sued in their official capacity for prospective injunctive relief. The government official is deemed to be “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”¹⁴⁶ This results in the legal fiction in which the action of the government official is deemed state action for purposes of the Fourteenth Amendment and under color of law for purposes of § 1983, but it is not deemed to be a state action for purposes of the Eleventh Amendment. *Ex parte Young* remains the law today, although its use has been limited by *Seminole Tribe of Florida v. Florida*,¹⁴⁷ holding that a court should hesitate before applying *Young* “where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right.”¹⁴⁸ It was also limited by *Idaho v. Coeur d’Alene Tribe of Idaho*, in which an Indian tribe was not allowed to use the *Ex parte Young* exception because, according to the Court, it raised an issue that is “unusual in that the tribe’s suit is the functional equivalent of a quiet title action which implicates special sovereignty interests.”¹⁴⁹

Second, the Court held that states may waive their Eleventh Amendment protection and consent to being sued in federal court; however, such waivers must be explicit.¹⁵⁰ In *Lapides v. Board of Regents of University System of Georgia*, the Court held that, by removing a case from state to federal court, a state waives its Eleventh Amendment protection.¹⁵¹ Lower courts have held that a state also waives its Eleventh Amendment protection by accepting federal funds pursuant to a statute that provides, in clear and unmistakable terms, that a recipient may be held liable in federal court for violations of, for example, a provision in the statute prohibiting discrimination.¹⁵²

Third, the Court held that Congress may abrogate Eleventh Amendment immunity,¹⁵³ but this has been limited to circumstances where Congress passes legislation pursuant to its power under Section 5 of the Fourteenth Amendment.¹⁵⁴ If it intends to abrogate Eleventh

¹⁴⁵ *Ex parte Young*, 209 U.S. 123 (1908).

¹⁴⁶ *Id.* at 160.

¹⁴⁷ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75–76 (1996).

¹⁴⁸ *Id.* at 74.

¹⁴⁹ 521 U.S. 261, 281 (1997).

¹⁵⁰ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99–100 (1984); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). See also *United States v. Metro. St. Louis Sewer Dist.*, 578 F.3d 722, 725–27 (8th Cir. 2008); *New Hampshire v. Ramsey*, 366 F.3d 1, 18 (1st Cir. 2004).

¹⁵¹ *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002).

¹⁵² See, e.g., *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 551 F.3d 193, 197–203 (3d Cir. 2008); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 33 (1st Cir. 2006); *Constantine v. Rectors & Visitors of George Mason Uni.*, 411 F.3d 474, 491–506 (4th Cir. 2005).

¹⁵³ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–57 (1976) (holding Title VII of the Civil Rights Act of 1964 abrogates states’ Eleventh Amendment protection and subjects them to liability for employment discrimination in violation of Title VII).

¹⁵⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64–65 (1996) (holding that Congress may not

Amendment immunity, Congress must express its intent in clear and unmistakable terms on the face of the statute.¹⁵⁵ While the power to abrogate gives Congress the power to ameliorate some of the consequences of *Hans*, the power has been limited substantially by the Court's narrow interpretation of Section 5 of the Fourteenth Amendment. Following *City of Boerne*, the Court ruled that several civil rights acts passed by Congress, which attempted to abrogate the states' Eleventh Amendment protection, were unconstitutional because they exceeded the Section 5 power of Congress.¹⁵⁶ Also beginning in *City of Boerne v. Flores*, the Court held that the Religious Freedom Restoration Act (RFRA)¹⁵⁷ exceeded the Section 5 power of Congress because it was not "congruent and proportionate" in light of the narrow scope of the Section 1 right.¹⁵⁸ Although the Section 1 right to religious freedom is very limited after *Smith*, requiring only that state and local governments act rationally in passing laws of general applicability that conflict with religious freedom,¹⁵⁹ RFRA required state and local government to satisfy strict scrutiny when passing laws of general applicability that conflict with religious freedom.¹⁶⁰

Because the Court held in *Edelman v. Jordan* that Congress in passing § 1983 did not abrogate the Eleventh Amendment immunity of states and state agencies,¹⁶¹ and in *Will v. Michigan Department of State Police* that states and state agencies are not persons subject to suit under § 1983,¹⁶² it is not possible to sue states pursuant to § 1983 for violations of federal constitutional and statutory rights.¹⁶³ While state officials are subject to § 1983 actions seeking damages in their individual capacity, they can raise an absolute and/or qualified immunity defense. This means that many violations of federal rights by state government officials will

abrogate Eleventh Amendment immunity when it passes legislation pursuant to its Article I power).

¹⁵⁵ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (finding clear congressional intent to abrogate Title I of the Americans with Disabilities Act but a lack of congruence); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74 (2000) (finding a lack of clear congressional intent in Age Discrimination in Employment Act).

¹⁵⁶ E.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Fla. Prepaid Post Secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Patent Remedy Act). Compare *Tennessee v. Lane*, 541 U.S. 509 (2004) (Title II of the Americans with Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (family-care leave provision of the Family and Medical Leave Act).

¹⁵⁷ 42 U.S.C. § 2000bb, *et seq.* (2006).

¹⁵⁸ *City of Boerne*, 521 U.S. at 530–34. The relevant Section 1 right is the Free Exercise Clause of the First Amendment, which is subject to only rational basis review in circumstances where a religious-neutral law of general applicability has an incidental effect on religious freedom, based on the decision in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

¹⁵⁹ *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

¹⁶⁰ See 42 U.S.C. § 2000bb-1 (providing that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.")

¹⁶¹ 415 U.S. 651, 673 (1974).

¹⁶² *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64–66 (1989).

¹⁶³ *Id.* at 64–66.

not be remedied.

C. Supervisory Liability

There are at least three reasons why § 1983 plaintiffs may want to hold supervisors personally liable for the actions of their subordinates: First, the supervisor is more likely to be a policymaker and this could trigger municipal liability based on *Monell*; second, supervisors are more likely to have resources from which plaintiffs could satisfy a judgment; and third, a judgment against a supervisor is more likely to lead to a change in the municipal culture, customs, practices or policies that facilitated the challenged conduct that led to the judgment. The law surrounding supervisory liability in § 1983 actions is unclear, but somewhat analogous to municipal liability after *Monell*.

In a § 1983 action against the mayor, the police commissioner, and others alleging a pervasive pattern of illegal and unconstitutional police mistreatment of racial minorities, the plaintiff sought equitable relief addressing the alleged mistreatment.¹⁶⁴ The trial court found that the evidence did not show a policy on the part of the defendants to violate the legal and constitutional rights of the plaintiff classes, but did find evidence of a tendency to discourage civilian complaints and to minimize the consequences of police misconduct.¹⁶⁵ After noting that individual police officers not named as defendants “were found to have violated the constitutional rights of particular individuals,” the Court said “there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [defendants] express or otherwise showing their authorization or approval of such misconduct.”¹⁶⁶ The Court overturned the equitable relief.

Later, in *Monell*, the Court said *Rizzo* rejected the argument that § 1983 liability may be premised on “the mere right to control without any control or direction having been exercised and without any failure to supervise.”¹⁶⁷ Relying on *Rizzo* and *Monell*, a majority of the circuits have required plaintiffs—who are attempting to hold supervisors liable based on a failure to supervise rather than affirmative misconduct—to show either gross negligence or deliberate indifference, with some

¹⁶⁴ *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

¹⁶⁵ *Council of Org. on Phila. Police Accountability and Responsibility v. Rizzo*, 357 F. Supp. 1289, 1317 (E.D. Pa. 1973).

¹⁶⁶ *Id.* at 371. Justice Blackmun, dissenting, saw it differently and pointed to the district court’s finding 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 386 (quoting *Council of Org. on Phila. Police Accountability and Responsibility v. Rizzo*, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973)).

¹⁶⁷ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

circuits requiring “knowledge and acquiescence.”¹⁶⁸

While not in the context of a § 1983 action, in *Ashcroft v. Iqbal*,¹⁶⁹ the Court considered the “supervisory liability” of the former Attorney General, John Ashcroft, and the Director of the Federal Bureau of Investigation, Robert Mueller, in an action by an alleged terrorist claiming that Ashcroft and Mueller “adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin.”¹⁷⁰ After noting that the plaintiff “correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,”¹⁷¹ the Court said “[w]here 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.”¹⁷² Imposing a heightened pleading requirement, the Court said the plaintiff would have to “plead sufficient factual matter to show that [defendants] 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.”¹⁷³ Rejecting the argument that “a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,” the Court said “[i]n 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,” and each government official “is only liable for his or her own misconduct.”¹⁷⁴ The Court went on to hold that the plaintiff’s allegations were nothing more than a “formulaic recitation of the elements” of a constitutional discrimination claim that were not entitled to an assumption of truth and did not nudge the claims of invidious discrimination “across the line from conceivable to plausible.”¹⁷⁵

Therefore, based on *Iqbal*, plaintiffs in *Bivens* actions, and presumably in § 1983 actions, must allege plausible facts showing the defendant supervisors were personally involved in the claimed

¹⁶⁸ See, e.g., *Harper v. Lawrence County, Ala.*, 584 F.3d 1030, 1039–40 (11th Cir. 2009); *Goodman v. Harris County*, 571 F.3d 388, 395–96 (5th Cir. 2009); *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir. 2008); *Johnson v. Snyder*, 444 F.3d 579, 583–84 (7th Cir. 2006).

¹⁶⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹⁷⁰ *Id.* at 1942. Federal officials are not subject to suit based on § 1983 because absent special circumstances they do not act under color of state or local law. However, federal officials may be subject to suit based on an implied right of action to enforce the Constitution. This is often referred to as a “*Bivens* action,” based on the decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), holding there is an implied right of action to enforce provisions of the U.S. Constitution against federal officials. See *Hui v. Castaneda*, 130 S. Ct. 1845 (2010).

¹⁷¹ *Iqbal*, 129 S. Ct. at 1948.

¹⁷² *Id.*

¹⁷³ *Id.* at 1948–49.

¹⁷⁴ *Id.* at 1949.

¹⁷⁵ *Id.* at 1951–52.

constitutional violation.¹⁷⁶ Justice Souter's dissent in *Iqbal* indicates that the majority's reasoning eliminates supervisory liability, stating that 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."¹⁷⁷ It remains to be seen whether the dissent is correct.

D. "State Action" and Action Under Color of Law

As a general rule, the individual rights guaranteed by the Fourteenth Amendment, including those incorporated through the Due Process Clause, restrict only government action. Private parties are subject to these constitutional restrictions only when their conduct is fairly attributable to state or local government. While not necessarily identical, the "under color of [state law]" requirement in § 1983 similarly limits § 1983 actions to claims against state and local government officials.¹⁷⁸ In short, the actions of state and local government officials, employees, and agents, taken in their official capacity, generally constitute state action,¹⁷⁹ while the actions of private parties generally do not. There is a relatively narrow band of cases that straddle the line—those where private parties act in conjunction with government officials, perform the work or a function of government, or act with the specific assistance of government—and the Supreme Court has not given clear, principled guidance in determining whether § 1983 and the Constitution

¹⁷⁶ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009); *Maldonado v. Fontanes*, 568 F.3d 263, 274 n.7 (1st Cir. 2009) (noting that after *Iqbal*, there is doubt as to whether a public official may be held vicariously liable under § 1983 based on a supervisory liability theory). See also Symposium: *Pondering Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010). *But see* *Al-Kidd v. Ashcroft*, 580 F.3d 949, 974–77 (9th Cir. 2009) (supervisors may be held liable for subordinates' actions that they set in motion or knowingly refuse to terminate, for improper training or supervision, for acquiescing in the constitutional deprivations, or for conduct showing a reckless or callous indifference to others' rights. Allegations that Ashcroft developed and set in motion a policy of using the material witness statute to arrest and preventively detain and interrogate terrorism suspects, absent probable cause that they committed a crime, satisfied this standard).

¹⁷⁷ *Iqbal*, 129 S. Ct. at 1957–58. (Souter, J., dissenting).

¹⁷⁸ See *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 (1982) (noting that private defendants who meet the state action requirement of the Fourteenth Amendment will be deemed to be acting "under the color of state law" and subject to suit under § 1983). See also *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

¹⁷⁹ See *Monroe v. Pape*, 365 U.S. 167, 171–72 (1961) (finding that government officials may act under color of state law even though acting contrary to state law). In other words, § 1983 does not require that a government official be acting pursuant to a state statute; rather, "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken 'under the color of state law.'" *Id.* at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). *But see* *Polk County v. Dodson*, 454 U.S. 312 (1981) (holding that a public defender sued for an alleged violation of constitutional rights in representing a client was not acting under color of law because a public defender exercises professional independence in representing a claim against the state).

are in play.

The easiest case for subjecting a private individual to a § 1983 action arises where the private party and a government official act jointly. This sometimes occurs pursuant to a statutory scheme,¹⁸⁰ and other times results from an agreement or conspiracy between private individuals and government officials.¹⁸¹ In contrast, private conduct authorized by state law, but not compelled, does not trigger § 1983 liability.¹⁸²

When private parties perform a public function that is exclusively and traditionally assigned to government, they may be subject to § 1983 liability.¹⁸³ This doctrine has been substantially narrowed recently, and the Court has refused to subject certain parties to § 1983 liability. Examples of this include a provider of utility services,¹⁸⁴ the operator of a nursing home that is funded almost exclusively with government-provided medical assistance,¹⁸⁵ and a provider of education to special needs children pursuant to an agreement with government.¹⁸⁶ These cases become more complicated in circumstances where the government contracts with a private party to perform a governmental function, such as the operation of a jail or prison. The Court, in *West v. Atkins*, held that a private physician who contracted with the state to provide medical services at a state hospital is subject to § 1983 liability, at least in part because the physician was fulfilling the government's statutory or constitutional obligation to provide medical services.¹⁸⁷ However, private parties who contract with government to provide services are not automatically subjected to § 1983 liability.¹⁸⁸

Government assistance to a private party can take many forms. Financial assistance alone is insufficient to trigger application of either § 1983 or the Fourteenth Amendment. In contrast, a “symbiotic

¹⁸⁰ See, e.g., *Lugar*, 457 U.S. 922 at 937 (1982) (pre-judgment attachment pursuant to a statute imposing a duty on the court clerk and the sheriff that is triggered by a private lawsuit); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 622–28 (1981) (a peremptory challenge scheme pursuant to which a private litigant motivated by race identifies a potential juror who is then excused by the judge).

¹⁸¹ See, e.g., *Tower v. Glover*, 467 U.S. 914, 920 (1984) (a public defender, who is normally not subject to § 1983 liability for actions taken in representing a client, is subject to § 1983 liability arising out of a conspiracy between the public defender and state officials); *Dennis v. Sparks*, 449 U.S. 24, 28–29 (1980) (private individual who bribes a judge is subject to suit under § 1983 even though the judge enjoys absolute immunity); *Dombrowski v. Eastland*, 387 U.S. 82, 83 (1967) (federal officials, not normally subject to suit under § 1983, may be subjected to § 1983 liability when acting in concert with state officials).

¹⁸² *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978).

¹⁸³ See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 506–08 (1946) (private company operating a municipality); *Smith v. Allwright*, 321 U.S. 649, 662–64 (1944) (a private political club effectively controlling a local election).

¹⁸⁴ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353–54 (1974).

¹⁸⁵ *Blum v. Yaretsky*, 457 U.S. 991, 1011–12 (1982).

¹⁸⁶ *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

¹⁸⁷ *West v. Atkins*, 487 U.S. 42, 54–57 (1988).

¹⁸⁸ See, e.g., *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 584–85 (8th Cir. 2006); *Leshko v. Servis*, 423 F.3d 337, 342 (3d Cir. 2005).

relationship” between government and a private party was sufficient in *Burton v. Wilmington Parking Authority*¹⁸⁹ to support a § 1983 action against the private owner.¹⁹⁰ This case may represent the outer limits of state action, decided at a time when the Court was quite interested in addressing racial discrimination.¹⁹¹ More recently, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,¹⁹² the Court held that a “private” statewide voluntary association, consisting of both public and private schools, is subject to the restraints of the Due Process Clause of the Fourteenth Amendment because of the “pervasive entwinement of public institutions and public officials.”¹⁹³ Several factors were considered in reaching this conclusion, including the dominant role of public schools and their officials in the membership and governance of the association, the assignment of state board of education members to serve *ex officio* on the governing body of the association, and the eligibility of association employees for membership in the state retirement system.¹⁹⁴ This case might be viewed as government delegation of the supervision of public high school athletic activities to a private association.

Another form of government assistance is found in *Shelley v. Kraemer*,¹⁹⁵ a case in which white property owners filed suit in state court to enforce a racially restrictive covenant and block a sale from a white owner to a black buyer. Of course, the action of a state court is government action subject to Fourteenth Amendment and § 1983 restrictions. In *Shelley*, the state court was asked to assist the white property owners in their enforcement of a racially restrictive covenant.¹⁹⁶ *Shelley* is unremarkable in the sense that the judicial branch of government was an instrument of racial discrimination. The Court held “that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.”¹⁹⁷ While *Shelley* would arguably support a finding of state action any time a private party brings a lawsuit with a discriminatory intent, *e.g.*, a private

¹⁸⁹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that the private operator of a restaurant, who leased space from the government and refused to serve African-American customers, was subject to liability under § 1983).

¹⁹⁰ *Id.* at 725.

¹⁹¹ The Court pointed to the mutual benefit from the arrangement, *id.* at 724, but the Court has not relied on the “symbiotic relationship” theory since *Burton*.

¹⁹² *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001).

¹⁹³ *Id.* at 298.

¹⁹⁴ *Id.* at 298–303.

¹⁹⁵ 334 U.S. 1 (1948).

¹⁹⁶ For a contrary approach, see *Evans v. Newton*, 382 U.S. 296 (1966), in which the state court accepted the resignation of a city as the trustee of park property designated in a will as available for white people only and appointed new trustees who would carry out the discriminatory purpose of the deceased. The Court found government action because it found that the park was still run as a municipal park, even after the new trustees took control.

¹⁹⁷ *Shelley*, 334 U.S. at 20.

landlord sues to evict a tenant because of her race, it has not been interpreted this broadly.

Government assistance in the form of a state-granted monopoly to operate a public utility,¹⁹⁸ or in the form of a liquor license for a private club which refused to serve a black customer,¹⁹⁹ was deemed insufficient to convert the private party's action into government action. In *Norwood v. Harrison*, the Court held that the action of the executive secretary of the Mississippi State Textbook Purchasing Board in loaning books to students attending private schools that discriminated on the basis of race violates the Fourteenth Amendment.²⁰⁰ While it was not remarkable to hold that the action of the state official constitutes state action, a more interesting question is whether the Court would have enjoined the private school, which benefitted from the state assistance, from discriminating on the basis of race in admissions.²⁰¹

While the state action doctrine has always been unclear, it is apparent that the Court, with the exception of *Brentwood*, has moved toward a more restrictive interpretation of state action. In other words, the current Court is less willing to subject private parties to the restrictions of the Fourteenth Amendment and § 1983. As the line between the private and government spheres becomes more blurred, and government increasingly utilizes private parties to perform government functions, constitutional protections may shrink.

E. Limitations on the Amount of Punitive Damages

In a series of cases, beginning with *Honda Motor Co., Ltd. v. Oberg*,²⁰² the Court has invoked due process, both substantive and procedural, as a means of imposing limitations on the amount of punitive damages awarded, usually by a jury. In *Oberg* the Court held that Oregon's constitutional prohibition on judicial review of the amount of punitive damages awarded by a jury "unless the court can affirmatively

¹⁹⁸ *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

¹⁹⁹ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

²⁰⁰ 413 U.S. 455 (1973).

²⁰¹ *But see* *Reitman v. Mulkey*, 387 U.S. 369 (1967) (affirming the holding of the California Supreme Court that a constitutional amendment (Proposition 14) designed to overturn state laws that prohibited race discrimination in selling or leasing real property constitutes an express state authorization of private race discrimination in violation of the Fourteenth Amendment).

²⁰² 512 U.S. 415 (1994). In an earlier case, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-24 (1991), the Court rejected a due process challenge to the "common-law method for assessing punitive damages," but indicated that unlimited jury or judicial discretion in fixing such damages could "cross the line into the area of constitutional impropriety." *See also* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462-63 (1993) (rejecting a due process challenge to an award of \$10 million in punitive damages, where the jury awarded \$19,000 in compensatory damages, because TXO acted in bad faith, its conduct was part of a broader pattern of fraud and deceit, and it was a wealthy defendant).

say there is no evidence to support the verdict,' violates the Due Process Clause of the Fourteenth Amendment."²⁰³ A few years later, in *BMW of North America, Inc. v. Gore*,²⁰⁴ the Court imposed another due process restriction on punitive damages, holding that (i) lawful conduct of the automobile manufacturer outside the state of Alabama could not be considered by an Alabama court in determining the appropriate amount of punitive damages in a fraud action,²⁰⁵ and (ii) an award of \$2 million in punitive damages was grossly excessive in light of three facts that serve as guideposts in determining the reasonableness of punitive damages awards—the degree of reprehensibility of the defendant's conduct, the disparity between the punitive damages awarded and the actual harm to the plaintiff, and the comparison with civil and criminal penalties that could be imposed for comparable misconduct.²⁰⁶

The *Gore* guideposts were applied in *State Farm Mutual Automobile Insurance Co. v. Campbell*, a case in which the jury awarded \$1 million in compensatory damages and \$145 million in punitive damages.²⁰⁷ The judgment of the Utah court was reversed because of the reliance on State Farm's out-of-state conduct, much of which was lawful where it occurred, that had no nexus to the specific injury suffered by the plaintiff and was not similar to that which harmed the plaintiffs.²⁰⁸ There is a presumption against an award that has such a high ratio—145:1 in this case—between punitive and compensatory damages,²⁰⁹ and the most relevant civil sanction under Utah law is limited to a \$10,000 fine.²¹⁰

Subsequently, in *Philip Morris USA v. Williams*, the Court clarified *Campbell*, holding that harm to other victims is relevant on the reprehensibility issue, but due process precludes a state from using "a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent" because such use would deprive the defendant of the opportunity to present every available defense, and it would add a "near standardless dimension to the punitive damages equation."²¹¹ In determining whether a punitive damages award is unconstitutionally excessive, appellate courts should consider a *de novo* standard because a jury's award of punitive damages does not constitute a finding of fact that is entitled to deference on appeal.²¹²

While the due process restrictions on punitive damages awards

²⁰³ *Oberg*, 512 U.S. at 415.

²⁰⁴ 517 U.S. 559 (1996).

²⁰⁵ *Id.* at 572–73.

²⁰⁶ *Id.* at 575–85. The Alabama Circuit Court entered judgment by the jury awarding the plaintiff \$4,000 in compensatory damages and \$4,000,000 in punitive damages.

²⁰⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

²⁰⁸ *Id.* at 419–24.

²⁰⁹ *Id.* at 426.

²¹⁰ *Id.* at 428.

²¹¹ *Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007).

²¹² *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

were imposed by the Court in the context of tort claims decided in state courts, the principles established in those cases are argued in § 1983 cases as well.²¹³ Because the source of the restrictions on punitive damages is the Due Process Clause of the Fourteenth Amendment, the restrictions are largely immune from corrective action by Congress. However, Section 5 of the Fourteenth Amendment gives Congress the power to “enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”²¹⁴ Because compensatory damage awards may be small in cases establishing a violation of federal rights, application of two of the *Gore* guideposts—the ratio between compensatory and punitive damages and the comparison to civil and criminal penalties²¹⁵—interferes with the goal of preventing and deterring unconstitutional conduct. Therefore, Congress has the power based on Section 5 to legislate more broadly than the Court’s interpretation of Section 1.²¹⁶

In addition, Congress could correct the Court’s decision in *City of Newport v. Fact Concerts, Inc.*,²¹⁷ which held that punitive damages are not generally available against municipalities in a § 1983 action.

F. Use of § 1983 to Enforce Federal Statutory Rights

With the decision in *Maine v. Thiboutot*,²¹⁸ it seemed well settled that § 1983 provided a cause of action to enforce federal statutes. Because “Congress attached no modifiers to the phrase [‘and laws’], the

²¹³ See, e.g., *Gibson v. Moskowitz*, 523 F.3d 657, 664–65 (6th Cir. 2008) (an award of \$3 million in punitive damages, in a case in which the jury awarded \$1.5 million in compensatory damages, against a prison psychiatrist who was deliberately indifferent in ignoring the medical needs of the deceased, held to be not excessive); *Alexander v. City of Milwaukee*, 474 F.3d 437, 454 (7th Cir. 2007) (suggesting that a higher ratio between punitive and compensatory damages may be tolerated in cases where the compensatory damages awarded are relatively low).

²¹⁴ *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003)

²¹⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 559 (1996). See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (holding that Congress has the power under § 5 of the Fourteenth Amendment to adopt “measures that remedy or prevent unconstitutional actions” so long as there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”). See also *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003).

²¹⁶ See *Boerne*, 521 U.S. at 519–20 (holding that Congress has the power under § 5 of the Fourteenth Amendment to adopt “measures that remedy or prevent unconstitutional actions” so long as there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”); See also *Hibbs*, 538 U.S. at 727–28 (affirming the congressional power to remedy and deter violations of rights under the Fourteenth Amendment); *Bd. of Trs., Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (“Congress’ power ‘to enforce’ [§ 1 of] the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”).

²¹⁷ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

²¹⁸ 448 U.S. 1, 9 (1980) (holding that a person deprived of constitutional rights under color of state law may be awarded attorney fees).

plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act."²¹⁹ The Court also confirmed that attorney fees are available, pursuant to 42 U.S.C. § 1988, in a § 1983 action seeking to enforce statutory rights.²²⁰

This seemingly straightforward approach to § 1983 quickly became clouded. In *Middlesex County Sewage Authority v. National Sea Clammers Association*,²²¹ the Court concluded *sua sponte* that Congress did not intend to allow an implied private right of action to enforce either the Federal Water Pollution Control Act or the Marine Protection, Research, and Sanctuaries Act and *sua sponte* addressed the possibility of enforcing these statutes through § 1983. While recognizing that such a claim "arguably falls within the scope of *Maine v. Thiboutot*," the Court said it has "recognized two exceptions to the application of § 1983 to statutory violations"—where Congress "foreclosed private enforcement of that statute in the enactment itself," and where "the statute at issue . . . was [not] the kind that created enforceable 'rights' under § 1983."²²² Relying on the first exception, the Court concluded that, because the two statutes at issue in *Middlesex County* "provide quite comprehensive enforcement mechanisms," Congress not only "intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983."²²³

A few years later, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Court referred to *Thiboutot*, *Pennhurst*, and *National Sea Clammers Association* and said that "[u]nder these cases, if there is a state deprivation of a 'right' secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement."²²⁴ By placing the burden on the defendant,²²⁵ the Court adopted an approach that is favorable to § 1983 plaintiffs.

Shortly after holding in *Wilder* that "reasonable and adequate" provided an enforceable standard,²²⁶ the Court in *Suter v. Artist M.* concluded that the "reasonable efforts" provision in the Adoption

²¹⁹ *Id.* at 4.

²²⁰ *Id.* at 9–10.

²²¹ 453 U.S. 1 (1981).

²²² *Id.* at 19 (discussing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

²²³ *Id.* at 20–21.

²²⁴ *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987) (concluding that tenants residing in low-income housing projects could sue under § 1983 to enforce the Brooke Amendment to the Housing Act, as well as HUD regulations including utilities as part of the rent ceiling). *But see* *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that a private cause of action cannot be implied directly under a federal regulation, but not determining whether § 1983 can be utilized to enforce a federal regulation).

²²⁵ This was confirmed in *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520–21 (1990), which held that the Medicaid Act created a right enforceable by health care providers to reasonable and adequate rates of reimbursement.

²²⁶ *Id.* at 512.

Assistance and Child Welfare Act was too vague and amorphous to create rights enforceable under § 1983.²²⁷ The result in *Suter* seems inconsistent with that in *Wilder*. Nevertheless, in *Livadas v. Bradshaw*, the Court unanimously sustained the right of a discharged employee to sue the state labor commissioner for violating her National Labor Relations Act right to bargain collectively, reasoning that

§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law . . . [w]e have no difficulty concluding . . . that the NLRA protects interests of employees and employers against abridgement by a State, as well as by private actors; that the obligations it imposes on government actors are not so ‘vague and amorphous’ as to exceed judicial competence to decide; and that Congress had not meant to foreclose relief under § 1983.²²⁸

The Court’s most recent decisions show that it has backed away from a plaintiff-friendly approach to the use of § 1983 to enforce federal statutes. The plaintiffs in *Blessing v. Freestone* brought a § 1983 action seeking to enforce Title IV-D of the Social Security Act, alleging that the state agency failed to take adequate steps to obtain child support payments for them. The Court ruled that Title IV-D did not give the parents an enforceable right to better performance by the state agency. In reaching this conclusion, the Court said it was necessary to examine three factors: (i) whether the plaintiff is the intended beneficiary of the statute, (ii) whether the interests asserted are so vague and amorphous as to be beyond the competence of the judiciary to enforce, and (iii) whether the statute imposes binding obligations on the state.²²⁹ The Court rejected the plaintiffs’ claim, stating that the plaintiffs must identify with particularity the right they want enforced. The Court noted that a statutory requirement that the state operate its child support program in “substantial compliance” with the statute is not intended to benefit individual children and parents, but rather to establish a “yardstick” to measure a state’s performance.²³⁰

Later, in *Gonzaga University v. Doe*, the Court said “*Blessing* emphasizes that it is only violations of *rights*, not *laws*, which give rise to § 1983 actions.”²³¹ *Gonzaga* presented the question of “whether a student may sue a private university for damages under [§ 1983] to enforce provisions of the Family Educational Rights and Privacy Act . . . which prohibit the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized

²²⁷ *Suter v. Artist M.*, 503 U.S. 347, 367 (1992).

²²⁸ *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994).

²²⁹ *Blessing v. Freestone*, 520 U.S. 329, 340–42 (1997).

²³⁰ *Id.* at 342–46.

²³¹ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

persons.”²³² After examining its prior cases, the Court abandoned the plaintiff-friendly approach that appeared in at least some of the earlier cases. First, the Court rejected lower court decisions interpreting *Blessing* as allowing individuals who fell within a general zone of interest that a federal statute was intended to protect to enforce the statute under § 1983. The Court confirmed that prior cases do not “permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”²³³ In short, “it is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under [§ 1983],” and thus the Court rejected “the notion that our implied right of action cases are separate and distinct from our § 1983 cases.”²³⁴

While recognizing that the question of whether a federal statute can be enforced through § 1983 is different than whether a private right of action can be implied from a federal statute, the Court said the “inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*.”²³⁵ Therefore, “the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute ‘confer[s] rights on a particular class of persons’”²³⁶ This means, according to the Court, that “where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.”²³⁷ It is not clear whether the limitations imposed by the Court in *Gonzaga University* apply only to Spending Clause legislation.²³⁸

This area has become much more complicated than necessary. The structure of § 1983 suggests that the approach should be the same whether the plaintiff seeks to enforce a federal constitutional right or a federal statutory right. In either case, the inquiry should be twofold—whether the plaintiff satisfies the elements of § 1983, and, if so, whether the plaintiff can establish a violation of the Constitution or the statute at issue. In *Gonzaga University*, the Court says “[i]n sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in

²³² *Id.* at 276.

²³³ *Id.* at 283.

²³⁴ *Id.*

²³⁵ *Id.* at 274.

²³⁶ *Gonzaga*, 536 U.S. at 274 (2002) (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

²³⁷ *Id.* at 286.

²³⁸ Some language in *Gonzaga* suggests the Court may have relied on the fact that Spending Clause legislation was at issue. See, e.g., *id.* at 280–81 (“[S]ince *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights,” and “[o]ur more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes.”). But see *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005), (holding that “[a]ny possibility that *Gonzaga* is limited to statutes that rest on the spending power (as the law in *Gonzaga* did) has been dispelled by *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), which treats *Gonzaga* as establishing the effect of § 1983 itself.”)

clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.²³⁹ There is nothing in the language of § 1983 that justifies a “clear and unambiguous terms”²⁴⁰ requirement. If the plaintiff meets the elements of § 1983, why not simply ask whether the defendant’s challenged conduct violates the federal statute relied upon by the plaintiff?

A related but different question is whether a statute, such as Title IX of the Education Amendments,²⁴¹ precludes a § 1983 action alleging sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. In *Fitzgerald v. Barnstable School Committee*, the Court concluded that Title IX did not preclude an equal protection claim under § 1983 because Congress did not intend the statutory remedial scheme to be the exclusive avenue of relief.²⁴² Earlier, in *Cannon v. University of Chicago*, the Court held that victims of sex discrimination by educational institutions had an implied right of action under the antidiscrimination provision of Title IX.²⁴³

G. Application of 28 U.S.C. § 1728 to § 1983 Actions

By statute, federal courts are required to give state judicial proceedings the same preclusive effect those proceedings are given under the preclusion law of the issuing state.²⁴⁴ This arrangement means, for example, that a defendant in a state court criminal proceeding who loses a motion to suppress evidence alleging a violation of the Fourth Amendment may be barred from pursuing the Fourth Amendment claim in a civil action in federal court.²⁴⁵ It also means that a discharged school official who prevailed on a breach of contract claim in state court may be precluded from pursuing a First Amendment claim in federal court, even though the First Amendment claim was not raised in state court.²⁴⁶ In *Allen* the Court concluded that there is “no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he

²³⁹ *Gonzaga*, 536 U.S. at 290.

²⁴⁰ *Id.*

²⁴¹ 20 U.S.C. § 1681 (2006).

²⁴² *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009).

²⁴³ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

²⁴⁴ 28 U.S.C. § 1738 (2006).

²⁴⁵ See *Allen v. McCurry*, 449 U.S. 90, 94–100 (1980). *Contra Haring v. Prorise*, 462 U.S. 306 (1983) (where a plaintiff brings a § 1983 action in federal court alleging a search violated the Fourth Amendment, after a state court conviction based on a plea of guilty, he is not precluded under either Virginia law or federal common law from pursuing the Fourth Amendment claim).

²⁴⁶ See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80–85 (1984).

would rather not have been engaged at all.”²⁴⁷ In short, the Court held that § 1983 does not create an exception to § 1728.

Similarly, in *University of Tennessee v. Elliott*, the Court held that Congress, in adopting § 1983, “did not intend to create an exception to general rules of preclusion....”²⁴⁸ As a result, state preclusion law governs the preclusive effect to be given to factual findings by a state administrative agency acting in a judicial capacity, as long as there was a full and fair opportunity to litigate the issue(s).²⁴⁹

As a result of these decisions, a § 1983 plaintiff may not only be deprived of a federal forum for resolution of her § 1983 claims, she may also lose her right to trial by jury—administrative agencies generally do not provide jury trials, and motions raising constitutional claims in state criminal proceedings are usually decided by the judge, not the jury. This is true even though the accused in a state criminal proceeding has no choice but to raise the constitutional argument in, for example, a motion to suppress evidence because the stakes are so high.²⁵⁰

III. OTHER DECISIONS AFFECTING § 1983 LITIGATION

As demonstrated in the prior section, the effectiveness of § 1983 as a vehicle for enforcing civil rights has been undermined over the past thirty-five to forty years. However, the decisions interpreting § 1983 do not portray a full picture of the civil rights landscape, in part because § 1983 plaintiffs have to look elsewhere for substantive rights and in part because § 1983 cases are governed by the same procedural rules as other civil litigation. The limited goal of this section is to demonstrate that the barriers facing plaintiffs seeking to protect their individual and civil rights are not limited to the Court's interpretation of § 1983.

Given the power assumed by the Court in *Marbury v. Madison* as the final voice on the meaning of the U.S. Constitution, the damage it can inflict upon civil rights litigants is most durable when the Court is interpreting the U.S. Constitution.²⁵¹ While Congress can never overturn a Supreme Court decision, a decision interpreting a federal statute can be

²⁴⁷ *Allen*, 449 U.S. at 104. See also *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 476 (1982) (concluding “that neither the statutory language nor the congressional debates suffice to repeal § 1738's long-standing directive to federal courts”).

²⁴⁸ 478 U.S. 788, 797 (1986).

²⁴⁹ *Id.* at 789.

²⁵⁰ The same is true of the federal court plaintiff in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 337–47 (2005), who was required by an earlier Supreme Court decision, *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), to pursue an inverse condemnation action in state court before pursuing a Fifth Amendment takings claim in federal court. State preclusion law applied because the California courts “interpreted the relevant substantive state takings law coextensively with federal law.” *San Remo Hotel*, 545 U.S. at 335. Therefore, the federal claims constituted the same claims already resolved in state court.

²⁵¹ 1 Cranch 137 (1803).

rendered meaningless by simply amending the statute. Congress has done this several times in the past twenty-five years.²⁵² While a decision of the Supreme Court interpreting the U.S. Constitution could be rendered meaningless by constitutional amendment, this rarely happens.

Congress does have the power under Section 5 of the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of this article.”²⁵³ But the Court interprets Section 5 and determines what constitutes “appropriate legislation,” and the power of Congress has been limited substantially since 1997, beginning with the decision in *City of Boerne v. Flores*.²⁵⁴ Today congressional power to compensate for a “bad” decision of the Court is substantially less than in the past. For example, Congress compensated for the decision in *Lassiter v. North Hampton County Board of Elections* (upholding a North Carolina statute conditioning voting eligibility on a person’s ability to read and write) by amending the Voting Rights Act to prohibit at least some literacy tests.²⁵⁵ In *Katzenbach v. Morgan*, the Court held that the amendment to the Voting Rights Act was a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, despite the fact that it effectively overturned the result in an earlier decision.²⁵⁶

The scope of the protection provided by the Equal Protection and Due Process Clauses of Section 1 of the Fourteenth Amendment has declined substantially over the past thirty-five years. As Section 1 rights contract, the range of “appropriate legislation” under Section 5 narrows. The Supreme Court controls the scope of Section 5 of the Fourteenth Amendment through its interpretation of Section 1. Probably, the equal protection decisions of the Supreme Court that are most harmful to a progressive understanding of civil rights are those addressing invidious race discrimination.

The Supreme Court decided that the Equal Protection Clause reaches only intentional discrimination,²⁵⁷ thereby insulating practices and policies with a disproportionate impact, unless purposefully discriminatory, from an equal protection challenge. As a result of the Court’s interpretation, the Equal Protection Clause does not address all racial inequality. For example, segregated schools are consistent with the Court’s interpretation of the Equal Protection Clause, unless challengers can show that the segregation results from purposeful government action.²⁵⁸ According to the Court, formal or legal equality, not actual

²⁵² See, e.g., Lily Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 6 (2009); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3557 (2008); Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 31 (1998); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

²⁵³ U.S. CONST. amend. XIV, § 5.

²⁵⁴ 521 U.S. 507 (1997).

²⁵⁵ 360 U.S. 45 (1959); 42 U.S.C. § 1971 (2006).

²⁵⁶ 384 U.S. 641 (1966).

²⁵⁷ *Washington v. Davis*, 426 U.S. 229 (1976).

²⁵⁸ See, e.g., *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (holding that where a

equality, is all that the Equal Protection Clause requires.

In contrast, because of the Court's insistence on utilizing strict scrutiny when addressing benign race-conscious actions,²⁵⁹ most governmental attempts to promote racial equality through benign race-conscious actions are invalidated by the Equal Protection Clause.²⁶⁰ A notable exception is the decision in *Grutter v. Bollinger*, upholding the University of Michigan Law School admissions policy aimed at achieving student body diversity.²⁶¹ The Equal Protection Clause, which was designed to promote racial equality, now stands in the way of governmental efforts to promote such equality.

The Court's interpretation of the Due Process Clause provides another example of how the scope of the protection afforded by Section 1 of the Fourteenth Amendment has narrowed. In order to prevail in a procedural due process claim, the plaintiff must show a "protected" liberty or property interest and, if successful, must show a defect in the process utilized by the government. Either prong can result in the defeat of a procedural due process claim, with the scope of "protected" interests seemingly declining.²⁶² Assuming there is a protected property or liberty interest, the Court determines what process is due by balancing three factors: (i) the private interest affected by the government action; (ii) the risk of an erroneous deprivation of this interest through the procedures utilized and the probable value, if any, of additional or different procedural safeguards; and (iii) the government interest.²⁶³

Pre-deprivation process is most beneficial to the person who is being deprived of a liberty or property interest by government. However, in *Parratt v. Taylor*, the Court held that the availability of a post-deprivation tort remedy under state law may be sufficient to satisfy due process where the deprivation of an inmate's property was the result of negligent, random and unauthorized action.²⁶⁴ The protection

federal court order resulted in desegregation of a school system that had been segregated by law, and then began to resegregate due to residential shifts, it was not appropriate for the lower court to require that attendance boundaries be redrawn annually).

²⁵⁹ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁶⁰ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand*, 515 U.S. at 239 (remanded for application of strict scrutiny); *Croson*, 488 U.S. at 511; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²⁶¹ 539 U.S. 306 (2003).

²⁶² Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that a recipient of public assistance has a protected property interest in continued receipt of the assistance) with *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (finding that an individual who obtained a restraining order based on state law does not have a constitutionally protected property interest in police enforcement of the restraining order).

²⁶³ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁶⁴ *Parratt v. Taylor*, 451 U.S. 527 (1981). See also *Zinermon v. Burch*, 494 U.S. 113 (1990) (narrowing the meaning of "random and unauthorized" to exclude governmental action where a state delegates to high-ranking officials the power and authority to carry out the alleged deprivation and the duty to initiate the procedural safeguards provided by state law); *Hudson v. Palmer*, 468 U.S. 517 (1984) (extending *Parratt* to an intentional deprivation of property that could not be anticipated).

afforded by procedural due process is less than it was in 1970 when the Court decided *Goldberg v. Kelly*,²⁶⁵ and it is influenced significantly by state law because the Court often looks to state law to determine whether there is a protected property or liberty interest. The availability of state remedies, even though not comparable to § 1983 remedies, may preclude a procedural due process claim.

While reasonable minds may differ on the scope and meaning of procedural due process, it is viewed as a legitimate concept because of the language of the Fourteenth Amendment: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”²⁶⁶ In contrast, use of the Due Process Clause to protect substantive rights is questioned and its history checkered. From 1905²⁶⁷ through 1936, the Due Process Clause was used frequently to strike down socio-economic legislation based on freedom of contract, a right inherent in liberty as used in the Fourteenth Amendment. This changed, beginning with the decision in *West Coast Hotel Co. v. Parrish*, when the Court abandoned the expansive notion of liberty and began giving substantial deference to legislative bodies, requiring only that they act rationally.²⁶⁸ This remains the standard applied to substantive due process challenges to socio-economic legislation, with the possible exception of the punitive damages cases.²⁶⁹

Two cases decided during the *Lochner* era, *Meyer v. Nebraska*²⁷⁰ and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*,²⁷¹ were used as the foundation for the protection of individual rights, through substantive due process, even after *Lochner* was effectively abandoned by the Supreme Court. Building on *Meyer* and *Pierce*, substantive due process jurisprudence developed as a means of protecting “fundamental rights,” such as personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education, and eventually abortion with the decision in *Roe v. Wade*.²⁷²

Because of the absence of a textual basis in the Constitution for substantive due process, Justices who disagree with the concept sought to

²⁶⁵ 397 U.S. 254 (1970).

²⁶⁶ U.S. CONST. amend. XIV, § 1.

²⁶⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁶⁸ 300 U.S. 379 (1937).

²⁶⁹ See *supra* Part II.E.

²⁷⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding, as a matter of substantive due process, that “liberty” encompasses the right of an individual to “establish a home and bring up children”).

²⁷¹ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (holding that an Oregon statute, which required parents to educate their children between the ages of eight and sixteen in a public school, “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children”).

²⁷² *Roe v. Wade*, 410 U.S. 113 (1973). See also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that a law making the use of contraceptives illegal intruded on married couples’ right to privacy); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (refusing to recognize a fundamental right to assistance in committing suicide).

limit the reach of substantive due process by limiting the rights that would be classified as fundamental. They sought to do so by limiting fundamental rights to those anchored in history and tradition at a very specific level.²⁷³ This narrow concept of substantive due process was rejected by five Justices in *Planned Parenthood v. Casey*, who stated the “inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.”²⁷⁴ However, in affirming the “essential holdings” of *Roe v. Wade*, the Court abandoned the “fundamental right” and “strict scrutiny” language of *Roe v. Wade* and spoke of a liberty interest that could not be unduly burdened by government.²⁷⁵

Today, what is protected by substantive due process is likely to be referred to as a protected liberty interest, rather than a fundamental right, with the level of scrutiny ranging from heightened rational basis²⁷⁶ to a balancing approach.²⁷⁷ Even after *Casey*, the Court in *Washington v. Glucksberg* upheld a Washington statutory ban on physician-assisted suicide against a facial substantive due process challenge and noted that the “established method of substantive-due-process analysis has primary features”—it specially protects fundamental rights and liberties deeply rooted in the nation’s history and tradition, and there must be a careful description of the asserted fundamental liberty interest.²⁷⁸

Despite the “primary features” described in *Glucksberg*, the Court has used a variety of approaches to substantive due process claims. For example, in *County of Sacramento v. Lewis*,²⁷⁹ the Court recognized that substantive due process may be utilized in a § 1983 action for damages alleging an abuse of executive power. However, in order to avoid substantial overlap between such a claim and state tort law, the Court held that only an abuse of power that “shocks the conscience” will be actionable.²⁸⁰ The Court rejected “deliberate indifference to constitutional rights” as the standard in *Lewis* because the case involved a high-speed chase by police officers, resulting in the death of a passenger on the fleeing motorcycle, and the Court was concerned that in

²⁷³ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Justice Scalia, joined by Chief Justice Rehnquist).

²⁷⁴ *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 849 (1982).

²⁷⁵ *Id.* at 877.

²⁷⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding the Texas statutory ban on same-sex sodomy violates the Due Process Clause).

²⁷⁷ See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (recognizing the right of a competent person to refuse unwanted medical treatment, while upholding Missouri’s clear and convincing evidence standard for determining the wishes of the individual).

²⁷⁸ 521 U.S. 702, 703 (1997).

²⁷⁹ 523 U.S. 833 (1998).

²⁸⁰ *Id.* at 846.

such a situation there is no opportunity for actual deliberation.²⁸¹

In another case, *DeShaney v. Winnebago County Department of Social Services*, the Court held that government's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."²⁸² Because government had not created the danger to the child, or rendered the child more vulnerable to abuse by his father, the Court refused to find liability absent a "custodial relationship" or a government-created danger.²⁸³ Substantive due process claims arise in a wide variety of circumstances. For our purposes, it is sufficient to say that the current Court does not favor such claims, and that it is certainly not willing to expand the protection provided by substantive due process.²⁸⁴

While the Court was interpreting § 1983 narrowly and imposing a number of substantial barriers to plaintiffs seeking relief under that statute, it was also interpreting other civil rights provisions narrowly. On several occasions, Congress has reacted to a Supreme Court decision interpreting a civil rights statute narrowly by amending the statute to specifically overturn the result reached by the Court.²⁸⁵ For example, the Pregnancy Discrimination Act²⁸⁶ was passed in 1978, shortly after the decision in *General Electric Co. v. Gilbert*,²⁸⁷ which held that discrimination based on pregnancy was not sex discrimination within the meaning of Title VII. In *Grove City College v. Bell*,²⁸⁸ the Court narrowly interpreted Title IX,²⁸⁹ which bans sex discrimination by educational institutions receiving federal financial assistance, to cover discrimination only in the program that actually receives the financial assistance, rather than the entire educational institution. This narrow interpretation was specifically rejected in 1988, when Congress passed the Civil Rights Restoration Act²⁹⁰ for the purpose of correcting the *Grove City* decision.

Congress passed the Civil Rights Act of 1991²⁹¹ to address several decisions narrowly interpreting § 1981²⁹² and Title VII of the Civil

²⁸¹ *Id.* at 851.

²⁸² 489 U.S. 189, 197 (1989) (finding no due process violation when county welfare workers failed to protect a young child from his abusive father even though the welfare department had intervened on numerous occasions and the caseworkers were fully aware of the danger).

²⁸³ *Id.* at 189–90.

²⁸⁴ Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 523–25 (2008).

²⁸⁵ See *supra* note 252 and accompanying text.

²⁸⁶ 42 U.S.C. § 2000e-2(k) (2006).

²⁸⁷ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

²⁸⁸ *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

²⁸⁹ 20 U.S.C. §§ 1681–1688 (2006).

²⁹⁰ Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 31 (codified as amended at 42 U.S.C. § 2000d-4a (1988)).

²⁹¹ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

²⁹² 42 U.S.C. § 1981 (2006).

Rights Act of 1964.²⁹³ One of those decisions was *Patterson v. McClean Credit Union*,²⁹⁴ interpreting § 1981, which prohibits race discrimination in contracting, to exclude “postformation conduct,”²⁹⁵ thereby rejecting racial harassment, failure to promote, and discharge claims brought by an African-American woman. The 1991 Act specifically defined the term “make and enforce contracts” to include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”²⁹⁶ This Act also overturned portions of the decision in *Ward's Cove Packing Co. v. Atonio*,²⁹⁷ narrowing the scope of disparate impact claims brought under Title VII of the Civil Rights Act of 1964.²⁹⁸

The ADA Amendments Act of 2008,²⁹⁹ which became effective in January 2009, overturned the results in several Supreme Court decisions narrowly interpreting the Americans with Disabilities Act.³⁰⁰ Most recently, the Lilly Ledbetter Fair Pay Act of 2009³⁰¹ was passed to correct the result in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*³⁰² The Act provides that the time limit for filing pay discrimination claims under Title VII begins to run each time an employee receives a paycheck that manifests discrimination, rather than when the employer makes a discriminatory pay decision. In each of these corrective Acts, Congress explicitly noted its disagreement with the Court's statutory interpretation.³⁰³

For purposes of this article an attempt to analyze and provide potential responses to all Supreme Court decisions adversely affecting civil rights litigation is unnecessary. One possible solution to this problem would be to amend federal statutes that provide substantive rights. This could alter the Court's narrow interpretation of those statutes. However, the feasibility of such amendments depends on the political climate. A more drastic solution would be to amend the Constitution, but the amendment process provided in Article V³⁰⁴ of the Constitution was designed to set a high bar, and the current political climate is not conducive to expanding civil rights through constitutional amendments. Another way to fix the Court's previous narrow

²⁹³ 42 U.S.C. §§ 2000e–2000e-17 (2006).

²⁹⁴ *Patterson v. McClean Credit Union*, 491 U.S. 164, 164 (1989).

²⁹⁵ *Patterson*, 491 U.S. at 165.

²⁹⁶ 42 U.S.C. § 1981(b).

²⁹⁷ *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

²⁹⁸ 42 U.S.C. § 2000e–c-17 (2006).

²⁹⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3557 (2008).

³⁰⁰ See, e.g., *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184 (2002); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

³⁰¹ 42 U.S.C. § 2000e-5(e)(3) (2006).

³⁰² *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

³⁰³ E.g., H.R. 2764, 110th Cong. (2008), Consolidated Appropriations Act, Pub. L. No. 110-325, 122 Stat. 3557 (2008).

³⁰⁴ U.S. CONST. art. V.

interpretations is through the Court itself. This, however, is also unlikely due to the current make-up of the Court and the vacancies that seem likely in the near future. A third option is to substitute statutory rights for the narrowly interpreted provisions of the Constitution, as attempted with the Religious Freedom Restoration Act,³⁰⁵ which followed the Court's strict interpretation of the Free Exercise Clause in *Department of Human Resources of Oregon v. Smith*.³⁰⁶ This option failed because the Court narrowly interpreted Section 5 of the Fourteenth Amendment, the legislative power utilized by Congress in passing the Religious Freedom Restoration Act.³⁰⁷

Nevertheless, there may be circumstances where Congress has the power to substitute a statutory right for a narrowly-interpreted constitutional provision through Section 5 of the Fourteenth Amendment, the Commerce Clause³⁰⁸ or the Spending Clause,³⁰⁹ combined with the Necessary and Proper Clause.³¹⁰ That, however, is for another article. The limited scope of Part IV is to suggest an amendment to § 1983 that would address some of the problems identified in Part II, above.

IV. A PROPOSED AMENDMENT TO § 1983

In Part II, I identified seven major areas—individual immunity, governmental entity immunity, supervisory liability, color of law, limitations on punitive damages, enforcement of statutory rights, and preclusion—in which the Court's interpretation of § 1983 has significantly narrowed a plaintiff's chances of recovery. Most of these limiting decisions, I contend, are not supported by either the language of § 1983 or public policy considerations.³¹¹ Therefore, it is time for

³⁰⁵ 42 U.S.C. § 2000bb, *et seq.* (2006).

³⁰⁶ *Employment Div., Dep't. of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990).

³⁰⁷ *See City of Boerne v. Flowers*, 521 U.S. 507 (1997).

³⁰⁸ U.S. CONST. art. I, § 8, cl. 3.

³⁰⁹ U.S. CONST. art. I, § 8, cl. 1.

³¹⁰ U.S. CONST. art. I, § 8, cl. 18. Justice Scalia, in his concurring opinion in *Gonzales v. Raich*, 545 U.S. 1, 34–42 (2005), argues in favor of utilizing the Necessary and Proper Clause to supplement the Commerce Clause where, for example, “regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself ‘substantially affect’ interstate commerce,” or regulation of “noneconomic local activity” is “a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (Scalia, J., concurring). In *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966), the Court compared Section 5 of the Fourteenth Amendment to the Necessary and Proper Clause, stating “[b]y including Section 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.” Later, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), Justice Douglas wrote that “[c]ongressional power under Section 5 of the Fourteenth Amendment is . . . buttressed by congressional power under the Necessary and Proper Clause.” *Id.* at 149 n.13 (Douglas, J., concurring in part and dissenting in part).

³¹¹ Of course, the Court is not supposed to rewrite a statute simply because Congress has not acted in accordance with the Court's view of what is good public policy.

Congress to repair at least some of the damage the Court has inflicted on § 1983 and those who are entitled to rely upon it for relief from violations of their civil rights. Following is a proposed amended version of the statute:

42 U.S.C. § 1983.

- (a) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except 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.
- (b) For the purpose of this section:
 - (1) Any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
 - (2) “[U]nder color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia” includes the conduct of private individuals and entities that is (a) taken pursuant to an agreement with state or local government, (b) authorized by state or local government, (c) taken on behalf of, or at least in part for the benefit of, state or local government, (d) taken jointly with state or local government employees, agents or officials, (e) taken with the assistance of state or local government, or (f) taken in the performance of a public function that is traditionally an important function of state or local government.³¹²
 - (3) When a person alleges a deprivation of “rights, privileges, or immunities secured by [section 1 of

³¹² This subsection adopts an expansive view of “under color of law,” consistent with *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Terry v. Adams*, 345 U.S. 461 (1953), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Marsh v. Alabama*, 326 U.S. 501 (1946). While this does not change the Court’s decisions interpreting “state action” for Fourteenth Amendment purposes, it expands the reach of § 1983 for plaintiffs seeking to enforce (a) provisions of the Constitution that do not require state action, like the Thirteenth Amendment, and (b) federal statutes that provide substantive rights against private parties.

the Fourteenth Amendment to] the Constitution,” conduct of private individuals and entities constitutes “state action” when it satisfies subsection (b)(2) and when its prohibition is necessary to remedy and deter violation of rights guaranteed by section 1.³¹³

- (4) The term “person,” insofar as it describes those who “shall be liable to the party injured,” includes individuals, states and state agencies, municipalities and local governmental agencies, and private entities that fall within subsection (b)(2).³¹⁴
- (5) Entities, both governmental and private, are subject to *respondeat superior* liability, *i.e.*, they are subject to liability for deprivations of protected rights caused by their agents and employees while acting within the scope of their agency or employment.³¹⁵
- (6) A supervisor “subjects, or causes to be subjected” another person “to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” where the supervisor was personally involved in the deprivation and where the supervisor either knew or should have known of the deprivation, but took no preventive or corrective action.³¹⁶

³¹³ While Section 5 of the Fourteenth Amendment does not give Congress the power to enlarge substantially the substance of § 1 as defined by the Court, “Congress’ power ‘to enforce’ [Section 1] of the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Bd. of Trs., Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). This subsection prohibits “a somewhat broader swath of conduct” than Section 1 because it expands a bit the concept of “state action,” when necessary “to remedy and to deter violation of rights guaranteed [by Section 1].” A challenge to conduct that falls within this “broader swath of conduct” is based on subsection (b)(3), not Section 1 of the Fourteenth Amendment, because Congress may not enlarge § Section rights beyond the Court’s interpretation. This means that subsection (b)(3) provides a substantive right, not just a cause of action to enforce rights found elsewhere, *i.e.*, there is a statutory right to challenge some private conduct that does not constitute “state action” under the Fourteenth Amendment. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (“Unlike the 1866 and 1870 Acts, [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 ensure that an individual had a cause of action for violations of the Constitution . . .”).

³¹⁴ This subsection confirms the holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a municipality is a “person,” but overrules the holding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), that neither a state nor a state agency is a “person” subject to suit under § 1983.

³¹⁵ This subsection invalidates the holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a municipality cannot be held liable based on *respondeat superior*.

³¹⁶ This subsection invalidates the holding in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), that supervisory liability is a misnomer because a supervisor “is only liable for his or her own misconduct.” *Id.* at 1949.

- (c) The qualified immunity defense, recognized by the U.S. Supreme Court in several cases, is abolished and any “person,” as defined above in subsection (b)(4), found to have violated the federal constitutional or statutory rights of another person in an action based on this section is liable for equitable relief and damages, including punitive damages.³¹⁷
- (d) The absolute immunity defense, recognized by the U.S. Supreme Court in several cases, is abolished and any “person,” as defined above in subsection (b)(4), found to have violated the federal constitutional or statutory rights of another person in an action based on this section is liable for equitable relief and damages, including punitive damages, *except* state and municipal judges are immune from an award of damages against them in their individual capacity, based on action taken in their judicial capacity, that (i) is subject to review by a state appellate court, (ii) is entitled to preclusive effect under state preclusion law, (iii) provided a full and fair opportunity to litigate, as required by the Due Process Clause of the Fourteenth Amendment, and (iv) is the result of an adversarial proceeding.³¹⁸
- (e) Any “person,” as defined above in subsection (b)(3), is subject to suit, brought pursuant to this section, in federal court and any protection provided by the Eleventh Amendment to the U.S. Constitution is abrogated.³¹⁹
- (f) Where the plaintiff satisfies the elements of this section, it creates a private right of action to enforce federal statutory rights without any showing that Congress, in clear and unambiguous terms, expressed its intent to create new

³¹⁷ This subsection eliminates both qualified immunity as a defense to claims for damages against governmental officials, agents and employees in their individual capacity, and governmental immunity from punitive damages. While *respondeat superior* liability, provided in subsection (b)(5), reduces the evils of qualified immunity, it needs to be eliminated because it is confusing and substantially increases the costs, including the unnecessary use of judicial resources, of litigation.

³¹⁸ This subsection eliminates absolute immunity as a defense to claims for damages against governmental officials, agents and employees in their individual capacity when performing certain functions, such as legislative, judicial and prosecutorial functions. However, it retains a more limited form of immunity for state and municipal court judges, acting in their judicial capacity under certain conditions. The conditions would lead to a different result in some cases decided by the Supreme Court, including *Mireles v. Waco*, 502 U.S. 9 (1991) (holding judge judicially immune from lawsuit regarding his order requesting and authorizing court officers to use excessive force against an attorney in bringing him into court), and *Stump v. Sparkman*, 435 U.S. 349 (1978) (holding judge immune from lawsuit regarding his order approving a “tubal ligation” procedure on a fifteen-year-old female based on an *ex parte* petition). Non-judicial officials performing a judicial function, as in *Butz v. Economou*, 438 U.S. 478 (1978), would no longer enjoy absolute immunity.

³¹⁹ This subsection abrogates the Eleventh Amendment protection, provided to states and state agencies, from an award of damages in an action in federal court. Congress has the power to abrogate the states’ Eleventh Amendment immunity “through a valid exercise of its [Section 5] power...” when it makes “its intention to abrogate unmistakably clear in the language of the statute.” *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727, 721 (2003).

rights enforceable under this section, unless the statute the plaintiff seeks to enforce contains its own comprehensive enforcement mechanism that is inconsistent with a private right of action under this section.³²⁰

- (g) Where necessary to prevent or deter unconstitutional conduct, an award of punitive damages is not limited by the amount of compensatory damages awarded or available civil and criminal penalties for comparable misconduct.³²¹
- (h) The statutory full faith and credit provision of 28 U.S.C. § 1738 does not apply to actions under this section where
 - (i) the prior state “judicial proceedings” were in the context of a criminal prosecution, (ii) the federal claim was not actually litigated and decided in the prior state “judicial proceedings,” or (iii) the prior state “judicial proceedings” were required to make the federal claim(s) ripe; administrative proceedings shall not be given preclusive effect in actions under this section.³²²
- (i) The legal sufficiency of a complaint alleging a violation of § 1983, when one or more defendants seeks dismissal for failure to state a claim, will be determined under the standard established in *Conley v. Gibson*, 355 U.S. 41 (1957), accepting all allegations in the complaint as true, dismissal is proper only if there is no set of facts on which the plaintiff(s) would be entitled to relief against the defendant(s).³²³

These proposed amendments demonstrate a true commitment to protection of civil rights, unlike the Court’s derogation of civil rights. A primary purpose of the Fourteenth Amendment, and § 1983, was to protect civil rights by imposing restrictions on the states. Counterintuitively, while states are generally subject to tort claims based on state laws, the Court has made it more difficult for civil rights plaintiffs than tort plaintiffs to succeed in obtaining remedies. The point is simply this—a person hit and injured by a government-owned vehicle is more likely to obtain full relief than a victim of excessive force by a police officer. As a result, there is little incentive for state and local government to make compliance with civil rights regulations a priority.

³²⁰ This subsection invalidates the results in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Suter v. Artist M.*, 503 U.S. 347 (1992), all of which place restrictions on the use of § 1983 to enforce federal statutory rights.

³²¹ This subsection eliminates two of the “guideposts” established by the Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–84 (1996).

³²² This subsection overrules the results in *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), *San Remo Hotel v. County of San Francisco*, 545 U.S. 323 (2005) and *Tennessee v. Elliott*, 478 U.S. 788 (1986), insofar as they held that § 1983 claims or issues were precluded.

³²³ This subsection requires application of the standard adopted in *Conley v. Gibson*, 355 U.S. 41 (1957), rather than the standard adopted in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Why should defendants who violate civil rights be held liable in damages only if the right at issue was “clearly established” at the time of the challenged conduct? This is not the standard applied in tort law. Why should governmental entities be absolved of liability for the unconstitutional actions of their agents, absent a showing that their agents were acting pursuant to entity policy? This is not the standard applied to entities in tort law, where *respondeat superior* is the norm. Why should supervisors who know, or would know if they cared, of the misconduct of their subordinates not be held responsible for such misconduct? This is a form of negligent supervision that is generally recognized as actionable in tort law. Why should states and state agencies be protected from civil rights liability by the misinterpretation of the Eleventh Amendment in *Hans*³²⁴ and the resulting narrow interpretation of “person” in *Will*?³²⁵

I fully understand the difficulty of passing legislation that enhances protection for civil rights. Most states and their political subdivisions are already experiencing budget difficulties and the proposed legislation will be viewed as exposing those units of government to greater liability and costs. However, whether or not such legislative reform would result in greater costs to state and local government depends on how those units of government react. The goal is to deter violations of civil rights, not to increase costs. One way to reduce civil rights litigation and reduce the cost of such litigation is to make more serious efforts to prevent violations of civil rights. Ideally such legislation would result in fewer violations, not more and larger judgments. Taxpayers who are upset with judgments that have to be paid by state and local government should elect officials who make avoiding such liability a priority. Do not blame the victims who seek compensation for their injuries; rather, blame the government officials who engage in or tolerate the violations of civil rights.

Most taxpayers who complain about the cost of civil rights liability view the matter very differently when, for example, a family member is the victim of the use of excessive force by a police officer or a family member is fired from a government job because she failed to support the winning candidate for political office. While government units will not be able to prevent all civil rights violations, just as they cannot prevent all negligent conduct by agents and employees, they can contain costs by making prevention a priority.³²⁶

³²⁴ *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890) (holding that states are protected from suits by their own citizens by the Eleventh Amendment).

³²⁵ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that neither a state nor a state agency is a “person” subject to suit under § 1983).

³²⁶ Exposure to liability for violations of civil rights, like exposure to tort liability, can be addressed through insurance. Governmental units with more accidents and more violations of civil rights will pay more for insurance, but that too can be addressed through preventive measures.

V. CONCLUSION

In many respects, the Supreme Court's interpretation of § 1983 is inconsistent with the statutory language, the purpose of the statute, and the importance of civil rights. Therefore, Congress should take corrective action, as it has done on several occasions in the past when the Court has misinterpreted civil rights statutes in favor of defendants.