

**CONSTITUTIONAL LITIGATION  
UNDER §1983**

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# CONSTITUTIONAL LITIGATION UNDER §1983

SECOND EDITION

2011 Supplement

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## Chapter 1

### OFFICIAL LIABILITY FOR CONSTITUTIONAL WRONGS

#### A. “Under Color of” State Law

Add the following to Note 1 on page 9:

See also Richard L. Aynes, *The 39<sup>th</sup> Congress (1865-1867) and the 14<sup>th</sup> Amendment: Some Preliminary Perspectives*, [42 AKRON L. REV. 1019](#) (2009) (describing in detail the legislative history behind the adoption of the Fourteenth Amendment); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CON. L. 1295, 1316 (2009) (observing that “various enforcement statutes” were put in place following passage of the Fourteenth Amendment); Jack M. Beermann, *The Supreme Common Law Court of the United States*, [18 B.U. PUB. INT. L.J. 119, 132](#) (2008) (“Many of the statutory provisions passed by Congress after the Civil War were aimed at creating social and legal equality for the freed slaves and for all blacks and other racial minorities.”).

Add the followin to Note 8 on page 13:

See also Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, [78 UMKC L. Rev. 889, 890](#) (2010) (“in the nearly fifty years since its decision in *Monroe v. Pape*, the Court has substantially diminished the availability of § 1983 damages actions”).

#### B. “State Action” Compared

##### [1] Official Wrongdoing

Add the following to Note 6 on page 20:

In *Vermont v. Brillon*, [129 S. Ct. 1283](#) (2009) (Ginsburg, J.), the Court ruled that just as pre-trial delay caused by retained counsel is charged to a criminal defendant (and not the state), delay caused by a public defender is charged to a defendant for purposes of the Sixth Amendment’s Speedy Trial Clause: “An assigned counsel’s failure ‘to move the case forward’ does not warrant attribution of delay to the State. ... [A]ssigned counsel generally are not state actors for purposes of a speedy-trial claim. While the Vermont Defender General’s office is indeed ‘part of the criminal justice system,’ the individual counsel here acted only on behalf of [the defendant], not the State.” (Citing *Polk County v. Dodson*, [454 U.S. 312](#) (1981)).

Add the following to footnote 39 on page 53:

See also *Borough of Duryea, Pa. v. Guarrieri*, \_\_\_ U.S. \_\_\_ (June 20, 2011) (extending *Garcetti* to cover First Amendment Right to Petition claims by public-sector employees).

## E. Additional Constitutional and Statutory Violations

Add the following to Note 4 on page 71:

The Supreme Court in *Fitzgerald v. Barnstable School Committee*, [555 U.S. 246](#) (2009) (Alito, J.), unanimously ruled that “Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.” The Court explained:

In determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, we have placed primary emphasis on the nature and extent of that statute's remedial scheme.

[Title IX's] only express enforcement mechanism ... is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance. In addition, this Court has recognized an implied private right of action. In a suit brought pursuant to this private right, both injunctive relief and damages are available.

These remedies—withdrawal of federal funds and an implied cause of action—stand in stark contrast to the “unusually elaborate,” “carefully tailored,” and “restrictive” enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*. Unlike those statutes, Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court, and can obtain the full range of remedies. As a result, parallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies.

Title IX contains no express private remedy, much less a more restrictive one. This Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation. Mindful that we should “not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,” we see no basis for doing so here.

A comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause lends further support to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others.

Title IX reaches institutions and programs that receive federal funds, which may include nonpublic institutions, but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals. The Equal Protection Clause reaches only state

actors, but § 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities.

Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds. For example, Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions; it exempts military service schools and traditionally single-sex public colleges from all of its provisions. Some exempted activities may form the basis of equal protection claims.

Even where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent. For example, a Title IX plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference. A plaintiff stating a similar claim via § 1983 for violation of the Equal Protection Clause by a school district or other municipal entity must show that the harassment was the result of municipal custom, policy, or practice.

Add the following to Note 5 on page 72:

The Court in *Maxwell-Jolly v. Independent Living Center of Southern California, Inc.*, [131 S.Ct. 996](#) (2011), granted review to consider whether the federal Medicaid Act implied a limited cause of action against states under the Supremacy Clause to ensure that they complied with the Medicaid Act's terms.

Add the following to Note 6 on page 72:

The Supreme Court granted review in *Mineci v. Pollard*, No. 1104 (U.S., May 16, 2011), to address: "Whether the Court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, [403 U.S. 388](#) (1971), against individual employees of private companies that contract with the Federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government." A divided Ninth Circuit panel ruled that the private prison guards acted under color of federal law and that an implied *Bivens* action was therefore proper. See [629 F.3d 843](#) (9th Cir. 2010).

Add the following new Note to page 73:

**7. Using § 1983 to Enforce Treaties.** Can § 1983 plaintiffs use treaties and executive agreements as their federally protected rights? The Seventh Circuit in *Jogi v. Voges*, [480 F.3d 822](#) (7<sup>th</sup> Cir. 2007), ruled they can. For an exhaustive analysis of the problem, see John T. Parry, *A Primer on Treaties and § 1983 After Medellin v. Texas*, [13 LEWIS & CLARK L. REV. 35](#) (2009). Professor Barry observes that although § 1983's "relationship to treaties is murky," *id.* at 43, and "[r]ecent cases are few in which plaintiffs have relied on § 1983 to bring treaty claims," *id.* at 45, "treaty rights ought to be part of the mix." *Id.* at 71.

## Chapter 2

### OFFICIAL IMMUNITIES

#### A. Absolute Immunity

##### [1] Legislative Immunity

Add the following to Note 1 on page 78:

For a historical analysis concluding that the creation of immunities was a congressional function in the nineteenth century, rather than a judicial one, see James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, [85 N.Y.U. L. REV. 1862](#) (2010).

Add the following to Note 3 on page 80:

Federal criminal charges stemming from alleged bribery schemes were filed against Congressman William J. Jefferson, the search of whose office was at issue in *United States v. Rayburn Office Building*, [497 F.3d 654](#) (D.C. Cir. 2007). The Fourth Circuit affirmed the trial court's refusal to dismiss the indictment, rejecting Jefferson's argument that evidence of his legislative acts was improperly presented to the grand jury in violation of the Speech or Debate Clause. See *United States v. Jefferson*, [546 F.3d 300](#) (4th Cir. 2008). The Court of Appeals noted that the District Court conducted an in camera review of grand jury materials even though "the controlling authorities did not compel such a comprehensive review," and properly concluded that "the grand jury had not considered any Speech or Debate Clause material." *Id.* at [314](#). Jefferson won a primary runoff election in November of 2008, but was defeated in the general election the following month. In August of 2009, after five days of deliberation, a jury convicted him on multiple counts of bribery, racketeering, and money laundering, and he received a thirteen-year prison sentence. Jefferson is appealing the conviction.

In *United States v. Renzi*, — F.3d — (9th Cir. June 23, 2011), the Ninth Circuit disagreed with the D.C. Circuit's reasoning in *Rayburn Office Building* and concluded that the Speech or Debate Clause "does not blindly preclude disclosure and review by the Executive of documentary 'legislative act' evidence" in connection with a permissible criminal investigation of unprotected activity. The Ninth Circuit therefore rejected the claim of Richard G. Renzi, another former Congressman facing criminal charges, that he was entitled to a "hearing to determine whether the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence and whether the Government can prove its case with evidence derived from legitimate independent sources."

### [3] Prosecutorial Immunity

Add the following to the fifth paragraph in Note 2 on page 98:

A unanimous Supreme Court reversed the Ninth Circuit in *Van de Kamp v. Goldstein*, [129 S. Ct. 855](#) (2009), concluding that a district attorney and his chief deputy were entitled to absolute immunity in connection with claims that they failed to adequately train and supervise their subordinates to ensure they were complying with the constitutional obligation to disclose exculpatory material to criminal defendants. Although the Supreme Court agreed that the plaintiff was challenging “the office’s administrative procedures,” the suit involved an “administrative obligation ... directly connected with the conduct of a trial,” as opposed to “workplace hiring, payroll administration, the maintenance of physical facilities, and the like.” [Id. at 861-62](#). “The management tasks,” the Court continued, “insofar as they are relevant, concern how and when to make impeachment information available at a trial [and] are thereby directly connected with the prosecutor’s basic trial advocacy duties.” [Id. at 863](#). The Court thus analogized the plaintiff’s claim to a suit filed against supervisory prosecutors alleging that “they should have found and turned over the impeachment material,” actions that clearly would have been entitled to absolute immunity. [Id. at 862](#). “[B]ecause better training or supervision might prevent most, if not all, prosecutorial errors at trial,” the Court explained, “the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*.” [Id. at 863](#).

Continuing in this vein in *Connick v. Thompson*, [131 S. Ct. 1350](#) (2011), the Court rejected a former death row prisoner’s attempt to sue a prosecutor in his official capacity for failing to adequately train the lawyers in his office on the constitutional rules mandating the disclosure of exculpatory evidence to the defense. This opinion is excerpted below in the material supplementing page 242 of the casebook.

In a very highly publicized opinion, the Ninth Circuit held that former Attorney General John Ashcroft was not entitled to absolute immunity in a case alleging that the plaintiff was detained in violation of the Fourth Amendment pursuant to Ashcroft’s policy of misusing the federal material witness statute “to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further.” *al-Kidd v. Ashcroft*, [580 F.3d 949, 954](#) (9th Cir. 2009). A prosecutor who “seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another’s trial” is acting in an investigative capacity, the court concluded, and therefore cannot claim absolute prosecutorial immunity. [Id. at 963](#). As described below in the material supplementing page 122, the Supreme Court concluded that Ashcroft was entitled to qualified immunity in this case, refusing to reach the “more difficult” question of absolute immunity. *Ashcroft v. al-Kidd*, [131 S. Ct. 2074](#) (2011).

Add the following to the end of Note 2 on page 98:

The section 1983 suit filed by three Duke lacrosse players also named as defendants Duke University, the City of Durham, and various university and city officials. The District Court recently ruled on the defendants' motions to dismiss in *McFadyen v. Duke University*, [2011 U.S. Dist. Lexis 34839](#) (M.D.N.C. Mar. 31, 2011). Although the court criticized the plaintiffs' complaint, consisting of 428 pages and 1,388 numbered paragraphs, as "exceeding all reasonable bounds" in its length, "dramatic rhetoric and sweeping accusations," it refused to dismiss a number of the plaintiffs' section 1983 claims, asserting Fourth Amendment violations and false public statements, as well as some common law claims. The opinion did not address the claims against Nifong, however, because he filed no response in the case. The court directed the plaintiffs to "address[] Nifong's status as a Defendant" if they intended to pursue their claims against him, including the relevance of his filing for bankruptcy.

Add the following to the third paragraph in Note 5 on page 99:

The Court has agreed to resolve the conflict among the lower courts on the question whether absolute immunity protects a government official who acts as a complaining witness and commits perjury while testifying in a grand jury or other judicial proceeding. *See Rehberg v. Paulk*, No. 10-788 (cert. granted, Mar. 21, 2011).

## **B. Qualified Immunity**

Add the following to Note 6 following *Harlow v. Fitzgerald* on page 107:

Recent empirical scholarship has documented how frequently section 1983 claims are dismissed on qualified immunity grounds. *See* Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, [36 PEPP. L. REV. 667, 692](#) (2009) (finding, in random sample of qualified immunity opinions decided by federal courts between 1988 and 2006, that immunity was denied in only about 20% to 30% of the cases); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, [62 STAN. L. REV. 523, 546](#) (2010) (reporting that qualified immunity was denied in about one-third of random sample of nine hundred § 1983 decisions issued by the federal appellate courts between 1976 and 2006). *But cf.* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, [62 STAN. L. REV. 809, 845](#) (2010) (finding that only two percent of the *Bivens*-claim dismissals in five federal districts between 2001 and 2003 were due to qualified immunity).

Add the following to Note 8 following *Harlow v. Fitzgerald* on page 108:

To no one's surprise, the Supreme Court unanimously reversed *Saucier* in *Pearson v. Callahan*, [129 S. Ct. 808](#) (2009). The Justices pointed to "a considerable body of new experience" that led them to conclude that "a mandatory, two-step rule for resolving all qualified immunity claims should not be retained." *Id.* at 817. Admonishing that "the sequence set forth [in *Saucier*] is often appropriate," the Court nevertheless thought that it "should no longer be regarded as mandatory." *Id.* at 818. Rather, the Court instructed the lower courts to "exercise

their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Id.* See also *Amnesty International v. Battle*, [559 F.3d 1170, 1181](#) (11th Cir. 2009) (“Although this two-step inquiry is no longer mandatory, we think it remains appropriate in this case.”).

In *Camreta v. Greene*, [131 S. Ct. 2020](#) (2011), the Court held that it had jurisdiction to consider cert petitions filed by government officials who had been granted qualified immunity by the lower courts despite a finding that their conduct violated constitutional norms. In order to satisfy Article III’s case or controversy requirement, Justice Kagan’s majority opinion made clear, both parties must have a stake in the outcome “not only at the outset of litigation, but throughout its course.” But “[s]o long as the litigants possess the personal stake,” the Court concluded, “an appeal presents a case or controversy, no matter that the appealing party was the prevailing party below.” The Court predicted that “[t]his Article III standard often will be met” in qualified immunity cases like *Camreta*. The lower court’s substantive constitutional decision will have a “prospective effect” on a defendant who “regularly engages in that conduct as part of his job.” In addition, a plaintiff who “may again be subject to the challenged conduct ... has a stake in preserving the court’s holding.” On the facts before it, however, the Court dismissed the case as moot because the plaintiff, a suspected victim of child sexual abuse who argued that her Fourth Amendment rights were violated when she was interviewed at school without a warrant or her parents’ consent, “no longer need[ed] protection from the challenged practice” because she had moved to another state and was “only months away from her 18th birthday – and, presumably, from her high school graduation.”

Interestingly, the Court discussed only its “authority to review cases in this procedural posture” and left open whether “an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds.” The Court admonished that “the considerations persuading us to permit review of petitions in this posture may not have the same force as applied to a district court decision” given that “district court decisions – unlike those from the courts of appeals – do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.”

Justice Kennedy, joined by Justice Thomas, dissented, arguing that “[p]arties who have obtained all requested relief may not seek review” in the Supreme Court. The defendants in that case, the dissenters pointed out, were “injured by the decision below to no greater extent than ... hundreds of other government officers who might argue that they too have been affected by the unnecessary statements made by the Court of Appeals.” “If today’s decision proves to be more than an isolated anomaly,” the dissent warned, “the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect.”

The views expressed by the two dissenters received some support from other members of the Court as well. Justices Sotomayor and Breyer concurred in the judgment, agreeing that the case should be dismissed as moot and refusing to take a position on the “difficult” question whether prevailing parties can seek review in the Supreme Court. Justice Scalia concurred in the majority opinion because he thought it “reasonably applies our precedents, strange though they

may be.” But he indicated a willingness to vote to “end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity” if a case should come to the Court properly raising that issue.

By contrast, a forthcoming article suggests that concerns that the Court’s decision in *Pearson v. Callahan* will lead to stagnation in constitutional decisionmaking would be alleviated by allowing plaintiffs to avoid the qualified immunity defense if they agreed to seek only nominal damages. See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, — COLUM. L. REV. — (forthcoming).

Add the following to Note 9 following *Harlow v. Fitzgerald* on page 109:

For a recent illustration of a case raising these issues, see *Bame v. Dillard*, [637 F.3d 380](#) (D.C. Cir. 2011), where the D.C. Circuit dismissed on qualified immunity grounds a suit brought by a group of protestors who were strip searched after being arrested on misdemeanor charges during a demonstration. The Court of Appeals explained that the Supreme Court’s decision in *Bell v. Wolfish*, [441 U.S. 520](#) (1979), was the “governing precedent..., then, as it is now,” and “nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility.” [637 F.3d at 386](#). Despite the fact that at the time of the plaintiffs’ arrest in 2002, ten courts of appeals had refused to approve “a blanket policy of strip searching all pretrial detainees,” but instead allowed such searches “only where objective circumstances indicated they were needed to maintain institutional security,” [id. at 391 \(Rogers, J., dissenting\)](#), the majority responded that “[w]e are aware of no Supreme Court case ... that suggests a reasonable officer could not have believed his actions were lawful despite a consensus among the courts of appeals when a precedent of the Supreme Court supports the lawfulness of his conduct.” [637 F.3d at 386](#).

Add the following to Note 2 following *Hope v. Pelzer* on page 122:

*Pearson v. Callahan*. The Supreme Court unanimously concluded that police officers were entitled to qualified immunity when they made a warrantless entry into a home after receiving a signal from an undercover informant that he had just purchased drugs in the house. See *Pearson v. Callahan*, [129 S. Ct. 808](#) (2009). In defending their action, the defendants relied on the “consent-once-removed” doctrine, which “permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.” [Id. at 814](#). Finding that the police had not violated clearly established law, the Supreme Court reasoned that “the ‘consent-once-removed’ doctrine had gained acceptance in the lower courts,” having been approved by three federal courts of appeals and two state supreme courts “starting in the early 1980’s.” [Id. at 822](#). The Court also relied on a federal appellate court opinion decided after the entry in question, noting that “prior to the Tenth Circuit’s decision in the present case, no court of appeals had issued a contrary decision.” [Id. at 823](#). The Supreme Court therefore thought that the police were “entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on ‘consent-once-removed’ entries,” concluding that “where the divergence of views on the

consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.” *Id.*

*Safford Unified School District v. Redding.* The plaintiff’s thirteen-year-old daughter was subjected to a strip search by school officials after another student reported that the girl had given her prescription-strength and over-the-counter pain relievers that were banned by school rules. In an opinion written by Justice Souter, eight Justices (all but Justice Thomas) took the position that although the defendants were entitled to search the girl’s backpack and outer clothing, they acted in violation of the Fourth Amendment by requiring her to remove her clothes and pull out and shake her bra and underwear. *See Safford Unified School District v. Redding*, [129 S. Ct. 2633](#) (2009). The majority went on to hold, however, that the school officials were entitled to qualified immunity given disagreements that had arisen among the lower courts in other strip search cases applying the Supreme Court’s holding in *New Jersey v. T.L.O.*, [469 U.S. 325, 342](#) (1985), that school officials should “limit the intrusiveness of a search, ‘in light of the age and sex of the student and the nature of the infraction.’” The *Safford* majority did not “suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law” and warned that “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.” Nevertheless, the Court thought that the “differences of opinion” here were “substantial enough to require immunity,” given that “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.”

Justices Stevens and Ginsburg dissented on the qualified immunity issue. They argued that “the clarity of a well-established right should not depend on whether jurists have misread our precedents.” These two Justices acknowledged that prior Supreme Court decisions (including *Pearson v. Callahan*) “noted the ‘divergence of views’ among courts in deciding whether to extend qualified immunity,” but distinguished those as cases where the Court “relied on that consideration only to spare officials from having ‘to predict the future course of constitutional law,’” and not, as in this case, where the Court merely applied existing precedent and “chart[ed] no new constitutional path.”

*Ashcroft v. al-Kidd.* The plaintiff, a Muslim American, alleged that he was improperly arrested as a material witness in the wake of September 11 pursuant to policies put in place by former Attorney General John Ashcroft. Specifically, al-Kidd claimed that he was detained for sixteen days and then placed on supervised release for another fourteen months, even though federal officials never intended to call him as a witness but instead suspected that he was involved in terrorist activities but lacked the probable cause necessary to arrest him. In addition to ruling against al-Kidd on the merits of his Fourth Amendment claim, the five Justices in the majority, in an opinion written by Justice Scalia, went on to decide that the Attorney General was entitled to qualified immunity. *See Ashcroft v. al-Kidd*, [131 S. Ct. 2074](#) (2011). The majority reasoned that at the time of al-Kidd’s arrest, only “[a] district-court opinion..., in a footnoted dictum devoid of supporting citation,” had questioned the legality of “using [a material witness] warrant for preventive detention of suspects.” *Id.* (citing *United States v. Awadallah*, [202 F.](#)

[Supp. 2d 55, 77 n.28](#) (S.D.N.Y. 2002)). “Even a district judge’s *ipse dixit* of a holding is not ‘controlling authority’ in any jurisdiction,” the majority noted, “much less in the entire United States.” And “his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust ‘consensus of cases of persuasive authority.’” *Id.* (quoting *Wilson v. Layne*, [526 U. S. 603, 617](#) (1999)). The Court also thought it significant that “eight Court of Appeals judges agreed with [Ashcroft’s] judgment in a case of first impression,” referring to the fact that eight Ninth Circuit judges dissented from the denial of rehearing en banc in al-Kidd’s case.

Justice Kennedy filed a separate concurring opinion, observing that “[t]he fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case.” Unlike officials working in only one federal judicial district, who “are expected to adjust their behavior in accordance with local precedent,” Justice Kennedy explained, officials like the Attorney General “with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law.” In such situations, he continued, high-ranking federal officials “need not abide by the most stringent standard adopted anywhere in the United States.” Rather, they “should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken.” Justice Kennedy suggested that his views would be the same even in the face of circuit court case law favoring the plaintiff because a “national officeholder” should not have to “guess at when a relatively small set of appellate precedents have established a binding legal rule.” “If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts,” Justice Kennedy feared, they “would be deterred from full use of their legal authority,” a result he found especially troubling “in the area of national security.”

All eight of the Justices participating in the case agreed that Ashcroft was entitled to qualified immunity (Justice Kagan took no part in the decision). But four of them joined the portion of Justice Kennedy’s concurrence pointing out that the majority’s opinion on the merits was limited to holding that an alleged pretextual motive did not undermine the legality of al-Kidd’s arrest as a material witness and left open the more difficult question “when material witness arrests might be consistent with statutory and constitutional requirements” and even “whether the Government’s use of the Material Witness Statute in this case was lawful.”

*Greene v. Fisher.* The Supreme Court has agreed to consider the definition of “clearly established” law in the context of habeas petitions governed by the Antiterrorism and Effective Death Penalty Act, in particular whether there is a “temporal cutoff” in ascertaining whether a Supreme Court decision articulates clearly established law under that statute. *See Greene v. Fisher*, No. 10-637 (cert. granted, Apr. 4, 2011).

*Messerschmidt v. Millender.* The Supreme Court has also agreed to consider whether qualified immunity was properly denied to law enforcement officials who obtained a search warrant for the home of a man with suspected gang ties who threatened his girlfriend with a black sawed-off shotgun. Although the Ninth Circuit concluded that there was probable cause to

search for that particular weapon, they thought that a warrant authorizing a general search for any weapon or evidence of gang-related activity was so overbroad and lacking in probable cause that a reasonable officer could not rely on it. *See Millender v. County of Los Angeles*, [620 F.3d 1016](#) (9th Cir. 2010) (en banc). One of the questions on which the Supreme Court granted certiorari is whether its decision in *Malley v. Briggs*, [475 U.S. 335](#) (1986) (described in Note 9 on page 109 of the casebook), should be reconsidered. *See Messerschmidt v. Millender*, No. 10-704 (cert. granted, June 27, 2011).

Add the following to Note 4 following *Hope v. Pelzer* on page 124:

In *Ortiz v. Jordan*, [131 S. Ct. 884](#) (2011), the Supreme Court observed that “[a] qualified immunity defense, of course, does not vanish when a district court declines to rule on the plea summarily.” Rather, “[t]he plea remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court.”

Add the following to the end of Note 5 following *Hope v. Pelzer* on page 130:

In *Robinson v. Lehman*, [552 U.S. 1172](#) (2008), the Supreme Court vacated for reconsideration in light of *Scott v. Harris*, [550 U.S. 372](#) (2007), an interlocutory Ninth Circuit decision denying qualified immunity to police officers who killed a fleeing motorist. The Ninth Circuit reached the same conclusion on remand, explaining that the video in that case “does not clearly contradict the version of events recounted by the plaintiffs.” *Lehman v. Robinson*, 346 F. App’x 188, 188 (9th Cir. 2009).

In *Ashcroft v. Iqbal*, [129 S. Ct. 1937](#) (2009), the Court held that a District Court decision denying the defendants’ motion to dismiss “turned on an issue of law and rejected the defense of qualified immunity,” and was therefore immediately appealable. The Supreme Court rejected the plaintiff’s contention that “‘a qualified immunity appeal based solely on the complaint’s failure to state a claim’”—rather than on the “‘ultimate’” qualified immunity issue whether the acts allegedly committed by the defendants constituted a violation of clearly established law—“‘is not a proper subject of interlocutory jurisdiction.’” “[A]ppellate jurisdiction is not so strictly confined,” the Court concluded.

The Court went on to distinguish its previous decision in *Johnson v. Jones*, [515 U.S. 304](#) (1995), noting that “[t]he concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings.” Although the *Iqbal* Court acknowledged that “the categories of ‘fact-based’ and ‘abstract’ legal questions used to guide the Court’s decision in *Johnson* are not well defined,” it thought that the decision to deny the defendants’ motion to dismiss “falls well within the latter class.” The Court reasoned that the case required an appellate court to “consider[] only the allegations contained within the four corners of [the plaintiff’s] complaint,” and that the decision whether a complaint “has the ‘heft’ to state a claim is a task well within an appellate court’s core competency.” “Evaluating the sufficiency of a complaint is not a ‘fact-based’ question of law,”

the *Iqbal* Court concluded, and therefore “the problem the Court sought to avoid in *Johnson* is not implicated here.” For a critical analysis of *Iqbal*, which predicts that the Court’s decision will “encourage more interlocutory fact-finding on appeal,” see Mark R. Brown, *Qualified Immunity and Interlocutory Fact-finding in the Courts of Appeals*, [114 PENN. ST. L. REV. 1317, 1332](#) (2010).

In *Ortiz v. Jordan*, [131 S. Ct. 884](#) (2011), the Supreme Court held that defendants who did not file an interlocutory appeal challenging the denial of qualified immunity on summary judgment could not resurrect the immunity defense in appealing the jury’s verdict. The Court left open, however, whether “[a] qualified immunity plea raising an issue of a ‘purely legal nature’ ... is preserved for appeal by an unsuccessful motion for summary judgment” even if it is not raised again after trial in a motion contesting the sufficiency of the evidence to support the jury’s verdict under Rule 50(b) of the Federal Rules of Civil Procedure. [Id. at 892](#). In this case, the Court explained, the qualified immunity defense did “not present ‘neat abstract issues of law’” because “[w]hat was controverted were the facts that could render [the defendants] answerable for crossing a constitutional line.” [Id. at 893](#).

## Chapter 3

### SOVEREIGN IMMUNITY

#### **B. Prospective Injunction Suits Filed Against State Officials**

Add the following to Note 1 on page 153:

In *Virginia Office for Protection & Advocacy v. Stewart*, [131 S. Ct. 1632](#) (2011), the Supreme Court held that an *Ex parte Young* suit against state officials seeking prospective injunctive relief may be brought by another agency of the same state and not just a private plaintiff.

#### **C. Waiver and Abrogation**

Add the following to Note 4 following *Atascadero State Hospital v. Scanlon* on page 163:

The Supreme Court held in *Sossamon v. Texas*, [131 S. Ct. 1651](#) (2011), that the Eleventh Amendment bars damages actions brought against a state under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), [42 U.S.C. § 2000cc](#). The plaintiff in the case, a Texas prisoner, alleged that he was denied access to the prison chapel for purposes of religious worship and was also prohibited from attending religious services while he was on cell restriction for disciplinary violations. The Court, in an opinion written by Justice Thomas, concluded that the states did not “unequivocally express[] intent to waive their sovereign immunity to suits for damages” by accepting federal funding under RLUIPA. Although the statute creates an express private cause of action for “appropriate relief against a government,” [42 U.S.C. § 2000cc-2\(a\)](#), the Court reasoned that the term “appropriate relief” is “open-ended and ambiguous about what types of relief it includes.” Moreover, the Court thought that the word “appropriate” is “inherently context-dependent,” and “[t]he context here – where the defendant is a sovereign – suggests, if anything, that monetary damages are not ‘suitable’ or ‘proper.’” Justice Sotomayor, joined by Justice Breyer, dissented, finding it “self-evident” that damages were included in the term “appropriate relief” given that “[u]nder general remedies principles, the usual remedy for a violation of a legal right is damages.”

Add the following to Note 7 following *Quern v. Jordan* on page 177:

In *Northwest Austin Municipal Utility District No. 1 v. Holder*, [129 S. Ct. 2504](#) (2009), a question arose concerning the constitutionality of the provision in Section 5 of the Voting Rights Act of 1965 requiring federal preclearance of any change in any election held in a state covered by the Act. The majority opinion, written by Chief Justice Roberts, ultimately side-stepped the constitutional issue, reasoning that the case could be resolved on statutory grounds. Specifically, the Court interpreted the statute so as to allow the plaintiff utility district to seek to avoid the preclearance requirement by filing a bailout suit under Section 4(b) of the Act. Before doing so,

however, the majority opinion cast doubt on the constitutionality of the preclearance requirement, noting that “Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities” even if “there has never been any evidence of racial discrimination in voting in the district.” The Court also observed that “conditions ... have substantially improved” since the Act was passed, that “[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance,” and that “there is considerable evidence that it fails to account for current political conditions.” Justice Thomas, writing alone, agreed with the Court’s statutory analysis, but would have gone on to reach the constitutional question and strike down the preclearance provision. “Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose,” Justice Thomas wrote.

The Supreme Court has agreed to consider whether Congress exceeded its constitutional power in abrogating the states’ Eleventh Amendment immunity in the self-care leave provision of the Family and Medical Leave Act of 1993, [29 U.S.C. § 2612\(a\)\(1\)\(D\)](#), which allows employees to take unpaid leave to care for their own serious health problems. See *Coleman v. Maryland Court of Appeals*, No. 10-1016 (cert. granted, June 27, 2011). In finding the provision unconstitutional, the Fourth Circuit distinguished the Supreme Court’s opinion in *Nevada Department of Human Resources v. Hibbs*, [538 U.S. 721](#) (2003) (described in Note 7 on page 178 of the casebook), on the grounds that “preventing gender discrimination was not a significant motivation” for the self-care portion of the Act. *Coleman v. Maryland Court of Appeals*, [626 F.3d 187, 193](#) (4th Cir. 2010).

## Chapter 4

### LOCAL LIABILITY

#### A. Historical Antecedents

Replace Note 2 on page 190:

Prior to *Monell*, lower courts sometimes solved the dilemma described by Justice Powell by allowing "official capacity" claims for injunctive relief against local authorities. Building on this logic, the Ninth Circuit in a series of opinions concluded that *Monell's* "policy or custom" requirement did not apply to § 1983 actions against local governments seeking only prospective relief. It was sufficient, according to the Ninth Circuit, to show the municipality caused the constitutional violation within the meaning of Article III. The Supreme Court in *Los Angeles County v. Humphries*, [131 S. Ct. 447](#) (2010), where parents challenged their inclusion in California's child abuse index, unanimously rejected this approach. Justice Breyer wrote for the Court:

The two plaintiffs in this case were initially accused of child abuse. But they were later exonerated. ... [T]hey filed this § 1983 case against the attorney general of California, the Los Angeles County sheriff, two detectives in the sheriff's department, and the County of Los Angeles. They sought damages, an injunction, and a declaration that the defendants had deprived them of their constitutional rights by failing to create a procedural mechanism through which one could contest inclusion on the Index.

The Ninth Circuit held that ... the plaintiffs were entitled to declaratory relief, and it believed that (on remand) they might prove damages as well. The Ninth Circuit also held that the plaintiffs were prevailing parties, thereby entitled to approximately \$600,000 in attorney's fees. [*See* Chapter 9, *infra*.] The Ninth Circuit wrote that Los Angeles County must pay approximately \$60,000 of this amount.

The Court [in *Monell*] ... concluded that a municipality could not be held liable under § 1983 solely because it employed a tortfeasor. ... For these reasons, the Court concluded that a municipality could be held liable under § 1983. ... The Court has also included the terms "usage" and "practice" as customs for which liability is appropriate. The length of this list of types of municipal action leads us here to use a shorthand term "policy or custom," but when we do so, we mean to refer to the entire list.

The language of § 1983 read in light of *Monell's* understanding of the legislative history explains why claims for prospective relief, like claims for money damages, fall within the scope of the "policy or custom" requirement. Nothing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought. *Monell* went on to quote this Court's statement in a 1973 case, *Kenosha v. Bruno*, [412 U.S. 507, 513](#), to the effect that the Congress that enacted § 1983 did not intend the "generic word "person" ... to

*have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.’ ” ([E]mphasis added). Monell added that “[n]othing we say today affects” this pre-Monell conclusion.”*

[The plaintiffs argue] that not only did *Monell* involve a damages claim, but its holding rests upon the concern that municipalities might have to pay large damages awards. ... But as we have pointed out, the Court's rejection of *respondeat superior* liability primarily rested not on the municipality's economic needs, but on the fact that liability in such a case does not arise out of the municipality's own wrongful conduct.

[They] further claim that, where prospective relief is at issue, *Monell* is redundant. They say that a court cannot grant prospective relief against a municipality unless the municipality's own conduct has caused the violation. Hence, where such relief is otherwise proper, the *Monell* requirement “shouldn't screen out any case.”

To argue that a requirement is necessarily satisfied, however, is not to argue that its satisfaction is unnecessary. If respondents are right, our holding may have limited practical significance. But that possibility does not provide us with a convincing reason to sow confusion by adopting a bifurcated relief-based approach to municipal liability that the Court has previously rejected.

[W]e hold that *Monell*'s “policy or custom” requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective.

The plaintiffs in *Humphries* named the county as a defendant. Does Justice Breyer's reasoning also apply to *Ex parte Young*-type actions, see Chapter 3.B., *supra*, filed against local officials? Does *Humphries* hold that *Monell* replaces *Ex parte Young* in the context of local government? Cf. *Brandon v. Holt*, [469 U.S. 464](#) (1985) (“official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent”).

Replace Note 7 on page 194:

**7. Supervisory Liability.** In *Ashcroft v. Iqbal*, [129 S. Ct. 1937](#) (2009), a Muslim Pakistani pretrial detainee (Iqbal) argued that high-ranking officials in the Bush Administration were responsible for racial, religious and ethnic discrimination in causing persons of “high interest” to be illegally detained following the September 11 terrorist attacks. Iqbal argued that “under a theory of ‘supervisory liability,’ [the officials] can be liable for ‘knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.’ That is to say, [Iqbal] believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.” *Id.* at 1949. The Supreme Court in a 5-to-4 opinion, written by Justice Kennedy, “reject[ed] this argument.” Iqbal’s “conception of supervisory liability,” Justice Kennedy ruled, “is inconsistent with his accurate stipulation that [government officials] may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term ‘supervisory liability’ is a misnomer. Absent vicarious liability, each

Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.”

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented. Justice Souter complained that the majority ignored the government’s concession that supervisory liability based on a supervisor’s knowledge of a subordinate’s wrongdoing was proper, and that the majority’s logic was faulty:

The dangers of the majority’s readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which “an employer is subject to liability for torts committed by employees while acting within the scope of their employment,” or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.

In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate’s constitutional violation and acquiesces, or where supervisors “know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,” or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, or where the supervisor was grossly negligent. I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.

[Id. at 1958 \(Souter, J., dissenting\) \(citations omitted\).](#)

The federal courts have come to varying conclusions concerning the reach of the Supreme Court’s decision in *Iqbal*. Compare *Starr v. Baca*, [633 F.3d 1191, 1196](#) (9th Cir. 2011) (interpreting *Iqbal* and ruling that “where the applicable constitutional standard is deliberate indifference, a plaintiff may state a claim for supervisory liability based upon the supervisor’s knowledge of and acquiescence in unconstitutional conduct by others”), and *Sandra T.E. v. Grindle*, [599 F.3d 583, 590](#) (7th Cir. 2010) (concluding that plaintiffs who alleged that school principal “actively conceal[ed] reports of [child sexual] abuse and creat[ed] an atmosphere that allowed abuse to flourish” were “seek[ing] to do no more than hold [the principal] liable ‘for ... her own misconduct,’” and thus “their substantive due process theory is not foreclosed by *Iqbal*”), with *Maldonado v. Fontanes*, [568 F.3d 263, 275 n.7](#) (1st Cir. 2009) (cautioning that *Iqbal* “may call into question” the doctrine of supervisory liability applied by the lower courts). Moreover, some constitutional tort plaintiffs have survived motions to dismiss filed by supervisory officials in the wake of *Iqbal*. See *al-Kidd v. Ashcroft*, [580 F.3d 949, 975-76](#) (9th Cir. 2009) (reasoning that the complaint sufficiently alleged facts to support both the theory that

former Attorney General John Ashcroft “knowing[ly] fail[ed] to act in the light of even unauthorized abuses” and that he “purposely used the material witness statute to preventatively detain suspects”), *rev’d on other grounds*, [131 S. Ct. 2074](#) (2011); *Padilla v. Yoo*, [633 F. Supp. 2d 1005, 1034](#) (N.D. Cal. 2009) (distinguishing *Iqbal* on the grounds that the plaintiff “alleges with specificity that [former Deputy Attorney General John] Yoo was involved” in constitutional wrongdoing—i.e., that he “personally recommended Mr. Padilla’s unlawful military detention as a suspected enemy combatant and then wrote opinions to justify the use of unlawful interrogation methods against persons suspected of being enemy combatants”). For the view that *Iqbal* does not necessarily signal the Supreme Court’s intent to repudiate the doctrine of supervisory liability endorsed by the lower courts, see Kit Kinports, *Iqbal and Supervisory Immunity*, [114 PENN. ST. L. REV. 1291](#) (2010) (pointing out that the Court’s attention was focused on the mental state required to impose liability on a high-ranking government official, that its references to discriminatory purpose and supervisory policy-making were linked to the specific allegations contained in *Iqbal*’s complaint, and that, following the lead of some federal appellate courts, the Court may have assumed that supervisory officials do violate constitutional norms when they act with the state of mind required to violate a particular constitutional provision and fail to adequately supervise the subordinate who inflicted constitutional injury).

## **B. Municipal Immunity**

Add to Note 3 on page 203:

Justice Ginsburg in a dissenting opinion filed in *Herring v. United States*, [555 U.S. 135](#) (2009)—which refused to extend the Fourth Amendment’s exclusionary rule to most governmental record-keeping errors—stated that “by restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves [the defendant], and others like him, with no remedy for violations of their constitutional rights. There can be no serious assertion that relief is available under [42 U.S.C. § 1983](#). The arresting officer would be sheltered by qualified immunity, and the police department itself is not liable for the negligent acts of its employees.” (Citing *Harlow* and *Monell*).

Add the following to Note 4 on page 204:

*See also* Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under § 1983 When Unconstitutional Race- and Sex-Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 GEO. MASON U. CIV. RIGHTS J. 371, 394 (2009) (“By forcing legislators to provide taxpayers with the best municipal services at the most cost-efficient price, ‘constitutional tort damage remedies levied against municipalities do, in fact, alter the behavior of government policymakers in desirable ways.’”).

## C. Ad Hoc Policies

### [1] The Final Authority Analysis

Add the following to Note 4 on page 225:

*See also N.N. v. Madison Metropolitan School District*, [670 F. Supp.2d 927](#) (W.D. Wis. 2009) (applying *Bethesda* to relieve school district for liability for unconstitutional affirmative action policy mandated by state law).

### [2] Deliberate Indifference

Add the following new Note 4 to page 242:

**4. "Obvious" Rights After *Bryan County*.** The Court in *Canton* hypothesized that rights--like the right to be free from deadly force--can be "so obvious" that even a single incident can give rise to municipal liability in the absence of adequate training. Following *Bryan County's* holding that plaintiffs are put to a stringent proof standard, does this possibility survive? Consider the following case.

**CONNICK V. THOMPSON**  
Supreme Court of the United States  
[131 S. Ct. 1350](#) (2011)

JUSTICE THOMAS delivered the opinion of the Court.

[Petitioner, the Orleans Parish District Attorney's Office, failed to disclose a crime lab report to Respondent, Thompson, in violation of *Brady v. Maryland*, [373 U.S. 83](#) (1963). Thompson was convicted of murder. A month before his scheduled execution, the lab report was discovered and a reviewing court vacated Thompson's conviction. Thompson was found not guilty in a retrial on the murder charge. He then filed suit against the district attorney's office under § 1983, alleging that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations.]

Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The

jury awarded Thompson \$14 million in damages, and the District Court added more than \$1 million in attorney's fees and costs.

Connick[, the Orleans Parish District Attorney,] argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different Brady training. We agree.<sup>1</sup>

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution."

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

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<sup>1</sup> [n.5] Because we conclude that Thompson failed to prove deliberate indifference, we need not reach causation. Thus, we do not address whether the alleged training deficiency, or some other cause, was the "moving force," that "actually caused" the failure to disclose the crime lab report. The same cannot be said for the dissent, however. Affirming the verdict in favor of Thompson would require finding both that he proved deliberate indifference and that he proved causation. Perhaps unsurprisingly, the dissent has not conducted the second step of the analysis, which would require showing that the failure to provide particular training (which the dissent never clearly identifies) "actually caused" the flagrant—and quite possibly intentional—misconduct that occurred in this case. The dissent believes that evidence that the prosecutors allegedly "misapprehen[ded]" Brady proves causation. Of course, if evidence of a need for training, by itself, were sufficient to prove that the lack of training "actually caused" the violation at issue, no causation requirement would be necessary because every plaintiff who satisfied the deliberate indifference requirement would necessarily satisfy the causation requirement.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations, he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office. Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.

Instead of relying on a pattern of similar *Brady* violations, Thompson relies on the “single-incident” liability that this Court hypothesized in *Canton*. He contends that the *Brady* violation in his case was the “obvious” consequence of failing to provide specific *Brady* training, and that this showing of “obviousness” can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal “[t]raining is what differentiates attorneys from average public employees.”

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. ... Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education.

Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

In addition to these ethical rules, the Louisiana Code of Criminal Procedure, with which Louisiana prosecutors are no doubt familiar, in 1985 required prosecutors, upon order of the court, to permit inspection of evidence “favorable to the defendant ... which [is] material and relevant to the issue of guilt or punishment,” as well as “any results or reports” of “scientific tests or experiments, made in connection with or material to the particular case” if those reports are exculpatory or intended for use at trial.

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the “obvious consequence” of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in “the usual and recurring situations with which [the prosecutors] must deal.” A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same “highly predictable” constitutional danger as *Canton's* untrained officer.

A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule. Thompson's complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here.

Thompson suggests that the absence of any formal training sessions about *Brady* is equivalent to the complete absence of legal training that the Court imagined in *Canton*. But failure-to-train liability is concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts carte blanche to micromanage local governments throughout the United States.

The dissent rejects our holding that *Canton's* hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their *Brady* obligation. It would instead apply the *Canton* hypothetical to this case, and thus devotes almost all of its opinion to explaining why the evidence supports liability under that theory. But the dissent's attempt to address our holding—by pointing out that not all prosecutors will necessarily have enrolled in criminal procedure class—misses the point. The reason why the *Canton* hypothetical is inapplicable is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles.

By the end of its opinion, however, the dissent finally reveals that its real disagreement is not with our holding today, but with this Court's precedent. The dissent does not see “any reason” for the Court's conclusion in *Bryan County* that a pattern of violations is “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train. As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents “difficult problems of proof,” and we must adhere to a “stringent standard of fault,” lest municipal liability under § 1983 collapse into respondeat superior.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to “a decision by the city itself to violate the Constitution.” To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was “highly predictable” that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants' *Brady* rights. He did not do so.

We conclude that this case does not fall within the narrow range of “single-incident” liability hypothesized in *Canton* as a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train.

JUSTICE SCALIA, with whom JUSTICE ALITO joins, concurring:

[T]o recover from a municipality under [42 U.S.C. § 1983](#), a plaintiff must satisfy a “rigorous” standard of causation; he must “demonstrate a direct causal link between the municipal action and the deprivation of federal rights.” Thompson cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan's colleague Michael Riehlmann, in 1994 Deegan confessed to him—in the same conversation in which Deegan revealed he had only a few months to live—that he had “suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant.” I have no reason to disbelieve that account, particularly since Riehlmann's testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan's misconduct for another five years, as a result of which he incurred professional sanctions.

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Court holds that the Orleans Parish District Attorney's Office (District Attorney's Office or Office) cannot be held liable, in a civil rights action under [42 U.S.C. § 1983](#), for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*'s requirements.

The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

Abundant evidence supported the jury's finding that additional *Brady* training was obviously necessary to ensure that *Brady* violations would not occur: (1) Connick, the Office's sole policymaker, misunderstood *Brady*. (2) Other leaders in the Office, who bore direct responsibility for training less experienced prosecutors, were similarly uninformed about *Brady*. (3) Prosecutors in the Office received no *Brady* training. (4) The Office shirked its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements. As a result of these multiple shortfalls, it was hardly surprising that *Brady* violations in fact occurred, severely undermining the integrity of Thompson's trials.

Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced. Because that did not happen in the District Attorney's Office, it was inevitable that prosecutors would misapprehend *Brady*. Had *Brady's* importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.

The District Court, tracking *Canton's* language, instructed the jury that Thompson could prevail on his “deliberate indifference” claim only if the evidence persuaded the jury on three points. First, Connick “was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused.” Second, “the situation involved a difficult choice[,] or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed.” Third, “the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights.”

In sum, despite Justice Scalia's protestations to the contrary, the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office. Thompson demonstrated that no fewer than five prosecutors ... disregarded his *Brady* rights. He established that they kept from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial.<sup>2</sup>

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<sup>2</sup> [n.20] The jury could draw a direct, causal connection between Connick's deliberate indifference, prosecutors' misapprehension of *Brady*, and the *Brady* violations in Thompson's case. I note, furthermore, that the jury received clear instructions on the causation element, and neither Connick nor the majority disputes the accuracy or adequacy of the instruction that, to prevail, Thompson must prove “that more likely than not the *Brady* material would have been produced if the prosecutors involved in

The Court nevertheless holds *Canton's* example inapposite. It maintains that professional obligations, ethics rules, and training—including on-the-job training—set attorneys apart from other municipal employees, including rookie police officers. Connick “had every incentive at trial to attempt to establish” that he could reasonably rely on the professional education and status of his staff. But the jury heard and rejected his argument to that effect.

The Court advances Connick's argument with greater clarity, but with no greater support. On what basis can one be confident that law schools acquaint students with prosecutors' unique obligation under *Brady*? Whittaker told the jury he did not recall covering *Brady* in his criminal procedure class in law school. Dubelier's *alma mater*, like most other law faculties, does not make criminal procedure a required course.

Connick suggested that the bar examination ensures that new attorneys will know what *Brady* demands. Research indicates, however, that from 1980 to the present, *Brady* questions have not accounted for even 10% of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination. A person sitting for the Louisiana Bar Examination, moreover, need pass only five of the exam's nine sections. One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.

The majority further suggests that a prior pattern of similar violations is necessary to show deliberate indifference to defendants' *Brady* rights. The text of § 1983 contains no such limitation. Nor is there any reason to imply such a limitation. A district attorney's deliberate indifference might be shown in several ways short of a prior pattern.<sup>3</sup> This case is one such instance.

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his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence.” The jury was properly instructed that “[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor.” Under that instruction, in finding Connick liable, the jury necessarily rejected the argument—echoed by Justice Scalia—that Deegan “was the only bad guy.” If indeed Thompson had shown simply and only that Deegan deliberately withheld evidence, I would agree that there would be no basis for liability. But, as reams of evidence showed, disregard of *Brady* occurred, over and over again in Orleans Parish, before, during, and after Thompson's 1985 robbery and murder trials.

<sup>3</sup> [n.27] For example, a prosecutor's office could be deliberately indifferent if it had a longstanding open-file policy, abandoned that policy, but failed to provide training to show prosecutors how to comply with their *Brady* obligations in the altered circumstances. Or a district attorney could be deliberately indifferent if he had a practice of paring well-trained prosecutors with untrained prosecutors, knew that such supervision had stopped untrained prosecutors from committing *Brady* violations, but nevertheless changed the staffing on cases so that untrained prosecutors worked without supervision.

#### **D. Innocent Agents**

Add the following to Note 3 on page 246:

*See also Staub v. Proctor Hospital*, [131 S. Ct. 1186](#) (2011) (holding under the federal Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA), [38 U.S.C. § 4301](#), *et seq.*, that a supervisor's discriminatory animus could be the proximate cause of a subordinate's wrongful discharge even though the actual decisionmaker was innocent of wrongdoing; "it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm").

## Chapter 5

### THE RELATIONSHIP BETWEEN STATE AND FEDERAL LAW IN SECTION 1983 LITIGATION

#### B. Notice-of-Claim Requirements

Add the following to Note 3 on page 276:

In *Haywood v. Drown*, [129 S. Ct. 2108](#) (2009), the Supreme Court struck down a New York statute that barred its state courts from taking jurisdiction of damages claims filed by prisoners against state prison officials. Instead, the statute required that any such suits be brought against the State in the Court of Claims, where no award of injunctive relief, punitive damages, or attorney’s fees was available. Finding the statute violative of the Supremacy Clause, Justice Stevens’ opinion for the five Justices in the majority refused to characterize the law as “a neutral rule of judicial administration” within the meaning of *Howlett v. Rose*, [496 U.S. 356](#) (1990). Rather, the Court observed, the statute was based on the legislature’s “judgment that correction officers should not be burdened with suits for damages” because “it regards these suits as too numerous or too frivolous (or both),” a policy that the Court found “contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages.” The Court also rejected the state court’s view that the statute passed constitutional muster because it did not differentiate between section 1983 and state law causes of action, noting that “[a]lthough the absence of discrimination is necessary to our finding a state law neutral, ... [a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear.” The majority declined to entertain the question whether “Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983,” concluding that the state “made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions.”

In the portion of his opinion joined by the other three dissenters, Justice Thomas took the position that the Supremacy Clause makes “jurisdictional neutrality ... the touchstone”: the Supremacy Clause “does not fossilize the jurisdiction of state courts in their original form,” but rather allows the states to “alter the structure of their judicial system” so long as they do not discriminate against federal causes of action. Writing only for himself, Justice Thomas went further in other portions of the dissent, arguing that the Constitution envisions that states may choose to entertain federal causes of action but may not be required to do so, and that the Supremacy Clause’s “exclusive focus on substantive state law” means that state jurisdictional statutes may discriminate against federal causes of action because “the superiority of federal law as a substantive matter does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal and state-law claims.”

## Chapter 6

### REMEDIES UNDER § 1983

#### C. Prospective Relief Against State and Local Officials

##### [1] Article III Limitations: Standing, Ripeness and Mootness

Add the following to Note 8 on page 340:

The Supreme Court in *Arizona Christian School Tuition Organization v. Winn*, [131 S. Ct. 1436](#) (2011), in an opinion by Justice Kennedy, ruled that state taxpayers challenging tax credits provided to parents who contribute money to school tuition organizations ("STOs"), which then used the contributions to provide scholarships to students attending religious schools, did not have proper "taxpayer standing:"

The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. ... The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*. It follows that respondents have neither alleged an injury for standing purposes under general rules nor met the *Flast* exception.

Furthermore, respondents cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. These considerations prevent any injury the objectors may suffer from being fairly traceable to the government. And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit's operation.

*See also Hibbs v. Winn*, [542 U.S. 88](#) (2004) (excerpted at page 373 in the main text).

Add the following to Note 2 on page 351:

The Supreme Court in *Alvarez v. Smith*, [130 S. Ct. 576](#) (2009) (Breyer, J.), a case involving the constitutionality of Illinois's procedures for challenging forfeitures of property, unanimously concluded following oral argument that the case was moot: "The State has returned all the cars that it seized, and the individual property owners have either forfeited any relevant cash or have accepted as final the State's return of some of it." Notwithstanding that the state was at least partly responsible for mootness, the Court (over Justice Stevens' lone dissent) also vacated the lower court's decision in favor of the plaintiffs: "[T]his case more closely resembles mootness through 'happenstance' than through 'settlement' .... The six individual cases proceeded through a different court system without any procedural link to the federal case before us." It therefore concluded that the "presence of this federal case played no significant role in the termination of the separate state-court proceedings. ... And if the presence of this federal case played no role in causing the termination of those state cases, there is not present here the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur."

The Supreme Court in *Camreta v. Greene*, [131 S. Ct. 2020](#) (2011), which involved a child's (S.G.) challenge to her warrantless seizure by child abuse investigators, concluded the matter was moot by the time it arrived in the Supreme Court: the child was about to turn 18 and had moved to another state. The Court, per Justice Kagan, accordingly dismissed the writ of certiorari and vacated the Ninth Circuit's decision that substantively favored the child: "In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived [the petitioner] of his appeal rights.<sup>4</sup> Mootness has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school."

Add to footnote 57 on page 362:

*See also Wal-Mart Stores, Inc. v. Dukes*, \_\_\_ U.S. \_\_\_ (June 20, 2011) (holding that individual monetary claims cannot be certified under Rule 23(b)(2): "at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. ... [I]t does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.").

## **[2] Statutory Limits on Prospective Relief**

Add the following to footnote 67 on page 375:

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<sup>4</sup> The Court also concluded that a government official who prevails in the Court of Appeals on qualified immunity grounds can ordinarily appeal to the Supreme Court to challenge an adverse decision on the constitutionality of his or her conduct. *See* Chapter 2.B., *supra*.

The Supreme Court in *Arizona Christian School Tuition Organization v. Winn*, [131 S. Ct. 1436](#) (2011), ruled state taxpayers pressing an Establishment Clause challenge to Arizona’s tax-credit program for contributions to “school tuition organizations” did not possess “taxpayer standing.” See Section 6.C., *supra*.

Add the following principal case after Note 2 on page 378:

In footnote 9 to its opinion in *Hibbs v. Winn*, the Supreme Court added that “it has relied upon ‘principles of comity’ to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.” The Court’s footnote referred to *Fair Assessment in Real Estate Ass’n v. McNary*, [454 U.S. 100](#) (1981) (discussed on page 373 n.65 in the main text), which held that federal principles of comity prohibit federal courts from ordering refunds of state and local taxes. Lower courts, including the Sixth Circuit, read this to mean that principles of comity work in lock-step with the Tax Injunction Act. To the extent *Hibbs* authorized prospective relief against state tax laws, comity principles were not offended by allowing the same. The following case addresses this apparent misunderstanding.

**LEVIN v. COMMERCE ENERGY, INC.**

Supreme Court of the United States

[130 S. Ct. 2323](#) (2010)

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents the question whether a federal district court may entertain a complaint of allegedly discriminatory state taxation, framed as a request to increase a commercial competitor’s tax burden. Relevant to our inquiry is the Tax Injunction Act (TIA or Act) ... More embracing than the TIA, the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration. See *Fair Assessment in Real Estate v. McNary*, [454 U.S. 100](#) (1981). The comity doctrine, we hold, requires that a claim of the kind here presented proceed originally in state court. In so ruling, we distinguish *Hibbs v. Winn*, in which the Court held that neither the TIA nor the comity doctrine barred a federal district court from adjudicating an Establishment Clause challenge to a state tax credit that allegedly funneled public funds to parochial schools.

Historically, all natural gas consumers in Ohio purchased gas from the public utility, known as a local distribution company (LDC), serving their geographic area. ... Today, consumers in Ohio’s major metropolitan areas can alternatively contract with an independent marketer (IM) that competes with LDCs for retail sales of natural gas. IMs do not own or operate distribution pipelines; they use LDCs’ pipelines. When a customer goes with an IM, therefore, she purchases two “unbundled” products: gas (from the IM) and delivery (from the LDC).

Ohio treats LDCs and IMs differently for tax purposes. Relevant here, Ohio affords LDCs three tax exemptions that IMs do not receive. Commerce Energy, Inc., a California corporation, and

Interstate Gas Supply, Inc., an Ohio company, are IMs that market and sell natural gas to Ohio consumers. ... Alleging discriminatory taxation of IMs and their patrons in violation of the Commerce and Equal Protection Clauses, [they] sued Richard A. Levin, Tax Commissioner of Ohio (Commissioner), in the U.S. District Court for the Southern District of Ohio. Invoking that court's federal-question jurisdiction under 28 U.S.C. § 1331, [they] sought declaratory and injunctive relief invalidating the three tax exemptions LDCs enjoy and ordering the Commissioner to stop “recognizing and/or enforcing” the exemptions.

[The U.S. Court of Appeals for the Sixth Circuit that neither the TIA nor comity barred the suit.] A footnote in *Hibbs*, the Court of Appeals believed, foreclosed [an] “expansive reading” of this Court's comity precedents. The footnote stated that the Court “has relied upon ‘principles of comity’ to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.”

The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction. The doctrine reflects “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.” *Fair Assessment*.

Comity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity. For “[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.”

Statutes conferring federal jurisdiction, we have repeatedly cautioned, should be read with sensitivity to “federal-state relations” and “wise judicial administration.” But by 1937, in state tax cases, the federal courts had moved in a different direction: they “had become free and easy with injunctions.” Congress passed the TIA to reverse this trend.

Our post-Act decisions, however, confirm the continuing sway of comity considerations, independent of the Act. ... [I]n *Fair Assessment*, we ruled, based on comity concerns, that 42 U.S.C. § 1983 does not permit federal courts to award damages in state taxation cases when state law provides an adequate remedy. And in *National Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, [515 U.S. 582](#) (1995), we said, explicitly, that “the [TIA] may be best understood as but a partial codification of the federal reluctance to interfere with state taxation.”

[The plaintiffs] complain that they are taxed unevenly in comparison to LDCs and their customers. Under either an equal protection or dormant Commerce Clause theory, [their] root objection is the same: State action ... “selects [them] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class.”

Of key importance, when unlawful discrimination infects tax classifications or other legislative prescriptions, the Constitution simply calls for equal treatment. How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent.

On finding unlawful discrimination, we have affirmed, courts may attempt, within the bounds of their institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity. In particular, when this Court—on review of a state high court's decision—finds a tax measure constitutionally infirm, “it has been our practice,” for reasons of “federal-state comity,” “to abstain from deciding the remedial effects of such a holding.” A “State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination.” Our remand leaves the interim solution in state-court hands, subject to subsequent definitive disposition by the State's legislature.

If lower federal courts were to give audience to the merits of suits alleging uneven state tax burdens, however, recourse to state court for the interim remedial determination would be unavailable. That is so because federal tribunals lack authority to remand to the state court system an action initiated in federal court. Federal judges, moreover, are bound by the TIA; absent certain exceptions, the Act precludes relief that would diminish state revenues, even if such relief is the remedy least disruptive of the state legislature's design.<sup>5</sup> These limitations on the remedial competence of lower federal courts counsel that they refrain from taking up cases of this genre, so long as state courts are equipped fairly to adjudicate them.

Comity considerations ... warrant dismissal of [the] suit. Assuming, arguendo, that [the plaintiffs] could prevail on the merits of the suit,<sup>6</sup> the most obvious way to achieve parity would be to reduce [the plaintiffs'] tax liability. [Plaintiffs] did not seek such relief, for the TIA stands in the way of any decree that would “enjoin ... collection of [a] tax under State law.” A more ambitious solution would reshape the relevant provisions of Ohio's tax code. Were a federal court to essay such relief, however, the court would engage in the very interference in state taxation the comity doctrine aims to avoid. [Plaintiffs'] requested remedy, an order invalidating the exemptions enjoyed by LDCs, may be far from what the Ohio Legislature would have willed. In short, if the Ohio scheme is indeed unconstitutional, surely the Ohio courts are better positioned to determine—unless and until the Ohio Legislature weighs in—how to comply with the mandate of equal treatment.

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<sup>5</sup> [n.7] State courts also have greater leeway to avoid constitutional holdings by adopting “narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.”

<sup>6</sup> [n.9] *But see General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (determining, at a time IMs could not compete with LDCs for the Ohio residential “captive” market, that IMs and LDCs were not “similarly situated”; and rejecting industrial IM customer's dormant Commerce Clause and equal protection challenges to LDCs' exemption from sales and use taxes).

[O]ur unelaborated footnote on comity in *Hibbs* led the Sixth Circuit to conclude that we had diminished the force of that doctrine and made it inapplicable here. We intended no such consequential ruling. *Hibbs* was hardly a run-of-the-mine tax case. It was essentially an attack on the allocation of state resources for allegedly unconstitutional purposes. [T]he charge was state aid in alleged violation of the Establishment Clause; in other cases of the same genre, the attack was on state allocations to maintain racially segregated schools. The plaintiffs in *Hibbs* were outsiders to the tax expenditure, “third parties” whose own tax liability was not a relevant factor. In this case, by contrast, the very premise of [the] suit is that they are taxed differently from LDCs. Unlike the *Hibbs* plaintiffs, respondents do object to their own tax situation, measured by the allegedly more favorable treatment accorded LDCs.

*Hibbs* held that the TIA did not preclude a federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision. In context, we clarify, the *Hibbs* footnote comment on comity is most sensibly read to affirm that, just as the case was a poor fit under the TIA, so it was a poor fit for comity. The Court, in other words, did not deploy the footnote to recast the comity doctrine; it intended the note to convey only that the Establishment Clause-grounded case cleared both the TIA and comity hurdles.

[The plaintiffs] steadfastly maintain that this case is fit for federal-court adjudication because of the simplicity of the relief they seek, i.e., invalidation of exemptions accorded the LDCs. But as we just explained, even if [the] Commerce Clause and equal protection claims had merit, respondents would have no entitlement to their preferred remedy. In *Hibbs*, however, if the District Court found the Arizona tax credit impermissible under the Establishment Clause, only one remedy would redress the plaintiffs' grievance: invalidation of the credit, which inevitably would increase the State's tax receipts. Notably, redress in state court similarly would be limited to an order ending the allegedly impermissible state support for parochial schools.<sup>7</sup> Because state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting the *Hibbs* suit to proceed in a federal forum.

Comity, in sum, serves to ensure that “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” A confluence of factors in this case, absent in *Hibbs*, leads us to conclude that the comity doctrine controls here. First, [the plaintiffs] seek federal-court review of commercial matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny. Second, while [the plaintiffs] portray themselves as third-party challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position. Third, the Ohio courts are better positioned

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<sup>7</sup>[n.12] No refund suit (or other taxpayer mechanism) was open to the plaintiffs in *Hibbs*, who were financially disinterested “third parties”; they did not, therefore, improperly bypass any state procedure. [Plaintiffs] here, however, could have asserted their federal rights by seeking a reduction in their tax bill in an Ohio refund suit.

than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the TIA does not constrain their remedial options. Individually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process.

The Sixth Circuit expressed concern that application of the comity doctrine here would render the TIA “effectively superfluous.” This concern overlooks Congress' point in enacting the TIA. The Act was passed to plug two large loopholes courts had opened in applying the comity doctrine. By closing these loopholes, Congress secured the doctrine against diminishment. Comity, we further note, is a prudential doctrine. “If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.”

Because we conclude that the comity doctrine justifies dismissal of [this] federal-court action, we need not decide whether the TIA would itself block the suit.<sup>8</sup>

JUSTICE KENNEDY, concurring.

The Court's rationale in *Hibbs* seems to me still doubtful. Nothing in the Court's opinion today expands *Hibbs*' holding further, however, and on that understanding I join the opinion of the Court.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Although I, too, remain skeptical of the Court's decision in *Hibbs*, I agree that it is not necessary for us to revisit that decision to hold that this case belongs in state court. As the Court rightly concludes, *Hibbs* permits not just the application of comity principles to the litigation here, but also application of the Tax Injunction Act (TIA or Act), 28 U.S.C. § 1341.

Congress enacted the TIA's prohibition on federal jurisdiction over certain cases involving state tax issues because federal courts had proved unable to exercise jurisdiction over such cases in the restrained manner that comity requires. As the Court explains, Congress' decision to prohibit federal jurisdiction over cases within the Act's scope did not disturb that jurisdiction, or the comity principles that guide its exercise, in cases outside the Act's purview. I therefore agree with the Court that nothing in the Act or in *Hibbs* affects the application of comity principles to cases not covered by the Act. I disagree that this conclusion moots the need for us to decide “whether the TIA would itself block th[is] suit.”

The TIA prohibits federal courts from exercising jurisdiction over any action that would “suspend or restrain the assessment, levy or collection of [a] tax under State law.” § 1341. As the

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<sup>8</sup> [n.13] The District Court and Court of Appeals concluded that our decision in *Hibbs* placed the controversy outside the TIA's domain. That conclusion, we note, bears reassessment in light of this opinion's discussion of the significant differences between *Hibbs* and this case.

Court appears to agree, this is such a case even under the crabbed construction of the Act in *Hibbs* ....

Because the Court appears to agree that even *Hibbs* does not endorse such a narrow view of the Act's jurisdictional bar, the “proper course” is to dismiss this suit under the statute and not reach the comity principles that the Court correctly holds independently support the same result. ... I see only one explanation for the Court's decision to dismiss on a “prudential” ground (comity), rather than a mandatory one (jurisdiction): The Court wishes to leave the door open to doing in future cases what it did in *Hibbs*, namely, retain federal jurisdiction over constitutional claims that the Court simply does not believe Congress should have entrusted to state judges under the Act.

That is not a legitimate approach to this important area of the law, and the Court's assertion that our civil rights precedents require it does not withstand scrutiny. If it is indeed true (which it may have been in the civil rights cases) that federal jurisdiction is necessary to ensure a fair forum in which to litigate an allegedly unconstitutional state tax scheme, the Act itself permits federal courts to retain jurisdiction on the ground that “a plain, speedy and efficient remedy” cannot be had in state court. § 1341. But where, as here and in *Hiibbs*, such a remedy can be had in state court, the Court should apply the Act as written.

JUSTICE ALITO, concurring in the judgment.

I agree with the Court that principles of comity bar the present action. I am doubtful about the Court's efforts to distinguish *Hibbs*, but whether today's holding undermines *Hibbs*' foundations is a question that can be left for another day.

## NOTES

**1. Does *Hibbs* Survive?** Is *Hibbs* good law? Justice Ginsburg attempts to limit *Hibbs*' result—that neither comity nor the TIA block federal jurisdiction—to challenges premised on fundamental rights (like those under the Establishment Clause) or involving suspect (or at least quasi-suspect) classes. Of course, these challenges would also have to mirror that in *Hibbs*; meaning that the challengers must be “outsiders” who are not attempting to avoid taxation. Do these restrictions make sense?

**2. Does the TIA Also Block Jurisdiction?** The majority in *Levin* does not decide whether the TIA would also block federal jurisdiction. Still, in light of what Justice Ginsburg calls “significant differences between *Hibbs* and this case,” *see* footnote 13, is it safe to say that she believed the TIA also applied? If this is true, perhaps there is not much distance between what comity principles and the TIA allow and prohibit. Why did the majority not resolve this matter using the TIA, as Justice Thomas suggests?

## Chapter 8

### PRIOR AND PARALLEL STATE PROCEEDINGS

#### A. Preclusion

Add to Note 2 on page 456:

See also *Skinner v. Switzer*, [131 S. Ct. 1289](#) (2011) (rejecting *Rooker-Feldman* defense to § 1983 action brought by inmate seeking DNA testing and stating that “[i]f a federal plaintiff ‘present[s][an] independent claim,’ it is not an impediment to the exercise of federal jurisdiction that the ‘same or a related question’ was earlier aired between the parties in state court”).

#### B. Habeas Corpus and § 1983

##### [1] Injunctive Relief

Add new Note 3 to page 468:

**3. Using § 1983 to Discover Evidence of Innocence.** Can § 1983 be used by a prisoner to force prosecutors to allow DNA testing of biological evidence in an effort to overturn a conviction? In *Skinner v. Switzer*, [131 S. Ct. 1289](#) (2011), where a convicted prisoner (Skinner) claimed that Texas officials violated procedural due process<sup>9</sup> by denying him access to DNA testing under state law, the Court (in an opinion by Justice Ginsburg) ruled that it can:

Skinner has properly invoked § 1983. Success in his suit for DNA testing would not “necessarily imply” the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; ... results might prove inconclusive or they might further incriminate Skinner.

Respondent Switzer and her *amici* forecast that a “vast expansion of federal jurisdiction ... would ensue” were we to hold that Skinner's complaint can be initiated under § 1983. In particular, they predict a proliferation of federal civil actions “seeking postconviction discovery of evidence [and] other relief inescapably associated with the central questions of guilt or punishment.”

In the Circuits that currently allow § 1983 claims for DNA testing, no evidence tendered by Switzer shows any litigation flood or even rainfall. The projected toll on federal courts is all the

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<sup>9</sup> In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009), the Supreme Court ruled that the Constitution provides no independent right on the part of post-conviction prisoners to discover exculpatory evidence. In *Skinner*, the Court observed that “the Court's decision in *Osborne* severely limits the federal action a state prisoner may bring for DNA testing. *Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process.”

more implausible regarding DNA testing claims, for *Osbourne* has rejected substantive due process as a basis for such claims.

More generally, in the Prison Litigation Reform Act of 1995 (PLRA), Congress has placed a series of controls on prisoner suits, constraints designed to prevent sportive filings in federal court. Nor do we see any cause for concern that today's ruling will spill over to claims relying on *Brady v. Maryland*, [373 U.S. 83](#) (1963) [holding that state has duty to disclose exculpatory evidence to criminal defendant]; indeed, Switzer makes no such assertion. *Brady* announced a constitutional requirement addressed first and foremost to the prosecution's conduct pretrial.

Unlike DNA testing, which may yield exculpatory, incriminating, or inconclusive results, a *Brady* claim, when successful postconviction, necessarily yields evidence undermining a conviction: *Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment. And parties asserting *Brady* violations postconviction generally do seek a judgment qualifying them for “immediate or speedier release” from imprisonment. Accordingly, *Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983.

Justice Thomas, joined by Justices Kennedy and Alito, dissented.

## [2] Damages

Add new Note to page 481:

**6.b. Using § 1983 to Obtain DNA Testing.** The Court in *Skinner v. Switzer*, [131 S. Ct. 1289](#) (2011), where a convicted prisoner (Skinner) claimed that Texas officials violated procedural due process by denying him access to DNA testing under state law, ruled that § 1983 can be used, under limited circumstances, to force state officials to perform DNA tests post-conviction.

## Chapter 9

### ATTORNEY'S FEES

#### A. Prevailing Party

Add the following new Note on page 498:

**1.a. Who Owns the Fee?** The Supreme Court in *Astrue v. Ratliff*, [130 S. Ct. 2521](#) (2010) (Thomas, J.), ruled that attorney's fees payable under the federal Equal Access to Justice Act<sup>10</sup> belong to the litigant, and thus are subject to liens and offsets for debts the litigant owes the federal government. The Court referred to § 1988(b) precedents to support this holding. Justice Sotomayor, joined by Justices Stevens and Ginsburg, concurred, but expressed concern that the holding might deter lawyers from taking cases on behalf of clients who owe the government money. What if a client owes money to another private party? Can this private party attach an attorney fee award under § 1988(b) and take precedence over the lawyer's contractual claim? Would it be wise for a plaintiff's lawyer contemplating taking a § 1983 case to first investigate the potential client's finances—to insure that there are no outstanding judgments, liens or debts? Note that some states provide lawyers' liens preferences over other debts, *see, e.g., C.I.R. v. Banks*, [543 U.S. 426](#) (2005) (observing that Oregon law awards lawyers a superior lien on their clients' funds), which might minimize this risk.

Add the following footnote \* to Note 7 on page 503:

\* Unlike § 1988(b) and the Prison Litigation Reform Act, some federal fee-shifting statutes do not require "prevailing party" status. *See, e.g., Hardt v. Reliance Standard Life Insurance Co.*, [130 S. Ct. 2149](#) (2010) (Thomas, J.) (holding that the Employee Retirement Income Security Act's (ERISA) fee-shifting provision does not require that a party "prevail"—fees may instead be awarded to either party who shows some degree of success on the merits).

Add new Notes and principal case following Note 7 on page 503:

**8. Plaintiff's Responsibility for Defendant's Fees.** The Court has made clear that a successful defendant can only shift fees if the plaintiff's claims were frivolous, groundless or vexatious. *See Hughes v. Rowe*, [449 U.S. 5](#) (1980). Must the plaintiff's entire complaint meet this standard? Or need only the plaintiff's § 1983 claims prove frivolous, groundless or vexatious? The Court addressed these questions in the case that follows:

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<sup>10</sup> Section 204(d) of the Equal Access to Justice Act (EAJA), codified in [28 U.S.C. § 2412\(d\)](#), provides that "a court shall award to a prevailing party ... fees and other expenses ... in any civil action ... brought by or against the United States ... unless the court finds that the position of the United States was substantially justified." It therefore differs from § 1988(b) in that it applies to the federal government and requires that the defense not have been "substantially justified."

**FOX v. VICE**  
Supreme Court of the United States  
\_\_ U.S. \_\_ (2011)

JUSTICE KAGAN delivered the opinion of the Court.

We have held that a defendant may receive such an award if the plaintiff's suit is frivolous. In this case, the plaintiff asserted both frivolous and non-frivolous claims. We hold today that a court may grant reasonable fees to the defendant in this circumstance, but only for costs that the defendant would not have incurred but for the frivolous claims. A trial court has wide discretion in applying this standard.

This case arises out of an election for chief of police in the town of Vinton, Louisiana. The candidates were petitioner Ricky Fox (the challenger) and respondent Billy Ray Vice (the incumbent). By Fox's account, Vice resorted to an assortment of dirty tricks to try to force Fox out of the race. ... Yet all of these machinations failed; Fox won the election. And Vice got an even greater comeuppance: He was subsequently convicted of criminal extortion for his election-related conduct.

Fox, however, chose not to let the matter rest; he filed this suit in Louisiana state court against Vice and the town of Vinton, also a respondent here. Fox's complaint asserted both state-law claims, including defamation, and federal civil rights claims under 42 U.S.C. § 1983, including interference with his right to seek public office. Vice and the town (Vice, for short) removed the case to federal court on the basis of the § 1983 claims.

At the end of discovery in the suit, Vice moved for summary judgment on Fox's federal claims. Fox conceded that the claims were “no[t] valid,” and the District Court accordingly dismissed them with prejudice. In the same ruling, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. The court instead remanded the now slimmed-down case to state court for adjudication. In doing so, the District Court observed that “[a]ny trial preparation, legal research, and discovery may be used by the parties in the state court proceedings.”

Vice then asked the federal court for an award of attorney's fees under § 1988, arguing that Fox's federal claims were “baseless and without merit.” Vice stated that his lawyers had had to participate in five lengthy depositions and review numerous records to defend against Fox's charges. In support of his fee request, Vice submitted attorney billing records estimating the time spent on the whole suit, without differentiating between the federal and state-law claims.

The District Court granted the motion for attorney's fees on the ground that Fox's federal claims were frivolous. Although the state-law allegations had not been found frivolous (and indeed remained live), the court did not require Vice to separate out the work his attorneys had done on the two sets of claims. According to the court, such “segregation” was unnecessary because the

“various claims arose out of the same transaction and were so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts.” Similarly, the court declined to reduce the fee award to reflect the surviving state-law claims. “[T]hroughout the litigation,” the court stated, both sides “focus[ed]” on Fox’s frivolous § 1983 claims. The court therefore concluded that Vice should receive all of the fees he reasonably incurred in defending the suit—a total of \$48,681.

A divided Court of Appeals affirmed.

[Section] 1988 authorizes a fee award to a prevailing defendant, but under a different standard reflecting the “quite different equitable considerations” at stake. In enacting § 1988, ... Congress sought “to protect defendants from burdensome litigation having no legal or factual basis.” Accordingly, § 1988 authorizes a district court to award attorney’s fees to a defendant “upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.”

These standards would be easy to apply if life were like the movies, but that is usually not the case. ... [I]n the real world, litigation is more complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits. Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with this untidiness in awarding fees.

Given this reality, we have made clear that plaintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress’s statutory purposes. ... A court should compensate the plaintiff for the time his attorney reasonably spent in achieving the favorable outcome, even if “the plaintiff failed to prevail on every contention.” The fee award, of course, should not reimburse the plaintiff for work performed on claims that bore no relation to the grant of relief: Such work “cannot be deemed to have been expended in pursuit of the ultimate result achieved.” But the presence of these unsuccessful claims does not immunize a defendant against paying for the attorney’s fees that the plaintiff reasonably incurred in remedying a breach of his civil rights.

Analogous principles indicate that a defendant may deserve fees even if not all the plaintiff’s claims were frivolous. In this context, § 1988 serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary. That remains true when the plaintiff’s suit also includes non-frivolous claims. The defendant, of course, is not entitled to any fees arising from these non-frivolous charges. But the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed.

Indeed, we have previously said exactly this much. In *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983)], we noted the possibility that a plaintiff might prevail on one contention in a suit while also asserting an unrelated frivolous claim. In this situation, we explained, a court could properly

award fees to both parties—to the plaintiff, to reflect the fees he incurred in bringing the meritorious claim; and to the defendant, to compensate for the fees he paid in defending against the frivolous one. We thus made clear that a court may reimburse a defendant for costs under § 1988 even if a plaintiff's suit is not wholly frivolous. Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees.

The question then becomes one of allocation: In a lawsuit involving a mix of frivolous and non-frivolous claims, what work may the defendant receive fees for? Vice concedes, as he must, that a defendant may not obtain compensation for work unrelated to a frivolous claim. Similarly, we think Fox would have to concede (once he has lost the argument that the presence of any non-frivolous claim precludes a fee award) that the defendant may receive reasonable fees for work related exclusively to a frivolous claim. The question in dispute concerns work that helps defend against non-frivolous and frivolous claims alike—for example, a deposition eliciting facts relevant to both allegations.

Vice proposes authorizing the trial court to award fees for work that is “fairly attributable” to the frivolous portion of the lawsuit. But that standard is in truth no standard at all.

[C]ongressional policy points to a different and more meaningful standard: Section 1988 allows a defendant to recover reasonable attorney's fees incurred because of, but only because of, a frivolous claim. Or what is the same thing stated as a but-for test: Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim. ... So if a frivolous claim occasioned the attorney's fees at issue, a court may decide that the defendant should not have to pay them. But if the defendant would have incurred those fees anyway, to defend against non-frivolous claims, then a court has no basis for transferring the expense to the plaintiff.

Suppose, for example, that a defendant's attorney conducts a deposition on matters relevant to both a frivolous and a non-frivolous claim—and more, that the lawyer would have taken and committed the same time to this deposition even if the case had involved only the non-frivolous allegation. In that circumstance, the work does not implicate Congress's reason for allowing defendants to collect fees. The defendant would have incurred the expense in any event; he has suffered no incremental harm from the frivolous claim. In short, the defendant has never shouldered the burden that Congress, in enacting § 1988, wanted to relieve. The basic American Rule thus continues to operate.<sup>11</sup>

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<sup>11</sup> [n.3] The test set out here differs from the one we adopted in *Hensley* to govern fee awards to plaintiffs in cases involving both successful and unsuccessful claims. The difference reflects the disparate legislative purposes we have recognized in the two settings. Congress authorized fees to plaintiffs to compensate them for the costs of redressing civil rights violations; accordingly, a plaintiff may receive fees for all work relating to the accomplishment of that result, even if “the plaintiff failed to prevail on every contention raised.” By contrast, Congress authorized fees to defendants to remove the burden

A standard allowing more expansive fee-shifting would furnish windfalls to some defendants, making them better off because they were subject to a suit including frivolous claims. For under any more permissive test, the simple presence of a frivolous claim would allow the court to shift to the plaintiff some of the costs of defending against regular, non-frivolous charges. So two defendants (call them Vice and Rice) could face identical non-frivolous allegations, but because Vice also confronted a frivolous claim, he might end by paying less than Rice to his attorneys. The chance assertion—for Vice, the downright lucky assertion—of the frivolous claim could relieve him not only of the incremental costs of that claim but also of costs that he, like Rice, would have had to pay in its absence. Section 1988 provides no warrant for that peculiar result; that statute was “never intended to produce windfalls” for parties.

At the same time, the “but-for” standard we require may in some cases allow compensation to a defendant for attorney work relating to both frivolous and non-frivolous claims. Suppose, for example, that a plaintiff asserts one frivolous and one non-frivolous claim, but that only the frivolous allegation can legally result in a damages award. If an attorney performs work useful to defending against both, but did so only because of the defendant's monetary exposure on the frivolous charge, a court may decide to shift fees. Or similarly, imagine that the frivolous claim enables removal of the case to federal court, which in turn drives up litigation expenses. Here too, our standard would permit awarding fees for work relevant to both claims in order to reflect the increased costs (if any) of the federal forum. And frivolous claims may increase the cost of defending a suit in ways that are not reflected in the number of hours billed. If a defendant could prove, for example, that a frivolous claim involved a specialized area that reasonably caused him to hire more expensive counsel for the entire case, then the court may reimburse the defendant for the increased marginal cost. As all these examples show, the dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation. The answers to those inquiries will usually track each other, but when they diverge, it is the second that matters.

The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of “the district court's superior understanding of the litigation.” We can hardly think of a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it.

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associated with fending off frivolous claims; accordingly, a defendant may recover for fees that those claims caused him to incur. In each context, the standard for allocating fees in “mixed” cases matches the relevant congressional purpose.

The District Court's analysis suggests that Vice's attorneys would have done much the same work even if Fox had not brought his frivolous claims. ... It therefore seems likely that Vice's attorneys would at least have conducted similar fact-gathering activities—taken many of the same depositions, produced and reviewed many of the same documents, and so forth. Indeed, the District Court highlighted the usefulness of the attorneys' work to defending against the state-law claims: In its order remanding those claims, the court noted that the “trial preparation, legal research, and discovery” done in the federal court could “be used by the parties in the state court proceedings.”

The District Court's decision to award full attorney's fees to Vice failed to take proper account of this overlap between the frivolous and non-frivolous claims. Rather than apply the but-for standard we have set out, the court indicated that the paramount factor was the parties' “focus” in the litigation.

On this record, we must return the case to the lower courts. In a suit of this kind, involving both frivolous and non-frivolous claims, a defendant may recover the reasonable attorney's fees he expended solely because of the frivolous allegations. And that is all. Consistent with the policy underlying § 1988, the defendant may not receive compensation for any fees that he would have paid in the absence of the frivolous claims.

**9. Intervenor's Responsibility for Fees.** Can an intervenor who joins § 1983 litigation to support either a private plaintiff or governmental defendant be held liable for attorney's fees under § 1988(b)? For example, in *Perry v. Schwarzenegger*, [704 F. Supp.2d 921](#) (N.D. Cal. 2010), California authorities refused to defend California's prohibition on gay marriage against a challenge under the Equal Protection Clause (and § 1983). Private intervenors therefore joined the litigation to defend the measure. Following the plaintiffs' success in the district court (and pending appeal), questions have emerged over attorney's fees. Who should pay? California officials who refused to defend the law? The intervenors? Both? See Rebecca Beyer, Prop. 8 Plaintiffs May Recoup Fees, (California) Daily Journal (Sept. 6, 2010).

The Supreme Court in *Independent Federation of Flight Attendants v. Zipes*, [491 U.S. 754](#) (1989), ruled in the context of Title VII that intervenors who had joined to support an unsuccessful defendant could only be held liable for shifted attorney's fees if their “action was frivolous, unreasonable, or without foundation.” Justice Scalia, who wrote for the majority, cited § 1983 precedents to bolster this result: “Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes. In *Kentucky v. Graham*, [473 U.S. 159](#) (1985), ... we stated: ‘Section 1988 does not in so many words define the parties who must bear these costs. Nonetheless, it is clear that the logical place to look for recovery of fees is to the losing party – the party legally responsible for relief on the merits. That is the party who must pay the costs of litigation ... and it is clearly the party who should also bear fee liability under § 1988.’” Lower courts have tended to apply this same standard to § 1983 litigation. See, e.g., *Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey*, [297 F.3d 253](#) (3d Cir. 2002). Still, where governmental agents intervene to defend against a § 1983 action, courts have had little difficulty distinguishing

*Zipes* and holding the governmental defendants fully accountable for shifted fees under § 1988(b). See, e.g., *Planned Parenthood of Central New Jersey*, [297 F.3d 253](#) (holding state legislature which had intervened to defend abortion law liable for fees even though defense was not frivolous); *Mallory v. Harkness*, [923 F. Supp. 1546](#) (S.D. Fla. 1996) (holding attorney general liable when it intervened to defend state law).

Can a losing governmental defendant be held liable for extra fees caused by a private intervenor? See *San Francisco NAACP v. San Francisco Unified School District*, [284 F.3d 1163](#) (9th Cir. 2002) (answering that a governmental defendant can be held liable for extra fees caused by private intervenors).

## **B. Reasonable Fees**

Replace Note 4 with the following on page 512:

**4. Fee Enhancement.** The Supreme Court in *City of Burlington v. Dague*, [505 U.S. 557](#) (1992), ruled that fee enhancements and “multipliers” are generally improper under federal fee-shifting statutes. Still, lower courts continued to use enhancement to reward attorneys in exceptional cases. The Supreme Court visited this matter in the following case:

**PERDUE v. KENNY A.**  
Supreme Court of the United States  
[130 S. Ct. 1662](#) (2010)

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether the calculation of an attorney's fee, under federal fee-shifting statutes, based on the “lodestar,” i.e., the number of hours worked multiplied by the prevailing hourly rates, may be increased due to superior performance and results. We have stated in previous cases that such an increase is permitted in extraordinary circumstances, and we reaffirm that rule. But as we have also said in prior cases, there is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified. Because the District Court did not apply these standards, we reverse the decision below and remand for further proceedings consistent with this opinion.

[P]laintiffs below are children in the Georgia foster-care system and their next friends. They filed this class action on behalf of 3,000 children in foster care and named as defendants the Governor of Georgia and various state officials .... Claiming that deficiencies in the foster-care system in two counties near Atlanta violated their federal and state constitutional and statutory rights, [plaintiffs] sought injunctive and declaratory relief, as well as attorney's fees and expenses.

The ... District Court ... eventually referred the case to mediation, where the parties entered into a consent decree, which the District Court approved. The consent decree resolved all pending issues other than the fees that [plaintiffs'] attorneys were entitled to receive under 42 U.S.C. § 1988.

[Plaintiffs] submitted a request for more than \$14 million in attorney's fees. Half of that amount was based on their calculation of the lodestar—roughly 30,000 hours multiplied by hourly rates of \$200 to \$495 for attorneys and \$75 to \$150 for non-attorneys. In support of their fee request, [plaintiffs] submitted affidavits asserting that these rates were within the range of prevailing market rates for legal services in the relevant market.

The other half of the amount that respondents sought represented a fee enhancement for superior work and results. Affidavits submitted in support of this request claimed that the lodestar amount “would be generally insufficient to induce lawyers of comparable skill, judgment, professional representation and experience” to litigate this case.

The District Court awarded fees of approximately \$10.5 million. The District Court found that the hourly rates proposed by respondents were “fair and reasonable,” but that some of the entries on counsel's billing records were vague and that the hours claimed for many of the billing categories were excessive. The court therefore cut the non-travel hours by 15% and halved the hourly rate for travel hours. This resulted in a lodestar calculation of approximately \$6 million.

The court then enhanced this award by 75%, concluding that the lodestar calculation did not take into account “(1) the fact that class counsel were required to advance case expenses of \$1.7 million over a three-year period with no on[-]going reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.” The court stated that [plaintiffs'] attorneys had exhibited “a higher degree of skill, commitment, dedication, and professionalism ... than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench.” The court also commented that the results obtained were ““extraordinary”” and added that “[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.” The enhancement resulted in an additional \$4.5 million fee award. [T]he Eleventh Circuit affirmed.

One possible method [for computing “reasonable” fees] was set out in *Johnson v. Georgia Highway Express, Inc.*, [488 F.2d 714, 717-19](#) (5<sup>th</sup> Cir. 1974), which listed 12 factors that a court should consider in determining a reasonable fee. This method, however, “gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.”

An alternative, the lodestar approach, was pioneered by the Third Circuit .... “Since that time, ‘[t]he “lodestar” figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.’”

Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to “the prevailing market rates in the relevant community.” Developed after the practice of hourly billing had become widespread, the lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. Second, the lodestar method is readily administrable, and unlike the *Johnson* approach, the lodestar calculation is “objective,” and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

Our prior decisions concerning the federal fee-shifting statutes have established six important rules that lead to our decision in this case.

First, a “reasonable” fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. Section 1988's aim is to enforce the covered civil rights statutes, not to provide “a form of economic relief to improve the financial lot of attorneys.”

Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. Indeed, we have said that the presumption is a “strong” one. *Dague*.

Third, although we have never sustained an enhancement of a lodestar amount for performance, we have repeatedly said that enhancements may be awarded in “rare” and “exceptional” circumstances.

Fourth, we have noted that “the lodestar figure includes most, if not all, of the relevant factors constituting a ‘reasonable’ attorney's fee,” and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors “presumably [are] fully reflected in the number of billable hours recorded by counsel.” We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar “[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate.”

Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant.

Finally, a fee applicant seeking an enhancement must produce “specific evidence” that supports the award. (An enhancement must be based on “evidence that enhancement was necessary to provide fair and reasonable compensation”). This requirement is essential if the lodestar method

is to realize one of its chief virtues, i.e., providing a calculation that is objective and capable of being reviewed on appeal.

In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a “strong presumption” that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

In this case, we are asked to decide whether either the quality of an attorney's performance or the results obtained are factors that may properly provide a basis for an enhancement. We treat these two factors as one. When a plaintiff's attorney achieves results that are more favorable than would have been predicted based on the governing law and the available evidence, the outcome may be attributable to superior performance and commitment of resources by plaintiff's counsel. Or the outcome may result from inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck. Since none of these latter causes can justify an enhanced award, superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance. Thus, we need only consider whether superior attorney performance can justify an enhancement. And in light of the principles derived from our prior cases, we inquire whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation. We conclude that there are a few such circumstances but that these circumstances are indeed “rare” and “exceptional,” and require specific evidence that the lodestar fee would not have been “adequate to attract competent counsel.”

First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation.<sup>12</sup> This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate.

Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be

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<sup>12</sup> [n.5] [Plaintiffs] correctly note that an attorney's “brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience.” But . . . , “[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.”

received until the successful resolution of the case, 532 F.3d, at 1227, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. Compensation for this delay is generally made “either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.” But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

We reject the suggestion that it is appropriate to grant performance enhancements on the ground that departures from hourly billing are becoming more common. As we have noted, the lodestar was adopted in part because it provides a rough approximation of general billing practices, and accordingly, if hourly billing becomes unusual, an alternative to the lodestar method may have to be found.

We are told that, under an increasingly popular arrangement, attorneys are paid at a reduced hourly rate but receive a bonus if certain specified results are obtained, and this practice is analogized to the award of an enhancement such as the one in this case. The analogy, however, is flawed. An attorney who agrees, at the outset of the representation, to a reduced hourly rate in exchange for the opportunity to earn a performance bonus is in a position far different from an attorney in a § 1988 case who is compensated at the full prevailing rate and then seeks a performance enhancement in addition to the lodestar amount after the litigation has concluded. Reliance on these comparisons for the purposes of administering enhancements, therefore, is not appropriate.

In the present case, the District Court did not provide proper justification for the large enhancement that it awarded. The court increased the lodestar award by 75% but, as far as the court's opinion reveals, this figure appears to have been essentially arbitrary. Why, for example, did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?

The District Court commented that the enhancement was the “minimum enhancement of the lodestar necessary to reasonably compensate [respondents'] counsel.” But the effect of the enhancement was to increase the top rate for the attorneys to more than \$866 per hour, and the

District Court did not point to anything in the record that shows that this is an appropriate figure for the relevant market.

The District Court pointed to the fact that [plaintiffs'] counsel had to make extraordinary outlays for expenses and had to wait for reimbursement, but the court did not calculate the amount of the enhancement that is attributable to this factor. Similarly, the District Court noted that ... counsel did not receive fees on an ongoing basis while the case was pending, but the court did not sufficiently link this factor to proof in the record that the delay here was outside the normal range expected by attorneys who rely on § 1988 for the payment of their fees or quantify the disparity. Nor did the court provide a calculation of the cost to counsel of any extraordinary and unwarranted delay. And the court's reliance on the contingency of the outcome contravenes our holding in *Dague*.

Finally, insofar as the District Court relied on a comparison of the performance of counsel in this case with the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review. Needless to say, we do not question the sincerity of the District Court's observations, and we are in no position to assess their accuracy. But when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method-providing an objective and reviewable basis for fees is undermined.

Determining a “reasonable attorney's fee” is a matter that is committed to the sound discretion of a trial judge, but the judge's discretion is not unlimited. It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such an explanation is given, adequate appellate review is not feasible, and without such review, widely disparate awards may be made, and awards may be influenced (or at least, may appear to be influenced) by a judge's subjective opinion regarding particular attorneys or the importance of the case. In addition, in future cases, defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement.

Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute's aim.<sup>13</sup> In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or

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<sup>13</sup> [n.8] Justice Breyer's opinion dramatically illustrates the danger of allowing a trial judge to award a huge enhancement not supported by any discernible methodology. That approach would retain the \$4.5 million enhancement here so that [plaintiffs'] attorneys would earn as much as the attorneys at some of the richest law firms in the country. These fees would be paid by the taxpayers of Georgia, where the annual per capita income is less than \$34,000, and the annual salaries of attorneys employed by the State range from \$48,000 for entry-level lawyers to \$118,000 for the highest paid division chief. Section 1988 was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide such a windfall.

statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services.

For all these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR, join, concurring in part and dissenting in part.

Where the majority and I part ways is with respect to a question that is not presented, but that the Court obliquely, and in my view inappropriately, appears to consider nonetheless—namely, whether the lower courts correctly determined in this case that exceptional circumstances justify a lodestar enhancement. I would not reach that issue, which lies beyond the narrow question that we agreed to consider. Nor do I believe that this Court, which is twice removed from the litigation underlying the fee determination, is properly suited to resolve the fact-intensive inquiry that 42 U.S.C. § 1988 demands. But even were I to engage in that inquiry, I would hold that the District Court did not abuse its discretion in awarding an enhancement.

[D]etermining whether a fee enhancement is warranted in a given case “is a matter that is committed to the sound discretion of a trial judge,” and the function of appellate courts is to review that judge's determination for an abuse of such discretion.

This case well illustrates why our tiered and functionally specialized judicial system places the task of determining an attorney's fee award primarily in the district court's hands. The plaintiffs' lawyers spent eight years investigating the underlying facts, developing the initial complaint, conducting court proceedings, and working out final relief. The District Court's docket, with over 600 entries, consists of more than 18,000 pages. Transcripts of hearings and depositions, along with other documents, have produced a record that fills 20 large boxes. Neither we, nor an appellate panel, can easily read that entire record. Nor should we attempt to second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect.

My own review of this expansive record cannot possibly be exhaustive. But those portions of the record I have reviewed lead me to conclude ... that the District Judge did not abuse his discretion when awarding an enhanced fee. I reach this conclusion based on four considerations.

First, the record indicates that the lawyers' objective in this case was unusually important and fully consistent with the central objectives of the basic federal civil-rights statute, 42 U.S.C. § 1983. Moreover, the problem the attorneys faced demanded an exceptionally high degree of skill and effort. Specifically, these lawyers and their clients sought to have the State of Georgia reform its entire foster-care system—a system that much in the record describes as well below the level of minimal constitutional acceptability. The record contains investigative reports, mostly

prepared by Georgia's own Office of the Child Advocate, which show, for example, the following:

- The State's foster-care system was unable to provide essential medical and mental health services; children consequently and unnecessarily suffered illness and life-long medical disabilities, such as permanent hearing loss, due to failures on the part of the State to administer basic care and antibiotics.
- Understaffing and improper staffing placed children in the care of individuals with dangerous criminal records; children were physically assaulted by the staff, locked outside of the shelters at night as punishment, and abused in other ways.
- The shelters themselves were “unsanitary and dilapidated,” “unclean,” infested with rats, “overcrowded,” unsafe, and “out of control.”
- Due to improper supervision and other deficiencies at the shelters, 20% of the children abused drugs; some also became victims of child prostitution.
- Systemic failures also caused vulnerable children to suffer regular beatings and sexual abuse, including rape, at the hands of more aggressive shelter residents.
- Not surprisingly, many children—upwards of 5 per day and over 750 per year—tried to escape these conditions; others tried to commit suicide.

The State's Office of the Child Advocate, whose reports provide much of the basis for the foregoing description, concluded that the system was “operating in crisis mode” and that any private operator who ran such a system “would never be licensed to care for children.” The advocate noted that neither her investigative reports nor national news publicity (including a television program that highlighted a 5-year-old foster child's death from beatings) had prompted corrective action by the State.

The advocate further stated that litigation was necessary to force reform. And she repeatedly asked the State to give her office the authority to conduct that litigation.

The upshot is that the plaintiffs' attorneys did what the child advocate could not do: They initiated this lawsuit. They thereby assumed the role of “a ‘private attorney general’” by filling an enforcement void in the State's own legal system, a function “that Congress considered of the highest priority,” and “meant to promote in enacting § 1988.”

Second, the course of the lawsuit was lengthy and arduous. The plaintiffs and their lawyers began with factual investigations beyond those which the child advocate had already conducted. They then filed suit. And the State met the plaintiffs' efforts with a host of complex procedural, as well as substantive, objections. The State, for example, argued that the law forbade the plaintiffs to investigate the shelters; on the eve of a state-court decision that might have approved

the investigations, the State then removed the case to federal court; the State then sought protective orders preventing the attorneys from speaking to the shelters' staff; and, after losing its motions, the State delayed to the point where the District Court “was forced to admonish [the] State Defendants for ‘relying on technical legal objections to discovery requests in order to delay and hinder the discovery process.’”

In the meantime, the State moved for dismissal, basing the motion on complex legal doctrines such as *Younger* abstention [*see* page 392, *supra*, in the main text] and the *Rooker-Feldman* doctrine, [*see* page 454, *supra*, in the main text,] which the District Court found inapplicable. The State also opposed the ... request to certify a class of the 3,000 children in foster care, but the District Court again rejected the State's argument. And, after that, the State filed a lengthy motion for summary judgment, which plaintiffs' attorneys opposed in thorough briefing supported by comprehensive exhibits. After losing that motion and eventually agreeing to mediation, the State forced protracted litigation as to who should be the mediator. All told, in opposing the plaintiffs' efforts to have the foster-care system reformed, the State spent \$2.4 million on outside counsel (who, because they charge the State reduced rates, worked significantly more hours than that figure alone indicates) and tapped its own law department for an additional 5,200 hours of work.

Third, in the face of this opposition, the results obtained by the plaintiffs' attorneys appear to have been exceptional. The 47-page consent decree negotiated over the course of the mediation sets forth 31 specific steps that the State will take in order to address the specific deficiencies of the sort that I described above. And it establishes a reporting and oversight mechanism that is backed up by the District Court's enforcement authority. As a result of the decree, the State agreed to comprehensive reforms of its foster-care system, to the benefit of children in many different communities.

Fourth and finally, the District Judge, who supervised these proceedings, who saw the plaintiffs amass, process, compile, and convincingly present vast amounts of factual information, who witnessed their defeat of numerous state procedural and substantive motions, and who was in a position to evaluate the ultimate mediation effort, said:

1. the “mediation effort in this case went far beyond anything that this Court has seen in any previous case;”
2. “based on its personal observation of plaintiffs' counsel's performance throughout this litigation, the Court finds that ... counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench;”
3. the Consent Decree “provided extraordinary benefits to the plaintiff class ... .” “[T]he settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage .... After 58 years as a practicing attorney and federal judge, the Court is unaware of

any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.”

Based on these observations and on its assessment of the attorneys' performance during the course of the litigation, the District Court concluded that “the evidence establishes that the quality of service rendered by class counsel ... was far superior to what consumers of legal services in the legal marketplace ... could reasonably expect to receive for the rates used in the lodestar calculation.”

On the basis of what I have read, I believe that assessment was correct. I recognize that the ordinary lodestar calculation yields a large fee award. But by my assessment, the lodestar calculation in this case translates to an average hourly fee per attorney of \$249. (The majority's reference to an hourly fee of \$866 refers to the rate associated with the single highest paid of the 17 attorneys under the enhanced fee, not the average hourly rate under the lodestar. The lay reader should also bear in mind that a lawyer's “fee” is substantially greater than his “profit,” given that attorneys must sometimes cover case-specific costs (which in this case exceeded \$800,000, and also must cover routine overhead expenses, which typically consume 40% of their fees.)

At \$249 per hour, the lodestar would compensate this group of attorneys—whom the District Court described as extraordinary—at a rate lower than the average rate charged by attorneys practicing law in the State of Georgia, where the average hourly rate is \$268. ... Indeed, the fact that these exceptional results were achieved in a case where “much of the work,” was performed by relatively inexperienced attorneys (who, accordingly, would be compensated by the lodestar “below the market average,”) is all the more reason to think that their service rendered their outstanding performance worthy of an enhancement. By comparison, the District Court's enhanced award—a special one-time adjustment unique to this exceptional case—would compensate these attorneys, on this one occasion, at an average hourly rate of \$435, which is comparable to the rates charged by the Nation's leading law firms on average on every occasion. *See Firm-by-Firm Sampling of Billing Rates Nationwide*, National Law Journal, Dec. 11, 2006, p. S2 (listing 13 firms at which average hourly rate is between \$400 and \$510). Thus, it would appear that the enhanced award is wholly consistent with the purpose of § 1988, which was enacted to ensure that “counsel for prevailing parties [are] paid as is traditional with attorneys compensated by a fee-paying client.”

Indeed, if the facts and circumstances that I have described are even roughly correct, then it is fair to ask: If this is not an exceptional case, what is?

#### **D. Bargaining Over Fees**

Add the following to the end of Note 3 on page 538:

Is it ethical for a plaintiff's lawyer to combine a lodestar formula with a contingency agreement? The court in *In re Dalton*, 18 So.3d 743, 746 (La. 2009), ruled it is not. *Dalton* involved a state-

law suit with a state-law fee-shifting provision. The plaintiff's lawyer built into his fee agreement "an hourly basis [for the amount], collection of which was contingent upon the client's recovery." The agreement was premised on the fact that the defendant would be responsible for the lodestar (hourly based) fee if the plaintiff won. The plaintiff settled with the defendant for \$10,000, and the lawyer kept \$4,600 of this under the lodestar agreement. In response to the client's (and Office of Disciplinary Counsel's) claim that this arrangement was unethical, the Louisiana Supreme Court stated: "While this court has never addressed the appropriateness of this unusual type of contingency fee arrangement (i.e., where an attorney charges an hourly rate, but collection of the fee is contingent on the client's recovery), the issue was discussed in an advisory opinion rendered by the South Carolina Bar's Ethics Advisory Committee. In opinion no. 87-07, the Committee stated that '[i]f the attorneys fee is reasonable and the client has full knowledge of the fee arrangement, it is generally deemed appropriate.'" So long as the "method by which the fee is to be determined" is clearly stated in the agreement, the court determined, it is not unethical.

## APPENDIX

Replace Rule 4 on page App-24 with the following:

### **Rule 4. Summons**

....

#### **(e) Serving an Individual Within a Judicial District of the United States.**

Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

....

#### **(j) Serving a Foreign, State, or Local Government.**

....

**(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:**

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.