

CHAPTER 8 LIMITATIONS ON RELIEF

This chapter will explore the contours of the primary limitations on suing states, state subdivisions, and state officials in federal court. The first section surveys the Eleventh Amendment and focuses on important recent developments in this area. It covers the abrogation and waiver of sovereign immunity and the availability of prospective injunctive relief under the *Ex Parte Young* doctrine. The second section discusses the scope of absolute and qualified immunity in Section 1983 suits against public officials in their individual capacities. The final section covers limitations imposed on Section 1983 claims against municipal agencies and governments.

I. Enforcing Federal Rights Against States and State Officials

At least since the passage of the Social Security Act in 1935, the federal government has become a major source of programs and funding to assist low-income individuals and other persons with needs that cannot be met without public intervention. Cash assistance programs, medical care, food stamps, education, housing, and numerous other programs were enacted by Congress, and in many instances these programs were implemented through grants to the states, which were responsible for their administration and obligated to operate them in compliance with federal law.

A. ENFORCING FEDERAL RIGHTS AGAINST STATES

In 1968 the U.S. Supreme Court decided the landmark case of *King v. Smith*.¹ In a suit brought under 42 U.S.C. § 1983 the plaintiffs challenged a state regulation under the Aid to Families with Dependent Children program on grounds that it conflicted with federal law. The Court agreed and ordered state officials to operate the federally funded program in accordance with federal law.² Since then, there have been thousands of federal cases against states to enforce federal requirements in federally funded programs.

Congress has enacted, in addition to benefit programs, a series of laws prohibiting discrimination based on race, ethnicity, religion, gender, disability, and age. Most of these laws either have an express provision allowing suit against states or have been interpreted to allow such suits.³ Federal labor laws protecting employees have been made applicable to the states.⁴

As a result, the ability to enforce federal rights against states has been a key element in the protection of low-income persons and population groups that have traditionally been the target of discriminatory practices. That protection has been eroded in part by a series of recent decisions by the Supreme Court acting under the mantle of sovereign immunity. However, enforcement of federal law in private actions against states is still possible.

B. OVERVIEW OF THE ELEVENTH AMENDMENT

The Eleventh Amendment to the Constitution bars suits in federal court against states by citizens of other countries and other states.⁵ In 1890 the Supreme Court held that the Eleventh Amendment also applied to suits by citizens of the defendant state.⁶ As a result, private parties may not sue a state or state agency by name in federal court unless Congress validly abrogated state Eleventh Amendment immunity or the state consented to be sued. The Eleventh Amendment does not bar suits against local governments.⁷ What constitutes a state agency is dependent on a number of factors which are

¹*King v. Smith*, 392 U.S. 309 (1968).

²See also *Maine v. Thiboutot*, 448 U.S. 1 (1980).

³See, e.g., 42 U.S.C. § 2000d-7.

⁴See, e.g., Fair Labor Standards Act, 29 U.S.C. § 216(b); Family Medical Leave Act, 29 U.S.C. § 2617(a)(2).

⁵"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

⁶*Hans v. Louisiana*, 134 U.S. 1 (1890).

⁷*Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

applied on the basis of state law.⁸ What may appear to be local governmental entities may instead be held to be state agencies.

Under *Ex parte Young*, private parties can sue state officials *in their official capacity* to enforce federal laws and regulations, but only for prospective injunctive relief.⁹ Accordingly there must be an ongoing violation of federal law to support injunctive relief.¹⁰ Relief may include notice to the plaintiff class of the availability of remedies under state law.¹¹ No damages are recoverable in *Young* suits, but prospective relief may require expenditures of state funds.¹²

State officials may be sued for damages in their individual capacity for violations of federal constitutional or statutory rights committed in the course of official duties but are entitled to qualified immunity.¹³ Qualified immunity bars recovery insofar as the official's conduct "did not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁴

States and state officials in their *official capacity* may not be sued, regardless of the relief sought, in federal court on claims arising out of state law. Such claims are usually dismissed even though there may be federal claims not barred by the Eleventh Amendment. Federal courts have supplemental jurisdiction to hear state-law claims against state officials sued in their *individual capacity* if there are federal claims that arise from the same subject matter and give the federal court jurisdiction.¹⁵ State immunity rules apply to claims under state law.¹⁶ The provision in 28 U.S.C. § 1367(d), which tolls the statute of limitations on supplemental claims dismissed in federal court, violates the Eleventh Amendment if the defendant is a state or state agency.¹⁷ Tolling does apply to counties, which do not have Eleventh Amendment immunity.¹⁸

States have no sovereign immunity protection if the proceeding is initiated or prosecuted by the federal government.¹⁹ This applies even if the federal government is seeking recovery of damages on behalf of an individual, and damages in a suit by the individual would be barred by the Eleventh Amendment.²⁰

C. ABROGATION OF STATE SOVEREIGN IMMUNITY BY CONGRESS

Congress has a degree of power to abrogate state sovereign immunity and has done so on numerous occasions. If the abrogation is constitutionally valid, states may be sued in federal court in their own name for violations of the statutes to which the abrogation applies, and plaintiffs may recover damages against the state if the underlying statute provides a damage remedy. However, since 1996, cases against states based on abrogation of immunity and the recovery of damages against states for violations of federal law have been sharply limited.

⁸*Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993). Although the criteria for determining what entities are entitled to claim Eleventh Amendment immunity may vary among circuits, the most important factor is whether, considering the source of the entity's funding, the payment of the judgment would come from the state. *Camden County Recovery Coalition v. Camden City Board of Education*, 262 F. Supp. 2d 446, 449 (D.N.J. 2003).

⁹*Ex parte Young*, 209 U.S. 123 (1908).

¹⁰*Green v. Mansour*, 474 U.S. 64 (1985).

¹¹*Edelman v. Jordan*, 415 U.S. 651 (1974).

¹²*Milliken v. Bradley*, 433 U.S. 267 (1977).

¹³The Fourth Circuit holds in *Lizzi v. Alexander*, 255 F.3d 128, 137–38 (4th Cir. 2001), *cert. denied sub nom. Lizzi v. Washington Metropolitan Area Transit Authority*, 534 U.S. 1081, *reh'g denied*, 535 U.S. 952 (2002), that individual capacity suits against state officials arising out of official acts may be limited to suits under 42 U.S.C. § 1983, and not to liability arising under other federal statutes, even though the statute specifically makes the state official liable. Such suits are in fact against the state, the court holds without specifying the reason. Presumably the court expects the state to indemnify the official for any liability. The Second Circuit holds that the sought amount of damages far exceeding the ability to pay of the defendant sued in an individual capacity does not transform the suit into one against the state even when the state voluntarily chooses to reimburse the official. *Huang v. Johnson*, 274 F.3d 682 (2d Cir. 2001). For a discussion of qualified immunity, see Section II *infra*.

¹⁴*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See Robert P. Capistrano, *Enforcing Federal Rights: The Law of Section 1983 (Part 2)*, 33 CLEARINGHOUSE REVIEW 393, 411 (Nov.–Dec. 1999).

¹⁵28 U.S.C. § 1367.

¹⁶*Theobald v. Board of County Commissioners*, 332 F.3d 414 (6th Cir. 2003).

¹⁷*Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002).

¹⁸*Jinks v. Richland County, South Carolina*, 123 S. Ct. 1667 (2003).

¹⁹*Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 768 n.19 (2002).

²⁰*United States v. Mississippi Department of Public Safety*, 321 F.3d 495 (5th Cir. 2003).

Before 1996, the Supreme Court held that Congress had the authority to abrogate immunity in the course of legislating under any of its broad powers under Article I of the Constitution, including the commerce clause, copyright powers, and bankruptcy.²¹ But in *Seminole Tribe of Florida v. Florida* the Court declared that Congress' power to abrogate Eleventh Amendment immunity of states to suits in federal courts is limited to matters arising under the legislative enabling clause of the Fourteenth Amendment.²² The Court held that Congress had no power to abrogate immunity under the Indian commerce clause involved in *Seminole* and added that it lacked the power under any other Article I provision.²³ The Court held that Congress must clearly express its intention to abrogate state immunity.

Beginning with *City of Boerne v. Flowers*, the Court simultaneously narrowed the legislative authority of Congress under the Fourteenth Amendment and thereby further limited the authority of Congress to abrogate state immunity.²⁴ The Court subsequently held that Congress lacked Fourteenth Amendment authority to enact the Age Discrimination in Employment Act.²⁵ In 2001 it held that Congress exceeded its legislative powers under the Fourteenth Amendment in providing for damages against state governments for violation of the employment provisions of Title I of the Americans with Disabilities Act.²⁶ In 2003 the Court reaffirmed these cases while it held that Congress did have Fourteenth Amendment authority to waive state immunity to suit under the Family Medical Leave Act.²⁷ The Court distinguished, as being based on sex discrimination, the Family Medical Leave Act from the statutes at issue in *Kimel* and *Garrett*. Sex discrimination is subject to higher scrutiny under the equal protection clause than discrimination based on age or disability, to which rational basis review applies.²⁸

The immediate effect of these decisions is that, if there is no Fourteenth Amendment legislative authority or other valid basis for abrogation and the state did not waive immunity, a suit may not be brought in federal court against a state or state agency named as defendant, and retroactive monetary relief against state officials sued in their official capacity is barred.

Although enforcement of federal rights against states has been limited, there remain a number of ways in which private litigation can succeed in enforcing federal rights against state governments. A major role is still available to private federal court suits (and state court suits as well) to enforce federal rights against states.

D. WAIVER OF IMMUNITY

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board reaffirmed a congressional authority to place conditions on its grant of funds.²⁹

1. Federally Mandated Waiver of Immunity Under Congressional Spending Power

In exercising its spending powers, Congress, the Supreme Court reaffirmed, may condition its grant of funds to the states upon their taking certain actions that Congress could not require them to take, and acceptance of the funds may entail an agreement to the condition.³⁰ Consent to suit in federal court is one such condition that Congress may impose. But mere-

²¹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

²² *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). As discussed below, abrogation is also recognized under the spending clause powers of Congress. Abrogation of immunity under the spending clause is more nearly correctly denoted as waiver of immunity by a state accepting federal funds under a statute which provides for suit against an entity accepting the funds.

²³ Nonetheless the Sixth Circuit held that Congress had authority under its Article I, Section 8, power over bankruptcy to abrogate state sovereign immunity in bankruptcy proceedings. *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003).

²⁴ *City of Boerne v. Flowers*, 521 U.S. 507 (1997).

²⁵ *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

²⁶ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

²⁷ *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003).

²⁸ The Seventh Circuit holds that discrimination claims alleging intentional discrimination are within congressional authority under the Fourteenth Amendment, at least in cases involving race and sex. *Nanda v. Board of Trustees of the University of Illinois*, 303 F.3d 817 (7th Cir. 2002), cert. denied, 123 S. Ct. 2246 (2003). The Second Circuit holds that Congress has Fourteenth Amendment authority to abrogate immunity in the Americans with Disabilities Act to the extent that there is evidence in the case of discriminatory animus or ill will due to disability. *Garcia v. State University of New York Health Science Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001). The Sixth Circuit holds that claims under the Americans with Disabilities Act based on a denial of due process are constitutionally valid even if claims under the statute based on the equal protection clause are not. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002).

²⁹ *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

³⁰ *Id.* at 686; U.S. Const., art. I, § 8, cl. 1 (spending powers).

ly receiving federal funds cannot establish that a state consents to suit in federal court.³¹ There must be a clear warning to the states of the consequences of accepting the money.³²

A number of cases, however, find a waiver even though the statutory language supporting a waiver is not phrased expressly in terms of waiver or abrogation of immunity. In *Illinois Bell Telephone Co. v. WorldCom Technologies Inc.* the state agency voluntarily undertook to act as part of a federal regulatory scheme.³³ The applicable statute provided for federal court review of the decisions of the state agency but did not expressly provide that the state agency could be made a party to the proceeding. The Seventh Circuit held that the agency consented to being a party by acting as a regulator, but the Fourth Circuit disagreed in a subsequent case.³⁴ The Supreme Court granted certiorari in both cases but dismissed the Seventh Circuit case as improvidently granted and decided the Fourth Circuit case without reaching the waiver issue.³⁵

Congress expressly abrogated state immunity for claims arising under four important federal laws enacted under the spending clause: 42 U.S.C. § 2000d-7 abrogates state immunity for suits under Title VI of the Civil Rights Act of 1962 (discrimination based on race and ethnicity), the Age Discrimination Act, Title IX of the Education Amendments of 1972 (gender discrimination in education), and Section 504 of the Rehabilitation Act of 1974 (discrimination based on disability). Although expressed in terms of abrogation, Section 2000d-7 applies to the states as a waiver of immunity arising from a state accepting federal funds.³⁶ Other federal statutes contain abrogation provisions; each statute should be examined to determine whether it contains language that can be construed to impose a consent to suit against the state as a condition of accepting federal money. If sovereign immunity is waived under statutes enacted as part of the spending power, a private plaintiff may sue the state as a named defendant and may recover damages to the extent that they are allowed by the underlying statute; the private plaintiff also may obtain injunctive and other relief.

Laws that are enacted under the spending clause and expressly waive state immunity have a wide applicability to state governments. Although the four laws covered by abrogation in Section 2000d-7 apply only to programs that are recipients of federal funds, almost all state agencies receiving federal funds should be covered by these laws. Under proposed regulations issued by the Clinton Administration (the regulations state that they merely reflect existing law), “program” is given a fairly broad definition.³⁷ Thus all activities of a state agency receiving any federal funds would be covered by the antidiscrimination provisions of Section 2000d-7. The preamble to the proposed regulations says, for example, that if a state health agency receives any federal funding, all of its operations are subject to the antidiscrimination requirements.³⁸ The Bush administration issued guidelines on obligations to persons with limited English proficiency under Title VI of the Civil Rights Act of 1964 with the same language and example.³⁹

Nonetheless the Second Circuit imposed a limitation on the application of Section 2000d-7 in cases involving Section 504.⁴⁰ An effective waiver, the Second Circuit held, requires an intentional relinquishment of a known right. When the state received the funds applicable to the suit, *Seminole* had not been decided and Title II of the Americans with Disabilities Act was understood to abrogate the state’s sovereign immunity under commerce clause authority. Therefore a state accepting federal funds could not have made a decision to waive immunity since “by all reasonable appearances

³¹ *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985).

³² *Id.*

³³ *Illinois Bell Telephone Co. v. WorldCom Technologies Inc.*, 179 F.3d 566 (7th Cir. 1999), cert. granted sub nom. *Mathias v. WorldCom Technologies Inc.*, 532 U.S. 903 (2001), cert. dismissed as improvidently granted, 535 U.S. 682 (2002), cert. denied, 535 U.S. 1107 (2002). See also *Innes v. Kansas State University*, 184 F.3d 1275 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000) (participation of a state university in a federal student loan program which required the university to participate in bankruptcy proceedings constituted a waiver of immunity for those proceedings).

³⁴ *Bell Atlantic Maryland Inc. v. MCI Worldcom Inc.*, 240 F.3d 279, 293 (4th Cir. 2001), cert. granted sub nom. *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 534 U.S. 1072 (2001), vacated, 535 U.S. 635 (2002).

³⁵ *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002).

³⁶ *Lane v. Peña*, 518 U.S. 187, 198 (1996). If treated as abrogation, Section 2000d-7 might not meet the test for Fourteenth Amendment legislative authority needed to abrogate state immunity. *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001).

³⁷ 65 Federal Register 64194 (Oct. 26, 2000) (amending the regulations governing nondiscrimination on the basis of race, color, national origin, handicap, sex, and age to conform to the Civil Rights Restoration Act of 1987).

³⁸ *Id.* at 64195.

³⁹ See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Federal Register 47311, 47313 (Aug. 8, 2003). However, a fund cutoff applies only to the program violating the nondiscrimination requirement. *Id.*

⁴⁰ *Garcia*, 280 F.3d at 114.

state sovereign immunity had already been lost.”⁴¹ The result of this approach to waiver is that in a Circuit following *Garcia*, if a state agreed to the waiver condition before March 27, 1996, the date of the *Seminole* opinion, sovereign immunity is not waived. Some cases indicate an even later cutoff date depending on the statute involved. For example, the Fifth Circuit appears to apply *Garcia* in claims under Section 504 for disability discrimination to any acceptance of federal funds before May 2, 2001.⁴² That was the date the Supreme Court issued a pertinent ruling in *Garrett*.⁴³ The Court ruled that the Americans with Disabilities Act did not validly abrogate state immunity to damage suits for employment discrimination based on disability.⁴⁴

There is one further limitation on the power of Congress to mandate waiver of immunity under the spending clause. If the financial or other inducement offered by Congress is so coercive that pressure turns into compulsion, the abrogation of immunity exceeds congressional power.⁴⁵ To date, no waiver of immunity provision has been declared coercive. In *Jim C. v. United States* the potential loss of federal funds was \$250 million, 12 percent of the State’s annual education budget.⁴⁶ The court described replacing these funds as “politically painful, but we cannot say that it compels Arkansas’s choice.”⁴⁷ This decision is significant because, with the exception of the Medicaid program, few, if any, federal grant programs exceed the amount of aid to education.⁴⁸

2. Waiver of Immunity by Litigation

The Supreme Court unanimously held that removal of a case by a state from state court to the federal court waived Eleventh Amendment immunity.⁴⁹ After stating this broad principle, however, the holding is limited to state-law claims with respect to which the state explicitly waives immunity from state court proceedings. The impact of the case is uncertain. However, several cases apply the holding to federal cases as well.⁵⁰

By the time the *Lapides* case reached the Supreme Court, the only remaining claims were a Section 1983 claim against the state agency and two state-law claims as to which state law waived immunity in suits in state courts. A Section 1983 claim may not be asserted against a state agency.⁵¹ Hence the only valid claims left in the case were the state-law claims. The Supreme Court noted that the district court had authority to hear the state claims—the case was not moot—although the Court also strongly suggested that the district court might wish to remand to the state court.

The Court then held that waiver by litigation conduct was based on the need to “avoid inconsistency, anomaly, and unfairness, and not upon a State’s actual preference or desire, which might, after all, favor selective use of ‘immunity’ to achieve litigation advantages.”⁵² For much the same reason, the question of waiver by litigation conduct is a federal question, which looks to fairness and not solely provisions of state law on waiver of immunity. Accordingly the Court overruled *Ford Motor Co. v. Department of the Treasury of Indiana*, which refused to allow a waiver by litigation conduct unless expressly authorized by state law.⁵³

In certain circumstances in some federal circuits, if a state defendant appears and litigates without raising a sovereign immunity defense, it may be held to have waived the defense. Where, for example, the state agency litigated the case

⁴¹ *Id.*

⁴² This date appears unwarranted in light of the statement by the U.S. Supreme Court in *Alden v. Maine*, 527 U.S. 706, 712 (1999), that “this Court decided *Seminole Tribe* [], which made it clear that Congress lacks power under Article I to abrogate the States’ sovereign immunity from suits commenced or prosecuted in the federal courts.”

⁴³ *Garrett*, 531 U.S. at 374 n.9.

⁴⁴ Judge Jaques Weiner Jr. of the Fifth Circuit wrote a powerful rebuttal to the decision in *Garcia*. See *Johnson v. Louisiana Department of Education*, 330 F.3d 362 (5th Cir.) (separate opinion), *reh’g en banc granted and order vacated*, 2003 WL 21983251 (5th Cir. May 5, 2003).

⁴⁵ *College Savings*, 527 U.S. at 686–87.

⁴⁶ *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), *cert. denied*, 533 U.S. 949 (2001). See also *State v. Califano*, 445 F. Supp. 532 (D.N.C. 1977), *aff’d without opinion*, 435 U.S. 962 (1978) (loss of funding, amounting to \$50 million in 1977 dollars, for some forty-five public health programs not coercive).

⁴⁷ *Jim C.*, 235 F.3d at 1082.

⁴⁸ See also *West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281 (4th Cir. 2002); *California v. United States*, 104 F.3d 1086 (9th Cir.), *cert. denied*, 522 U.S. 806 (1997) (rejecting contention that Medicaid requirement to provide emergency care to immigrants is coercive since state health system would collapse without federal Medicaid funds).

⁴⁹ *Lapides v. Board of Regents*, 535 U.S. 613 (2002).

⁵⁰ *Ku v. Tennessee*, 322 F.3d 431 (6th Cir. 2003); *Estes v. Wyoming Department of Transportation*, 302 F.3d 1200 (10th Cir. 2003).

⁵¹ *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

⁵² *Lapides*, 535 U.S. at 620.

⁵³ *Lapides*, 535 U.S. at 623, *overruling Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945).

through discovery and did not raise the issue of sovereign immunity until the day of trial, the Ninth Circuit held that the state agency waived any claim to immunity.⁵⁴ Other courts allowed a sovereign immunity defense to be raised at almost any stage of the case.⁵⁵ In a case decided on other grounds, the Supreme Court stated in a footnote that “[w]hile the Eleventh Amendment is jurisdictional in the sense that it is a limitation of the federal court’s judicial power, and therefore can be raised at any state of the proceedings, we have recognized that it is not coextensive with the limitation on Judicial Power in Article III.”⁵⁶ Commenting on this statement, the Fifth Circuit observed that a state may waive immunity other than by an express renunciation, noting that

[c]ourts have found waiver in two general varieties of cases: where the state asserted claims of its own or evidenced an intent to defend the suit against it on the merits. The common thread among these cases is that the state cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense.⁵⁷

This reasoning is supported by the rationale in *Lapides* that avoiding unfairness underlies the waiver of immunity. In the removal context, states were removing claims that could be asserted against it in state court and then moving to dismiss under the Eleventh Amendment. Similarly it is unfair for a state to litigate on the merits without actively asserting its Eleventh Amendment defense and then if it loses, or is in danger of losing on the merits, to move to dismiss on grounds of sovereign immunity.⁵⁸ *Lapides* also significantly holds that the conduct of the litigation by the state attorney general may constitute waiver even though the state constitution provides that immunity may be waived only by statute.⁵⁹

E. PROSPECTIVE INJUNCTIVE RELIEF UNDER *EX PARTE YOUNG*

Ever since *Ex parte Young*, prospective relief in federal courts has been available to enforce federal rights by suing a state official, usually the official in charge of the agency responsible for the violation, even absent a valid Congressional abrogation of state immunity.⁶⁰

1. The Continued Availability of a Remedy

Even if a federal statute was not authorized by the Fourteenth Amendment, its substantive provisions may be valid under other Congressional authority, such as the commerce clause.⁶¹ Those provisions may be enforceable prospectively against the states under *Young*.⁶² Prospective relief is an injunction, and the violation of federal law must be ongoing to warrant an injunction.⁶³ Some courts also allow declaratory judgments as ancillary to injunctive relief.⁶⁴

Young suits should expressly designate the defendant official as being sued in her official capacity. A claim may be asserted against the official in the official’s individual capacity, including damages, but such claims are subject to a defense of qualified immunity.⁶⁵

⁵⁴*Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *opinion amended and reh’g denied*, 201 F.3d 1186 (9th Cir. 2000). *Accord Ku*, 322 F.3d at 435.

⁵⁵*Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000), *overruled on other grounds by Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

⁵⁶*Calderon v. Ashmus*, 523 U.S. 740, 745 n.2. (1998).

⁵⁷*Neimast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000), *reh’g denied*, 228 F.3d 411 (5th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001).

⁵⁸The Supreme Court granted review of a case that raised the question of whether a state waived its immunity by entering into a consent decree approved by the trial court with respect to a motion to enforce the decree. *Frazer v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *cert. granted sub nom. Frew v. Hawkins*, 123 S. Ct. 1481 (2003).

⁵⁹*See Lapides*, 251 F.3d 1372, 1375 (11th Cir. 2001), *rev’d*, 535 U.S. 613 (2002).

⁶⁰*Ex parte Young*, 209 U.S. at 123.

⁶¹*Maryland v. Wirtz*, 392 U.S. 183 (1968).

⁶²The Age Discrimination in Employment Act may be enforced against states prospectively by injunction even though damages are not recoverable. *Ku*, 322 F.3d at 431.

⁶³*Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995).

⁶⁴*Lawson v. Shelby County, Tennessee*, 211 F.3d 331, 335 (6th Cir. 2000).

⁶⁵*See id.* at 335 n.13.

The Supreme Court reaffirmed *Ex parte Young* in *Seminole* and in its subsequent state immunity decisions.⁶⁶ Indeed, the availability of the *Young* remedy is the majority's answer to the argument that states are free to disregard federal law. In *Seminole* the majority stated that "[t]his argument wholly disregards other methods of ensuring the States' compliance with federal law; . . . an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law . . ."⁶⁷

In *Verizon Maryland Inc. v. Public Service Commission of Maryland* the Court explicitly adopted a simple test for the application of *Young*, which should make its application easier in the lower courts.⁶⁸ It stated that "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"⁶⁹ Since the prayer for relief asked that the commissioners be enjoined from enforcing an order in contravention of federal law, the test was met. The addition of a claim for declaratory relief did not impose on the state any monetary loss for past breach of its duty. The Court also rejected a claim that *Young* was inapplicable because the commission's decision was probably consistent with federal law: "the inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim."⁷⁰

Many federal statutes create liability only on an entity, such as a state or local government.⁷¹ Federal statutes impose such liability also on a recipient of federal funds.⁷² States argued that a *Young* suit naming a state officer could not be brought since the officer, who must be named as defendant, had no liability.⁷³ The Supreme Court twice rejected this limitation on *Young*. In *Verizon* the statute in question referred to determinations of state public service commissions.⁷⁴ Plaintiffs sued both the commission and the commissioners in their official capacity. The Court, with no discussion, stated that "[w]e also conclude that the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities."⁷⁵

In *Garrett*, which barred recovery of damages against states under Title I of the Americans with Disabilities Act, the Court expressly approved use of *Young* to enforce Title I by injunctive relief against states engaging in employment discrimination:

Our holding here that Congress did not validly abrogate the State's sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*.⁷⁶

Cases seeking to apply *Young* may be brought in several different ways. First, suits for prospective relief may be brought directly under a federal statute which creates a private cause of action.⁷⁷ The private cause of action is either explicit or implicit to the extent that implied causes of action are still viable.⁷⁸ Second, suits for prospective relief may be brought under 42 U.S.C. § 1983, which creates a federal cause of action for violation of "rights" secured by the federal laws and the Constitution.⁷⁹ Third, in some cases such as those involving claims of federal preemption, the suit is simply brought under the federal question jurisdiction of the federal courts.⁸⁰

There is, however, a possible barrier to enforcement of federal rights under *Young*. In *Seminole Tribe*, the Court held, where Congress creates a comprehensive scheme with a limited remedy for the enforcement of a particular federal right,

⁶⁶*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁶⁷*Id.* at 71 n.14 (citing *Young*, 209 U.S. at 154–58).

⁶⁸*Verizon*, 535 U.S. at 635.

⁶⁹*Id.* at 645 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)).

⁷⁰*Id.* at 646.

⁷¹E.g., Americans with Disabilities Act, Title II, 42 U.S.C. §§ 12131(1), 12132.

⁷²E.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

⁷³E.g., *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), cert. denied sub nom. *United States v. Snyder*, 531 U.S. 1190 (2001).

⁷⁴*Verizon*, 535 U.S. at 635.

⁷⁵*Id.* at 648.

⁷⁶*Garrett*, 531 U.S. at 374 n.9 (emphasis added). *Accord Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003).

⁷⁷*Garrett*, 531 U.S. at 374 n.9.

⁷⁸See *Alexander v. Sandoval*, 532 U.S. 275, 290–91 (2001).

⁷⁹*Rosado v. Wyman*, 397 U.S. 397 (1970); see Robert P. Capistrano, *Enforcing Federal Rights: The Law of Section 1983* (Part 1), 33 CLEARINGHOUSE REVIEW 217 (Sept.–Oct. 1999).

⁸⁰*Verizon*, 535 U.S. at 643.

courts may refuse to “supplement” that scheme with judicial enforcement under *Ex parte Young*.⁸¹ In *Seminole Tribe* the Court found that a system of mandated conferences and mediation, culminating in a suit against the state with very limited remedies authorized, was a sufficient alternative scheme to indicate that Congress did not intend suits under the *Ex parte Young* theory. The statute before the Court in *Seminole Tribe* limited a remedy in a suit against a state to a transfer of decision-making power from the state to the federal government. The statute did not permit any injunctive relief or damages, as does Section 1983.⁸²

Another possible limitation on *Young* which has largely failed is the “special state sovereignty” claim upheld by the Court in *Idaho v. Coeur d’Alene Tribe of Idaho*.⁸³ That case involved a dispute as to title to a waterway between the state and a Native American tribe. The Court found that the interest of the state in title to its land was such a special sovereignty interest that the federal government should not interfere. Few other courts applied the case and found *Young* inapplicable, even when land was involved.⁸⁴ The courts held, for example, that the administration of a welfare program did not implicate a special state sovereignty interest.⁸⁵

2. Rejection of the Assault on *Ex Parte Young*

Encouraged by the recent sovereign immunity cases, some states began a wholesale attack on the ability of private parties to enforce federal laws under *Young*. The first decision adopting this challenge was the district court decision in *Westside Mothers v. Haveman*.⁸⁶ That decision was reversed by the Sixth Circuit.⁸⁷ It was rejected by the Fourth.⁸⁸ But other cases are pending in which state defendants challenge those circuit decisions.

Westside Mothers was a routine suit under 42 U.S.C. § 1983 to enforce the federal Medicaid law provisions which require certain screening and services to be provided to eligible children. The suit was brought against state officials responsible for administering the Michigan Medicaid program and sought only prospective injunctive relief. Medicaid is enacted under the spending clause; although states are free not to participate, all states do so.

The court in *Westside Mothers* ruled that the existing precedents enforcing the Medicaid statute were no longer good law. At the heart of the decision is a conclusion (1) that *Young* applies only to violations by state officials of the federal Constitution or federal laws and (2) that, because the Medicaid program is enacted under the spending clause, the federal requirements are not binding federal laws since the states are free not to participate in the Medicaid program. Rather, the nature of the program is a contract between the federal and state government. In *Ex Parte Young* the Supreme Court did not authorize suits for breach of contract against state officers. The district court reached this conclusion while acknowledging that the Supreme Court in the past “held that federal-state cooperative programs enacted under the Spending power fall within the ambit of the Supremacy Clause.”⁸⁹

The Sixth Circuit rejected this argument and noted that the Supreme Court in *Pennhurst I*

makes clear that it is using the term “contract” metaphorically to illuminate certain aspects of the relationship formed between a state and the federal government. . . . It does not say that Medicaid is only a contract. . . . It did not limit the remedies to common law contract remedies or suggested [sic] that normal federal question doctrines do not apply. . . . Binding precedent has put the issue to rest. The Supreme Court has held that the conditions imposed by the federal government pursuant to statute upon states participating in Medicaid and similar programs are not merely contract provisions; they are federal laws.⁹⁰

⁸¹ *Seminole Tribe*, 517 U.S. at 73–76.

⁸² In *Verizon* the Court rejected an alternate remedy exclusion based on a statutory provision providing for judicial review of decisions of the state commission; the Court emphasized that the remedy under the statute did not significantly limit the liability of the state more than remedies available in the suit brought in federal court under 28 U.S.C. § 1331.

⁸³ *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997).

⁸⁴ See *Elephant Butte Irrigation District v. Department of the Interior*, 160 F.3d 602 (10th Cir. 1998), cert. denied, 526 U.S. 1019 (1999).

⁸⁵ *Antrican v. Odom*, 290 F.3d 178 (4th Cir.), cert. denied, 123 S. Ct. 467 (2002); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir.), cert. denied, 123 S. Ct. 618 (2002). *J.B. v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999).

⁸⁶ *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001), reversed, 289 F.3d 852 (6th Cir.), and cert. denied, 537 U.S. 1045 (2002).

⁸⁷ *Westside Mothers*, 289 F.3d at 861–63.

⁸⁸ *Antrican*, 290 F.3d at 188 (4th Cir. 2002).

⁸⁹ *Westside Mothers*, 133 F. Supp. 2d at 561.

⁹⁰ *Westside Mothers*, 289 F.3d at 858 (referring to *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981); see also *Antrican*, 290 F.3d at 187–88. Justice Thomas expressed support for the approach of the district court in *Westside Mothers*. See *Pharmaceutical Research and Manufacturers of America v. Walsh*, 123 S. Ct. 1855 (2003). Justice Scalia appears to have similar views but concedes that suits under the spending clause are not suits in contract and that contract law principles do not apply to all issues that they raise. *Barnes v. Gorman*, 536 U.S. 181, 188 (2002).

F. INTERLOCUTORY APPEALS

One major factor to consider in naming defendants who may assert a claim to sovereign immunity is that in federal court a state or state official claiming immunity has a right to an interlocutory appeal if the district court rejects the immunity defense.⁹¹ The general rule is that the filing of the appeal ousts the district court of jurisdiction as to those defendants appealing on immunity grounds, at least as to claims covered by the immunity defense.⁹² If this occurs, proceedings against the appealing defendants come to a halt, and the district court has discretion to stay or limit proceedings against other defendants.⁹³

One exception to staying proceedings against the appealing state defendant is recognized in many circuits. If the district court certifies in writing that the immunity appeal is frivolous, proceedings in the district court may continue. The Supreme Court approved this procedure.⁹⁴ The interlocutory appeal nonetheless proceeds to decision in the Court of Appeals.

G. SUITS IN STATE COURTS

In *Alden v. Maine* the Supreme Court held that, under the structure of the federal Constitution and historic principles of sovereign immunity, Congress could not authorize suits against states in state courts on federal claims without the consent of the state to be sued, except when Congress acted pursuant to its Fourteenth Amendment powers.⁹⁵ Since the decision rests on Eleventh Amendment jurisprudence, mandated waiver of immunity in state courts under the spending clause power would seem to be permissible, but the issue is not free of doubt.

Alden merely held that a state court need not enforce federal laws; *Alden* does not prevent it from doing so. Thus a careful examination of state statutes may reveal authority in state court to enforce federal claims against the state. In *Alden* the Maine Supreme Court found that the state had not consented to a suit for overtime pay because state law expressly excluded state employees from overtime pay. But the Iowa Supreme Court reached the opposite conclusion in *Anthony v. State*.⁹⁶ State agencies, the court found, are employers under the Iowa Wage Payment Collection Law. The court found the collection law to contain express consent to sue in Iowa courts for purposes of recovering any compensation owed to plaintiff. Overtime pay due under the Fair Labor Standards Act falls under the law as compensation.⁹⁷

Other state courts express a restrictive approach to state statutes that waive state immunity. The most restrictive approach is that of the Nebraska Supreme Court in *King v. State*.⁹⁸ The case announced that statutes waiving immunity must be clear in intent and strictly construed in favor of the sovereign and against waiver: "A waiver of sovereign immunity will only be found where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction."⁹⁹

A state is not required by the full-faith and credit clause to apply another state's immunity law when that other state is sued in the courts of the forum state. The state may do so as a matter of comity.¹⁰⁰

Another route to state court enforcement of federal claims against a state may be that indicated by the Seventh Circuit in *Erickson v. Board of Governors of State Colleges and Universities*.¹⁰¹ If a state opens its courts to suits against the state on state-law claims comparable to federal claims against the state, the Seventh Circuit stated, the state may not exclude

⁹¹ *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

⁹² *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992).

⁹³ See, e.g., *Root v. Liberty Emergency Physicians Inc.*, 68 F. Supp. 2d 1086 (W.D. Mo. 1999) (staying all proceedings against all parties pending the immunity appeal of one party).

⁹⁴ *Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996).

⁹⁵ *Alden v. Maine*, 527 U.S. 706, 755–56 (1999).

⁹⁶ *Anthony v. State*, 632 N.W. 2d 897 (2001), cert. denied sub nom. *Iowa v. Anthony*, 534 U.S. 1129 (2002). Accord *Williamson v. Department of Human Resources*, 572 S.E. 2d 678 (Ga. Ct. App. 2002).

⁹⁷ The Iowa court took a more liberal approach to statutory consent to suit than the U.S. Supreme Court to waive Eleventh Amendment immunity. The Supreme Court held that a state statute authorizing suit against the state in a court of competent jurisdiction was insufficient to waive Eleventh Amendment immunity to suit in federal court. A clear statement of consent to suit in federal court is required. *College Savings Bank v. Florida Prepaid Postsecondary Expense Board*, 527 U.S. 666, 675–76 (1999).

⁹⁸ *King v. State*, 614 N.W.2d 341 (Neb. 2000).

⁹⁹ *Id.* at 347.

¹⁰⁰ *Hyatt v. Franchise Tax Board of California*, 123 S. Ct. 1683 (2003). Because the parties did not raise any issue of sovereign immunity in the U.S. Supreme Court, the Court did not consider the issue.

¹⁰¹ *Erickson v. Board of Governors of State Colleges and Universities*, 207 F.3d 945 (7th Cir. 2000), cert. denied sub nom. *United States v. Board of Governors*, 531 U.S. 1190 (2001).

claims based on the federal law. Almost all states have laws against discrimination, and many allow such laws to be enforced in suits against the state or state agencies.

However, other courts require an express consent to suits in state courts to enforce federal law. In *Alden v. Maine*, decided before the Seventh Circuit decision in *Erickson*, the Supreme Court stated that, “[t]o the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit.”¹⁰²

Advocates in several states are seeking state legislation waiving sovereign immunity in suits to enforce federal laws. Minnesota is the first state to enact such a law, applicable only to certain federal employment laws and consenting to suit in any court of competent jurisdiction.¹⁰³ However, the Eighth Circuit found the language not sufficiently unequivocal on waiver of immunity in federal courts; the Eighth Circuit cited a statement to that effect in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.¹⁰⁴ Advocates drafting state consent laws should include an express statement of consent to suit in federal courts.

H. ADMINISTRATIVE PROCEEDINGS

The Supreme Court held that states enjoyed sovereign immunity from federal adjudicative administrative hearings initiated and prosecuted by private parties.¹⁰⁵ The case may have only limited impact because all the justices agreed that

private parties remain perfectly free to complain to the Federal Government about unlawful State activity and “the Federal Government [remains] free to take subsequent legal action.” The only step the FMC may not take, consistent with this Court’s sovereign immunity jurisprudence, is to adjudicate a dispute between a private party and a nonconsenting State.¹⁰⁶

One area that may be affected is federal whistle-blower statutes that provide for administrative hearings.¹⁰⁷ However, the bar of sovereign immunity in that situation can be overcome if the federal agency intervenes as a party in the proceeding.¹⁰⁸ The First Circuit also left open the possibility that *Ex parte Young* could be applied to administrative proceedings if state officials were named as defendants in their official capacity and if the private plaintiff sought only injunctive relief.¹⁰⁹

II. Suits Against Public Officials in Their Individual Capacity

Besides authorizing official-capacity suits against state and local officials for structural injunctive relief, 42 U.S.C. § 1983 authorizes claims against those officials in their individual capacity for compensatory and punitive damages. Although, as discussed above, the Eleventh Amendment limits official-capacity claims against state officials to prospective injunctive relief, it does not affect damage claims against those officials in their individual capacity.¹¹⁰ When does absolute and qualified immunity limit individual-capacity suits against public officials?

A. ABSOLUTE IMMUNITY

By its terms, Section 1983 imposes liability without defense on state and local officials who, acting under color of law in their individual capacity, deprive plaintiffs of rights created by the Constitution and federal law. Nevertheless the Supreme Court, drawing on common law, created absolute immunity from liability for some government officials and qualified immunity for others. Absolute and qualified immunity were developed to protect officials from lawsuits for actions relating to their official duties. The Court explained the underlying rationale for immunity:

[T]he public interest requires decisions and actions to enforce laws for the protection of the public Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions

¹⁰² *Alden*, 527 U.S. at 758.

¹⁰³ 2001 Minn. Sess. Laws ch. 159.

¹⁰⁴ *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676 (1999). See *Faibash v. University of Minnesota*, 304 F.3d 797 (8th Cir. 2002).

¹⁰⁵ *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002).

¹⁰⁶ *Id.* at 768 n.19.

¹⁰⁷ See *Rhode Island Department of Environment Management v. United States*, 304 F.3d 31 (1st Cir. 2002).

¹⁰⁸ *Id.* at 53–54.

¹⁰⁹ *Id.* at 52.

¹¹⁰ *Hafer v. Melo*, 502 U.S. 21, 29–30 (1991); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183 (1984).

when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.¹¹¹

Absolute immunity bars any action against officials in the conduct of their office even for actions taken maliciously or in bad faith. Absolute immunity focuses on the governmental function being performed and the nature of the responsibilities of the official, not on the specific action taken.¹¹² In deciding whether officials performing a particular function are entitled to absolute immunity, courts generally look for a historical or common-law basis for the immunity in question.¹¹³ With one exception, absolute immunity is restricted to those persons performing judicial or legislative functions.

1. Judicial Immunity

Judges have absolute immunity, the Supreme Court held in *Stump v. Sparkman*, from Section 1983 damage actions for their “judicial” acts.¹¹⁴ The Court qualified the acts as those not taken “in the clear absence of all jurisdiction.”¹¹⁵ Judicial immunity, the Court, drawing from the common-law immunity of judges, held, protects judges even when their judicial acts

- exceed their jurisdiction,¹¹⁶
- are done maliciously or corruptly, or
- are flawed by grave procedural error.¹¹⁷

For example, in *Stump*, a circuit court judge was held to be absolutely immune from suit for authorizing sterilization of a “somewhat retarded” 15-year-old girl. The girl’s mother brought the petition for sterilization because she had stayed out overnight with young men, and the mother wanted “to prevent unfortunate circumstances.”¹¹⁸ Judge Stump approved the petition the day it was filed, without notice to the child or appointment of a special guardian. The girl underwent the procedure six days later under the misinformed belief that she was having her appendix removed. She did not find out about the sterilization, or the court order, until after she married and was unable to become pregnant. The Court reasoned that, though unconstitutional, Judge Stump’s order was a judicial act. Though issued in excess of his jurisdiction, it was not issued in the clear absence of jurisdiction.¹¹⁹

Because of its focus on judicial acts, judicial immunity attaches to the judicial function, not the judicial office. To the extent that a court, individual judge, or prosecutor performs executive or legislative functions, immunity will be determined by the immunity applicable to the legislative or executive function performed.¹²⁰ Thus absolute judicial immunity did not protect a judge from a suit for damages alleging that he dismissed a probation officer because she was a woman.¹²¹ Rejecting the argument that a judge must have absolute immunity when hiring and firing staff, the Court ruled that judicial immunity attaches only to the judicial acts of judges. Because a judge who hires and fires is indistinguishable from an administrative or executive branch official who makes personnel decisions, the personnel decision is an administrative rather than a judicial act and is therefore not protected by absolute immunity. The Court remanded for a determination of whether the judge was protected by qualified immunity. Similarly a judge who harassed and arguably

¹¹¹ *Scheuer*, 416 U.S. at 241–42.

¹¹² *Bogan v. Scott-Harris*, 523 U.S. 44, 54–55 (1998); *Cleavinger v. Saxner*, 474 U.S. 193, 201–2 (1985).

¹¹³ See *Mitchell*, 472 U.S. at 521. But see *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976), discussed *infra*.

¹¹⁴ *Stump v. Sparkman*, 435 U.S. 349 (1978).

¹¹⁵ *Stump*, 435 U.S. at 357. *Mireles v. Waco*, 502 U.S. 9, 12 (1991); see also *Bradley v. Fisher*, 80 U.S. 335, 341 (1 Wall 1871).

¹¹⁶ *Pierson v. Ray*, 386 U.S. 547, 554 (1967), overruled on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Peia v. United States*, 152 F. Supp. 2d 226, 235 (D. Conn. 2001).

¹¹⁷ *Stump*, 435 U.S. at 359.

¹¹⁸ *Id.*

¹¹⁹ Absolute judicial immunity is justified in part because “the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.” *Mitchell*, 472 U.S. at 522. Absolute immunity was upheld in *Stump*, although these protections were unavailable to the sterilized plaintiff.

¹²⁰ *Supreme Court of Virginia v. Consumers Union of the United States Inc.*, 446 U.S. 719, 731–34 (1980).

¹²¹ *Forrester v. White*, 484 U.S. 219 (1988).

constructively discharged his secretary because she became engaged to a courthouse employee did not act in a judicial capacity and therefore was not entitled to absolute immunity.¹²²

Four factors determine whether an act is judicial: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.¹²³ Employing those considerations, the Court held that a judge who ordered police officers "forcibly and with excessive force" to bring to his courtroom an attorney who was absent for morning calendar performed a judicial act.¹²⁴ The Court reasoned that an order to court officers to bring a person within the courthouse before the judge is a function normally performed by a judge; because the order was directed at an attorney in a pending case, it was issued by a judge acting in his judicial capacity.¹²⁵ Similarly a state judge who held in contempt and jailed a party immediately, and thereby defied a binding rule of judicial procedure requiring a five-day stay of the sentence, was entitled to absolute judicial immunity. The act of holding a party in contempt in a proceeding in which a judge has subject-matter jurisdiction is a judicial act, and the failure to issue the required stay was a judicial error by a judge performing a judicial function rather than an act taken in the complete absence of jurisdiction.¹²⁶ But a judge who sexually assaulted women who had come to his chambers to see him in his official capacity in pending matters was not entitled to judicial immunity. Regardless of where committed, a sexual assault is not a judicial act.¹²⁷ Similarly a night court judge who ordered his bailiff to detain, handcuff, and bring into a court a coffee vendor who sold putrid coffee was not entitled to judicial immunity.¹²⁸

Judges who sit on courts of limited rather than general jurisdiction, the courts of appeals unanimously held, also enjoy absolute judicial immunity for judicial acts not taken in the clear absence of jurisdiction.¹²⁹ Administrative adjudication can give rise to absolute judicial immunity when the administrative adjudicator performs a judicial function in proceedings sufficiently judicial in character. In determining whether an individual performing administrative adjudicatory functions is entitled to absolute or only to qualified immunity, the Supreme Court identified several relevant factors:

- 1) The need to assure that the individual can perform his functions without harassment or intimidation; 2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; 3) insulation from political influence; 4) the importance of precedent; 5) the adversary nature of the process; and 6) the correctability of error on appeal.¹³⁰

School board members who sit as adjudicators in student disciplinary proceedings, prison employees who decide prison disciplinary proceedings, and court reporters, the Court held accordingly, do not enjoy absolute judicial immunity and may invoke only qualified immunity.¹³¹ The courts of appeal extended absolute immunity to growth management board members adjudicating land-use controversies.¹³² They extended it to state personnel board members performing adjudicative functions.¹³³ But they did not extend it to school board members sitting as adjudicators in proceedings relating to individual faculty employment decisions.¹³⁴

¹²²*Cameron v. Seitz*, 38 F.3d 264 (6th Cir. 1994). *Cameron* held that the judge was entitled to qualified immunity. *But see Hope v. Pelzer*, 536 U.S. 730 (2002), discussed *infra*.

¹²³See generally *Mireles*, 502 U.S. at 12.

¹²⁴*Id.* at 10.

¹²⁵*Id.* at 12.

¹²⁶*Figueroa v. Blackburn*, 208 F.3d 435, 444 (3d Cir. 2000); see also *Tucker v. Outwater*, 118 F.3d 930, 936 (2d Cir. 1997) (judge who acts in excess of jurisdiction still entitled to immunity).

¹²⁷*Archie v. Lanier*, 95 F.3d 438, 441 (6th Cir. 1996).

¹²⁸*Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). The judge did not argue the claim of judicial immunity on appeal and contested only the award of punitive damages. Even if issuing an arrest order for selling bad coffee was a judicial act, Judge James A. Perry clearly lacked subject-matter jurisdiction for his actions.

¹²⁹*Figueroa*, 208 F.3d at 441 (collecting cases).

¹³⁰*Cleavenger v. Saxner*, 474 U.S. 193, 202 (1985) (quoting *Butz v. Economou*, 438 U.S. 478, 511 (1978)).

¹³¹*Antoine v. Byers and Anderson Inc.*, 508 U.S. 429, 435–37 (1993) (court reporters); *Cleavenger v. Saxner*, 474 U.S. at 203–6 (prison disciplinary committee members); *Wood v. Strickland*, 420 U.S. 308, 320–22 (1975) (school board members).

¹³²*Buckles v. Kings County*, 191 F.3d 1127, 1132–36 (9th Cir. 1999).

¹³³*Collyer v. Darling*, 98 F.3d 211, 221 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997).

¹³⁴*Harris v. Victoria Independent School District*, 168 F.3d 216, 224–25 (5th Cir. 1999); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1507–8 (11th Cir. 1990).

Judicial immunity is lost, *Mireles*, *Stump*, and *Bradley* held, if the judge acts “in the clear absence of all jurisdiction.”¹³⁵ All circuits interpret *Stump* and *Bradley* to require a clear absence of subject matter jurisdiction in order to lose immunity; a judge who has subject-matter jurisdiction but acts without personal jurisdiction still enjoys absolute immunity for judicial acts.¹³⁶ So does a judge who issues a contempt order after having been disqualified by the filing of a disqualification affidavit.¹³⁷

Notwithstanding the broad reach of *Stump*, a few cases found judges liable for acting in a complete absence of jurisdiction. A judge whose subject matter jurisdiction to issue arrest warrants was limited to crimes committed within his judicial district lost judicial immunity when he signed an arrest warrant based on a complaint of criminal conduct which he knew occurred outside his territorial jurisdiction.¹³⁸ Not only did he exceed his jurisdiction, but also he acted in the complete absence of subject-matter jurisdiction.¹³⁹

Although cases creating judicial immunity bar a Section 1983 claim for damages, they do not bar a Section 1983 action for prospective injunctive relief or an award of attorney fees under Section 1988.¹⁴⁰ However, Congress amended Section 1983 to forbid injunctive relief absent a violation of a declaratory decree or the unavailability of declaratory relief and thus effectively if not formally extended absolute judicial immunity to claims for injunctive relief.¹⁴¹

Because judicial immunity arises from the performance of an adjudicatory function, it extends to judicial or adjudicative acts within a quasi-judicial administrative proceeding whether or not the actor is a judge or an administrator.¹⁴² One oft-cited standard for determining whether to apply judicial immunity to protect members of licensing boards is a useful test to distinguish an administrative adjudicatory act entitled to judicial immunity from an ordinary administrative act entitled only to qualified immunity:

First, does a Board member, like a judge, perform a traditional “adjudicatory” function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a Board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect a physician’s constitutional rights?¹⁴³

2. Prosecutorial Immunity

Prosecutors enjoy absolute immunity from damage liability for the initiation and prosecution of a criminal case.¹⁴⁴ The Supreme Court, relying heavily on considerations of policy, extended absolute immunity to prosecutors lest they drown in civil litigation challenging their every act. The Court also reasoned that initiating a prosecution and presenting the case are activities that are “intimately associated with the judicial phase of criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.”¹⁴⁵

Like judicial immunity, prosecutorial immunity is functional; it attaches only to acts intimately related to the initiation and prosecution of a criminal case. The Court, struggling to define the boundaries of prosecutorial immunity, holds that a prosecutor who advises police officers on Fourth Amendment considerations in an ongoing criminal investigation performs an investigatory rather than a prosecutorial function and is therefore not entitled to absolute immunity. That same

¹³⁵ *Stump*, 435 U.S. at 357; *Mirales*, 502 U.S. at 13; *Bradley*, 80 U.S. at 351.

¹³⁶ *Holloway v. Brush*, 220 F.3d 767, 773 (6th Cir. 2000) (en banc); *Crabtree v. Muchmore*, 904 F.2d 1475, 1477 (10th Cir. 1990); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc), *overruling Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981).

¹³⁷ *Stern v. Mascio*, 262 F.3d 600, 606–7 (6th Cir. 2001).

¹³⁸ *Maestri v. Jutkofsky*, 860 F.2d 50, 52–53 (2d Cir. 1988).

¹³⁹ *Id.* at 53.

¹⁴⁰ *Pulliam v. Allen*, 466 U.S. 522 (1984).

¹⁴¹ Federal Courts Improvement Act of 1996, Pub. Law No. 104-317, § 309(c), 110 Stat. 3847, 3853 (1996).

¹⁴² *Butz v. Economou*, 438 U.S. 478, 506–7 (1978); see generally *Tobin for Governor v. Illinois State Board of Elections*, 268 F.3d 517, 521–27 (7th Cir. 2001) (collecting cases); *Mishler v. Clift*, 191 F.3d 998, 1002–8 (9th Cir. 1999) (collecting cases); *Watts v. Burkhardt*, 978 F.2d 269, 272–78 (6th Cir. 1992) (en banc) (extensive discussion of judicial immunity for members of licensing boards).

¹⁴³ *Watts*, 978 F.2d at 278 (quoting *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 772, 783 (1st Cir. 1990)).

¹⁴⁴ *Imbler v. Pachtman*, 424 U.S. 409, 423–24 (1976).

¹⁴⁵ *Id.* at 430.

prosecutor, however, is entitled to absolute immunity for eliciting misleading testimony from those officers at a hearing on an application for a search warrant.¹⁴⁶ Although a prosecutor who suborns perjury at a criminal trial is absolutely immune, a prosecutor who manufactures false evidence does not enjoy absolute immunity. The former performs a prosecutorial function by presenting evidence, while the latter performs a police investigatory function by gathering evidence.¹⁴⁷ Because conducting a press conference is not intimately associated with the judicial process, a prosecutor is not absolutely immune for statements made during a press conference.¹⁴⁸ The prosecutor who prepares and files an information and application for an arrest warrant enjoys absolute immunity for those actions. But if the prosecutor swears under oath to false statements of fact in the information, he becomes a complaining witness rather than a prosecutor and, like a complaining witness at common law, is not entitled to absolute immunity.¹⁴⁹

The Court's decisions do not draw the line between performance of the investigatory function and the prosecutorial function with absolute clarity. *Imbler* suggests that the inquiry begins with determining whether the prosecutor is performing a quasi-judicial function. A prosecutor most obviously performs that function by trying a criminal case; hence absolute immunity extends to the presentation of perjured testimony and the withholding of exculpatory evidence.¹⁵⁰ But *Imbler* and *Kalina* extend absolute immunity to the initiation of a prosecution, and *Imbler* notes “[p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining ... of evidence.”¹⁵¹ Relying on that language, several courts of appeals extend absolute immunity to the prosecutor's investigation into and collection of evidence once probable cause is established.¹⁵² Other courts hold that, before probable cause is established, an investigating prosecutor performs the role of police officer and is therefore not entitled to absolute immunity.¹⁵³

Because public defenders do not act under color of law in representing individual clients, they may not be sued under Section 1983; hence the issue of absolute immunity never arises.¹⁵⁴ When a public defender acts in an administrative capacity rather than as representative of a client, he acts under color of law but is not performing a quasi-judicial function and is therefore entitled only to qualified immunity.¹⁵⁵

3. Witness Immunity

With the exception of complaining witnesses who sign affidavits seeking the issuance of search or arrest warrants, witnesses in judicial proceedings are absolutely immune from suit arising from their testimony.¹⁵⁶ Though often phrased as witness immunity, the immunity can best be understood as an incident of judicial immunity; just as judicial immunity extends to prosecutors presenting a criminal case, so does it extend to witnesses testifying in judicial proceedings. Complaining witnesses who swear affidavits in support of arrest and search warrants are said not to be participants in judicial proceedings and therefore enjoy only qualified immunity.¹⁵⁷

¹⁴⁶*Burns v. Reed*, 500 U.S. 478 (1991). *Burns* expressly declined to decide whether a prosecutor would be absolutely immune for maliciously seeking a warrant without probable cause; the Court limited its holding to conduct as an advocate during the probable-cause hearing.

¹⁴⁷*Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

¹⁴⁸*Id.*

¹⁴⁹*Kalina v. Fletcher*, 522 U.S. 118 (1997). Justice Scalia concurred but argued that the Court's prosecutorial immunity decisions could not be grounded in the common law of 1871 and that the result, though correct, rested upon a meaningless distinction between preparing an information and swearing to its truthfulness.

¹⁵⁰*Imbler*, 424 U.S. at 431 n.34; *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam) (extending absolute immunity to prosecutor who fails to turn over exculpatory evidence discovered after sentencing); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (prosecutor's absolute immunity for withholding exculpatory evidence begins with arrest and continues through appeals); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 679 (9th Cir. 1984) (failure to preserve exculpatory evidence subject to absolute immunity).

¹⁵¹*Imbler*, 424 U.S. at 431 n.33.

¹⁵²*Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003); *Herb Hallman Chevrolet Inc. v. Nash-Holmes*, 169 F.3d 636, 643 (9th Cir. 1999).

¹⁵³*Mitchell*, 472 U.S. at 524 (attorney general not entitled to absolute immunity for ordering wiretaps as part of national security investigation since he was not acting in prosecutorial capacity); *Powers v. Coe*, 728 F.2d 97, 103 (2d Cir. 1984) (prosecutor not entitled to absolute immunity “when a prosecutor engages in or authorizes and directs illegal wiretaps” and “the wiretapping is . . . investigative in nature . . .”).

¹⁵⁴*Polk County v. Dodson*, 454 U.S. 312, 324–25 (1981).

¹⁵⁵*Miranda v. Clark County, Nevada*, 319 F.3d 465, 469–70 (9th Cir. 2003) (en banc) (holding that public defender acted in administrative capacity and therefore was subject to suit for policy of withholding investigatory and legal resources from defendants who failed polygraph test and for policy of assigning inadequately trained, inexperienced attorneys to capital cases).

¹⁵⁶*Briscoe v. La Hue*, 460 U.S. 325 (1983).

¹⁵⁷*Kalina*, 522 U.S. at 129–31 (prosecutor who signs affidavit seeking arrest warrant is entitled only to qualified immunity); *Malley v. Briggs*, 475 U.S. 335, 341–45 (1986) (police officer who makes false statement or material omission to secure warrant enjoys only qualified immunity).

4. Legislative Immunity

Members of Congress acting as legislators are absolutely immune from suits for either prospective relief or damages under the speech and debate clause of the U.S. Constitution.¹⁵⁸ Speech-and-debate-clause immunity ensures that the legislative function may be performed independently without fear of outside interference.¹⁵⁹ Because of its constitutional status, speech-and-debate clause immunity is broader in scope than common-law legislative immunity.¹⁶⁰

State officials performing legislative functions enjoy absolute immunity under Section 1983 for their legislative acts.¹⁶¹ So do regional officials.¹⁶² And so do local officials.¹⁶³ The immunity attaches to any legislator acting in the sphere of any legitimate legislative activity, including the conduct or participation of investigations by standing or special committees.¹⁶⁴ Whether an act is legislative turns on the nature of the act, not the motive of the actor. Introducing and voting for a general budget which abolishes a specific position within local government is a legislative act sheltered by absolute immunity whatever the motives of the legislators may be.¹⁶⁵

Although it extended legislative immunity to local officials, *Bogan* left open the question of whether introducing and voting for an ordinance was always a legislative act. The Supreme Court held that the budget ordinance “bore all the hallmarks of traditional legislation,” “reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services it provides to its constituents,” and “may have prospective implications that reach well beyond the particular occupant of the office.”¹⁶⁶

Refusing to exalt form over substance, the courts of appeals denied legislative immunity to local legislators

- who voted to lay off selected employees because of their political affiliation,¹⁶⁷
- who voted not to renew an individual employment contract,¹⁶⁸ and
- who voted to terminate a particular employee.¹⁶⁹

However, they granted legislative immunity to local legislators who voted to strip certain employee classifications of civil service protection.¹⁷⁰ Local government legislators who voted to deny a conditional land-use permit analogously were not entitled to legislative immunity because of the ad hoc character of the process and the individual focus of the matter determined.¹⁷¹ Legislators voting to award bids or purchase property similarly performed administrative rather than legislative functions and were not sheltered by absolute immunity.¹⁷² Thus, when a school board acts to expel students, or a city council fires a police chief, the school board members and city council members do not enjoy legislative immunity. Although these officials may have some legislative responsibility, their decisions to expel or fire determine the rights of specific individuals and are therefore not legislative acts; rather they are executive or administrative acts beyond the scope of either legislative or judicial immunity.

¹⁵⁸ *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 503 (1975).

¹⁵⁹ *Id.* at 502.

¹⁶⁰ Speech and Debate Clause immunity extends to criminal prosecutions. Its scope includes all activity related to the deliberations of Congress. *Gravel v. United States*, 408 U.S. 606 (1972). In *Gravel* Sen. Mike Gravel held a meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, read extensive portions of the Pentagon Papers regarding the United States' involvement in the Vietnam War, and placed all forty-seven volumes in the public record. Senator Gravel also arranged for their private publication. The Supreme Court held that the senator was absolutely immune from any suit regarding the conduct of the hearing but was not immune for his actions in arranging a private publication.

¹⁶¹ *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

¹⁶² *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403–6 (1979).

¹⁶³ *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998).

¹⁶⁴ *Tenney*, 341 U.S. at 376–77.

¹⁶⁵ *Bogan*, 423 U.S. at 55–56 (1998).

¹⁶⁶ *Id.* See also *Gallas v. Pennsylvania Supreme Court*, 211 F.3d 760, 770–71 (3d Cir. 2000) (legislative immunity attaches to decision to abolish position of court administrator as part of broad reorganization plan).

¹⁶⁷ *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 7–9 (1st Cir. 2000).

¹⁶⁸ *Id.* at 651–52, quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (other citations omitted).

¹⁶⁹ *Canary v. Osborn*, 211 F.3d 324, 329–30 (6th Cir.), cert. denied, 531 U.S. 927 (2000).

¹⁷⁰ *Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 4–5 (1st Cir. 2000).

¹⁷¹ *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219–24 (9th Cir. 2003).

¹⁷² *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1252–53 (10th Cir. 1998).

The still evolving scope of legislative immunity may generate substantial litigation as local governments learn to be more sophisticated in using their powers to punish unpopular speech and unpopular groups. But, for the most part, legislative immunity should not pose a major practice problem. Litigation seeking to enjoin the enforcement of an unconstitutional statute should proceed against the officials charged with enforcement rather than the legislators who enacted it.

5. Absolute Immunity and Interlocutory Appeals

Because absolute immunity confers an immunity from the burden of litigation, not just from liability, defendants may claim absolute immunity either through a motion to dismiss or in an answer and accompanying motion for summary judgment. Should the court deny either motion, the defendant may appeal immediately despite the absence of a final judgment under the collateral final decision rule staying proceedings related to the damage claim pending appeal.¹⁷³ A defendant who unsuccessfully appeals from an order denying a motion to dismiss on qualified immunity may appeal a second time from an order denying summary judgment on qualified immunity, again staying proceedings below.¹⁷⁴ Thus claims for damages against a defendant who can raise the defense of qualified immunity can take years to come to trial even when the defense is unsuccessful. Accordingly you must discuss with clients the advantages and disadvantages of suing public officials for damages so that they can make an informed decision on whether the claim is worth pursuing in the face of almost certain delay.

B. QUALIFIED IMMUNITY: EXECUTIVE OFFICIALS

The U.S. president enjoys absolute immunity from suits for damages arising from his conduct as president.¹⁷⁵ But every other executive official from cabinet officials and governors, legislators and judges performing administrative functions, to the tens of thousands of public employees exercising state and local authority such as law enforcement officers and schoolteachers enjoy only qualified immunity from suit.¹⁷⁶ Drawn from analogous common-law defenses available to public officials, qualified immunity protects public officials from personal liability unless their conduct violates then clearly established constitutional law. The defense rests upon

two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.¹⁷⁷

Qualified immunity is an affirmative defense. Early cases required a public employee to establish both that he did not violate clearly established law and that he acted without malicious intent.¹⁷⁸ Because proof of subjective good faith was incompatible with summary judgment, the Supreme Court modified the defense to shield public employees performing discretionary government functions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁷⁹ Because public employees almost always perform discretionary functions, qualified immunity really turns on two issues: (1) the nature of the action in question and (2) whether that action violated clearly established law. Although the former question may involve disputed facts, the latter is a question of law subject to early resolution. This involves a historical inquiry into whether the law was clearly established when the defendant acted.¹⁸⁰

¹⁷³See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43 (1982).

¹⁷⁴*Behrens v. Pelletier*, 516 U.S. 299, 306–8 (1996).

¹⁷⁵*Nixon*, 457 U.S. at 749. Immunity is limited to claims arising from conduct within the “outer perimeter” of presidential responsibility and does not extend to conduct before the President takes office. *Clinton v. Jones*, 520 U.S. 681, 693–96 (1997).

¹⁷⁶*Mitchell*, 472 U.S. at 520–24 (rejecting absolute immunity for cabinet officers and individuals performing national security investigations); *Harlow v. Fitzgerald*, 457 U.S. 800, 808–13 (1982) (high-ranking presidential aides); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (school officials); *Scheuer v. Rhodes*, 416 U.S. 232, 247–49 (1974) (governors, state adjunct generals, national guard officers, and enlisted members and presidents of state universities.).

¹⁷⁷*Scheuer*, 416 U.S. at 240.

¹⁷⁸E.g., *Wood*, 420 U.S. at 322.

¹⁷⁹*Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

¹⁸⁰*Id.*

1. Clearly Established Law

Whether qualified immunity shelters a public employee critically depends on the level of generality at which a court determines whether the law is clearly established. In a series of cases the Supreme Court sketched out the approach to be taken. *Anderson v. Creighton* refined the meaning of “clearly established law” in a law enforcement officer’s qualified immunity defense against a claim that he conducted a warrantless search without probable cause or exigent circumstances.¹⁸¹ The plaintiff argued that no officer could reasonably believe that he could conduct an unreasonable search since the Fourth Amendment itself clearly established the prohibition against unreasonable searches. The Court, rejecting the argument, held that the argument stated the legal inquiry too generally; because probable-cause determinations are fact-dependent, the relevant question was “the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.”¹⁸² Although identifying a case in which “the very action in question has previously been held unlawful” is not necessary, that “in the light of pre-existing law, the unlawfulness must be apparent” is essential.¹⁸³

Because both the Fourth Amendment and qualified immunity incorporate an inquiry into reasonableness, the *Anderson* plaintiff argued that one could not both violate the Fourth Amendment by acting unreasonably and enjoy qualified immunity for having acted reasonably. The Court rejected that argument. The Court’s reasoning is that each definition of reasonableness incorporates a different focus. For example, the Fourth Amendment definition of reasonableness includes an officer’s reasonable yet mistaken appraisal of the facts, such as the “severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁸⁴ In contrast, reasonableness in the qualified immunity context includes reasonable mistakes of law even when all facts are perceived correctly, such as how much force is excessive.¹⁸⁵

In the wake of *Anderson*, the Eleventh Circuit repeatedly held that a plaintiff could defeat qualified immunity only by identifying a previous case deciding the same issue on materially similar facts—a standard which virtually converted qualified immunity into absolute immunity. Thus, when prison guards punished a member of a chain gang for misconduct by handcuffing him to a hitching post shirtless with his arms above his shoulders for seven hours in the hot sun without food or a bathroom break, the Eleventh Circuit held his Eighth Amendment claim barred by qualified immunity because there was no previous case decided on materially similar facts. In *Hope v. Pelzer* the Supreme Court reversed the Eleventh Circuit.¹⁸⁶ The Court said that “[t]his rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases.”¹⁸⁷ Rather, the Court held that qualified immunity served to protect defendants from liability absent “fair notice” that their conduct was unlawful. The Court noted that it previously held that in prosecutions under 18 U.S.C. § 242, the criminal counterpart to Section 1983, due process required only that the accused be given fair warning that his conduct was unlawful.¹⁸⁸ Furthermore, the Court had on several occasions “upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.”¹⁸⁹ Seeing no reason to require a greater warning in civil litigation, the Court held:

Although earlier cases involving “fundamentally similar” facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with “materially similar” facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.¹⁹⁰

¹⁸¹ *Anderson v. Creighton*, 483 U.S. 635 (1987).

¹⁸² *Id.* at 641.

¹⁸³ *Id.* at 640.

¹⁸⁴ *Saucier v. Katz*, 533 U.S. 194, 205–6 (2001) (internal citations omitted).

¹⁸⁵ *Id.*

¹⁸⁶ *Hope*, 536 U.S. at 730.

¹⁸⁷ *Id.* at 739.

¹⁸⁸ *United States v. Lanier*, 520 U.S. 259 (1997).

¹⁸⁹ *Id.* at 269.

¹⁹⁰ *Hope*, 536 U.S. at 741.

Hope answered the question and concluded that Supreme Court and circuit cases were sufficient to give the required fair warning that the use of a hitching post as punishment violated the Eighth Amendment.

The courts of appeals came to different conclusions respecting the extent to which *Hope* modified the defense of qualified immunity. These circuits interpreted *Hope* liberally to deny qualified immunity even in the absence of cases decided on similar facts:

- First,¹⁹¹
- Second,¹⁹²
- Third,¹⁹³
- Sixth,¹⁹⁴ and
- Eighth¹⁹⁵

These circuits interpreted *Hope* narrowly to grant qualified immunity because of the absence of cases decided on similar facts:

- Fourth,¹⁹⁶
- Fifth,¹⁹⁷
- Seventh,¹⁹⁸ and
- Ninth.¹⁹⁹

¹⁹¹*Savard v. Rhode Island*, 2003 WL 282421, *1, 8 (1st Cir. 2003) (denying qualified immunity in Fourth Amendment claim based on body cavity search); *Suboh v. District Attorney's Office of Suffolk District*, 298 F.3d 81, 86 (1st Cir. 2002) (denying qualified immunity in due process family integrity claim against officer who, based on grandparents' claim of parental kidnapping, took custody of child from mother and transferred the child to the grandparents who fled with the child to Morocco).

¹⁹²*Loria v. Gorman*, 306 F.3d 1271, 1283 (2d Cir. 2002) (denying qualified immunity in Fourth Amendment claim against officer who, responding to loud noise complaint, made warrantless entry into home to seize homeowner because noise had abated before arrival and no reasonable officer could believe exigent circumstances were present).

¹⁹³*Atkinson v. Taylor*, 316 F.3d 257, 261–66 (3d Cir. 2003) (denying qualified immunity to prison guards who housed prisoner known to have severe allergic reactions to cigarette smoke in cell exposing him to environmental tobacco smoke).

¹⁹⁴*Burchett v. Kiefer*, 310 F.3d 937, 942–46 (6th Cir. 2002) (denying qualified immunity in Fourth Amendment claim against police officer who detained arrestee in police car for three hours with windows rolled up in 90-degree heat); *Bell v. Johnson*, 308 F.3d 594, 612–13 (6th Cir. 2002) (denying qualified immunity in First Amendment claim against prison guard alleged to have seized prisoner's legal papers and medical dietary material in retaliation for filing civil lawsuit).

¹⁹⁵*Hawkins v. Holloway*, 316 F.3d 777, 788–89 (8th Cir. 2003) (denying qualified immunity in substantive due process claim against sheriff who pointed loaded gun at deputies and threatened to shoot them whether as method of discipline or as expression of official frustration). *But see Hill v. McKinley*, 311 F.3d 899, 902–5 (8th Cir. 2002) (granting qualified immunity to deputies who restrained nude violent intoxicated female prisoner by spread-eagling her on a restraining board for three and one half hours with her genitals fully exposed since law forbidding purposeless exposure of genitals in presence of male deputies not clearly established).

¹⁹⁶*Robles v. Prince George's County*, 302 F.3d 262, 270–71 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1634 (2003) (granting qualified immunity to police officers from one county who handcuffed pretrial detainee to pole in deserted shopping center in the middle of the night and left him there to be picked up by officers from another county to whom he was to be transferred).

¹⁹⁷*McClendon v. City of Columbia*, 305 F.3d 314, 323–33 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1355 (2003) (granting qualified immunity in state created danger of wrongful death claim under Fourteenth Amendment against police officer who gave gun to confidential informant who was known gang member with substantial history of drug involvement to take to meeting with drug dealer; informant used gun to murder the dealer); *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395, 401–2 (5th Cir. 2002) (granting qualified immunity to social worker who conducted a visual search of 6-year-old girl's labia for evidence of sexual abuse without demonstrable probable cause or a court order, without parental consent, and in the absence of exigent circumstances).

¹⁹⁸*White v. City of Markham*, 310 F.3d 989, 993–97 (7th Cir. 2002) (granting qualified immunity to police officer who conducted nonjudicial eviction of tenants by threatening them with immediate arrest unless they vacated residence owned by landlord).

¹⁹⁹*Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1048–52 (9th Cir. 2002) (granting qualified immunity to warden and guards who knowingly double-celled decedent with psychiatrically disturbed inmate with substantial history of violence because when risk of some harm became serious risk of substantial harm was unclear from previous cases).

The Eleventh Circuit construed *Hope* liberally

- to deny qualified immunity²⁰⁰ and
- narrowly to grant qualified immunity.²⁰¹

2. The Reasonable Official

The question of whether a reasonable official should have believed that the conduct in question violated clearly established law is largely a function of whether the law in question was clearly established. In that sense the determination of whether the official's belief was reasonable is redundant; it is reasonable whenever the law is not clearly established. However, cases also suggest that the determination of reasonableness takes into account the defendant's scope of discretion and responsibilities of the office. The existence of reasonable grounds for the belief formed at the time of the action and in light of all the circumstances then present is what affords a basis for qualified immunity.

In *Malley v. Briggs* the Court set forth guidelines for the lower court to use in applying this standard to determine the existence of qualified immunity.²⁰² In *Malley* the plaintiffs sued the police officer who procured the warrant that led to their arrest; they asserted that the warrant application and supporting affidavit failed to establish probable cause.²⁰³ The Court applied a standard of objective reasonableness, holding that “[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost.”²⁰⁴

Given the Court's expansive interpretation of qualified immunity, you should proceed cautiously when suing a public official for damages. Rule 11 requires a prefiling factual investigation; as the next section makes clear, you should allege the facts that defeat qualified immunity in detail. Advocates should refrain from suing officials for damages in the absence of evidentiary support.

3. Qualified Immunity, Intentional Discrimination, and Retaliation

Conventional claims of unlawful discrimination and retaliation rest upon conduct whose legality depends upon the motive for rather than the character of the conduct. The Constitution does not prohibit firing public employees, but it does prohibit firing them because of their race or in retaliation for protected speech. To avoid summary judgment on the underlying constitutional claim, the plaintiff must produce sufficient evidence, usually circumstantial, from which a reasonable jury can infer that the defendant *intentionally* discriminated or retaliated; without that evidence, the plaintiff cannot establish unconstitutional conduct.²⁰⁵ Without unconstitutional conduct, the defendant prevails whether or not qualified immunity exists.

²⁰⁰ *Holmes v. Kucynda*, 321 F.3d 1069, 1077–83 (11th Cir. 2003) (denying qualified immunity to officers who responded to a domestic disturbance complaint, obtained permission to enter an apartment, interviewed the occupant and his nude girlfriend, and, after ascertaining that girlfriend was visiting from out of town, arrested her for narcotics possession without probable cause or a warrant when the tenant, searching for his wallet, opened a drawer containing drugs); *Vineyard v. Wilson*, 311 F.3d 1340, 1346–55 (11th Cir. 2002) (denying qualified immunity to sheriff who used pepper spray to quiet a handcuffed, disorderly conduct arrestee who, while seated in back seat of cruiser, yelled back at deputy who verbally abused her).

²⁰¹ *Willingham v. Loughnan*, 321 F.3d 1299, 1302 (11th Cir. 2003), *petition for cert. filed*, 71 USLW 3737 (May 16, 2003) (NO. 02-1694) (the court reinstated a grant of qualified immunity after the earlier decision was vacated and remanded for reconsideration in light of *Hope* to police officers who used excessive force in shooting plaintiff four times because no case was decided on materially similar facts; the court stated: “The Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), did not change the preexisting law of the Eleventh Circuit much and [d]ecisions of this Court before the Supreme Court's *Hope* decision demonstrate that the law of the Circuit harmoniously complies with the Supreme Court's reminder”); *but see Vaughn v. Cox*, No. 00-14380, 2003 WL 22025451, at *4–5 (11th Cir. Aug. 29, 2003) (*sua sponte* vacation of earlier decision; holding that police officer was not entitled to qualified immunity because no reasonable officer could have concluded that the Fourth Amendment permitted the use of deadly force to seize a fleeing suspect who posed no danger to the officers or others).

²⁰² *Malley v. Briggs*, 475 U.S. 335 (1986).

²⁰³ *Id.* at 337.

²⁰⁴ *Id.* at 344–45.

²⁰⁵ *See generally Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 141 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–5 (1973).

Qualified immunity is less useful in shielding officials from frivolous claims where the defendant's subjective mental state is at issue, such as retaliation and intentional discrimination, because often that matter can be resolved only at trial. The question of how to adapt qualified immunity to state-of-mind claims reached the Supreme Court when a prisoner alleged that a prison official intentionally misdelivered legal papers in retaliation for the filing of a lawsuit.²⁰⁶ The Court noted a potentially serious problem:

Because an official's state of mind is "easy to allege and hard to disprove," insubstantial claims that turn on improper intent may be less amenable to summary disposition . . . [and] therefore implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages.²⁰⁷

Despite its concern, reasoning that trial courts must address the defense of qualified immunity within the existing framework of the rules of civil procedure, the Court rejected the imposition of a heightened clear and convincing evidentiary burden in claims against public officials.

4. Qualified Immunity Practice and Procedure

Qualified immunity protects public officials from the burden of litigation as well as from judgments.²⁰⁸ Therefore the issue should be resolved early and, when possible, before discovery.²⁰⁹ Given that defendants are virtually certain to raise qualified immunity, you must anticipate it in drafting the complaint. The Supreme Court never requires plaintiffs to plead with particularity in Section 1983 litigation.²¹⁰ A majority of circuits reject a heightened pleading standard.²¹¹ However, some continue to insist upon fact-specific pleading in Section 1983 damage claims.²¹² However, *Crawford-El* authorizes district courts to require plaintiffs to "put forward specific, nonconclusory factual allegations" by either granting a motion for more definite statement under Federal Rule of Civil Procedure 12(e) or by ordering a reply to the answer under Federal Rule of Civil Procedure 7(a).²¹³ Should the defendant raise the defense of qualified immunity, the court must rule before permitting discovery and decide whether the specific allegations show a violation of clearly established law.²¹⁴ Should the court deny summary judgment, the defendant is entitled to an immediate interlocutory appeal and, should he take one, a stay of further proceedings in the district court pending adjudication of the appeal.²¹⁵ Thus the defense of qualified immunity immediately tests whether the plaintiff alleged facts sufficient to establish that a reasonable officer would have believed the conduct in question to have been unlawful under clearly established law.

If the plaintiff alleges specific facts showing a violation of clearly established law, but the defendant accompanies a summary judgment motion with affidavits contesting plaintiff's factual allegations and supporting qualified immunity,

²⁰⁶ *Crawford-El v. Britton*, 523 U.S. 574 (1998).

²⁰⁷ *Id.* at 584–85. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), previously held the defense to be available to claims of unlawful retaliation, but its specific holding was only that immunity sheltered an employee unless he violated clearly established law irrespective of his state of mind: "Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case." *Crawford-El v. Britton*, 523 U.S. at 589.

²⁰⁸ *Harlow*, 457 U.S. at 817.

²⁰⁹ *Anderson*, 483 U.S. at 646 n.6.

²¹⁰ See *Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit*, 507 U.S. 163, 168 (1993) (reserving question in context of qualified immunity).

²¹¹ *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1225–26 (9th Cir. 2002); *Goad v. Mitchell*, 297 F.3d 497, 502–3 (6th Cir. 2002) ("We conclude that the Supreme Court's decision in *Crawford-El* invalidates the heightened pleading requirement that we enunciated in *Veney*" (overruling *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995)); *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) ("there is no heightened pleading standard in qualified immunity cases"); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.), cert. denied, 534 U.S. 1019 (2001) ("We conclude that this court's heightened pleading requirement cannot survive *Crawford-El*"); *Harbury v. Deutch*, 233 F.3d 596, 610 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002) ("plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard"); *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998) ("Civil rights complaints are not held to a higher standard than complaints in other civil litigation").

²¹² See, e.g., *Gonzales v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003); *Judge v. City of Lowell*, 160 F.3d 67, 73 (1st Cir. 1998). The First Circuit has not always followed *Judge*; see *Torres-Viera v. Laboy-Alvarado*, 311 F.3d 105, 108 (1st Cir. 2002) (while plaintiffs are not held to higher pleading standards in Section 1983 actions, they must plead enough for a necessary inference to be reasonably drawn) (citations omitted).

²¹³ *Crawford-El*, 523 U.S. at 598.

²¹⁴ *Id.*

²¹⁵ *Id.*; *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

then discovery is proper.²¹⁶ Should the court again deny summary judgment following discovery, the defendant may take a second interlocutory appeal.²¹⁷ If the defendant does not seek summary judgment, or if the district court denies the motion(s), the plaintiff may finally undertake full discovery.

III. Damage Claims Against Cities and Counties Under Section 1983

Most Section 1983 claims involve suits against government employees who violate the Constitution, statutes, or their employer's own stated policies.

A. THE CUSTOM, POLICY, OR PRACTICE REQUIREMENT

These employee actions cannot be imputed to the agency, and do not give rise to *agency* liability under Section 1983 because a city, county or similar governmental agency is liable only for a deprivation of federal rights caused by its own “custom, policy or practice.”²¹⁸ *Monell* establishes the principle that government should be liable only for actions for which it is directly responsible; *Monell* stakes out the parameters of this exception to the common-law rule that government should be immune from suit.

1. No Governmental “Respondeat Superior” Liability

That the state actor is a government employee acting within the scope of the state actor's employment does *not* make the government liable for all actions of the employee. *Monell* clearly rejects *respondeat superior* liability for government agencies; *Monell's* reasoning is that “the touchstone of § 1983 action against a government body is an allegation that official policy is responsible for a deprivation.”²¹⁹ *Monell* further holds that a governmental “strict liability” rule would run counter to the statutory intent that only when official policy is the culprit may the agency be held accountable. Hence the government entity—as opposed to the individual government employee or agent—is liable only for its employee's or agent's acts which stem from a “custom, policy or practice” of the entity, and not from an individual aberration or isolated act, even one committed “under color of law.”²²⁰

This is generally not an issue when the deprivation of federal rights results from enforcement of a regulation or policy formally adopted by the agency. The problems arise when the source of the policy, or the authority under which it is enforced, is uncertain.

2. Establishing a “Custom, Policy, or Practice” in the Absence of Written Guidelines or Repeated Acts

Under Section 1983, an unwritten “standard operating procedure” can amount to a “custom, policy, or practice” if carried out with the acquiescence of the agency heads.²²¹ Thus, in *Jett v. Dallas Independent School District*, involving an alleged unwritten custom of racial discrimination, the plaintiff could establish such a policy or practice only by proving that agency policymakers “caused the deprivation of rights at issue by ... acquiescence in a long-standing practice or custom”²²² Under this rule, for example, a housing authority's custom of permitting friends of its employees to leapfrog the waiting list for vacant units may be actionable under Section 1983 if shown to be so blatant that one can infer that the agency had no objection to it.

To establish a “policy or practice” in the absence of a formal agency rule or guideline most often requires proof of repeated incidents suggesting a pattern or practice: “[T]he scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful action of a single city employee not authorized to make city policy.”²²³ Despite the categorical language, this is not always the case.

²¹⁶ *Crawford-El*, 523 U.S. at 598–99.

²¹⁷ *Pelletier*, 516 U.S. at 306–7. The defendant may not appeal if the sole reason for denying summary judgment is his failure to show the absence of a genuine issue of material fact respecting whether certain conduct occurred rather than whether the conduct violated clearly established law. *Johnson*, 515 U.S. at 316.

²¹⁸ *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690–91, 692 (1978).

²¹⁹ *Id.* at 690.

²²⁰ The policy or practice, however, must be that of the entity sued. If the local agency is carrying out a state policy which results in a deprivation, the local entity may escape official liability. See, e.g., *Surplus Store and Exchange v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991).

²²¹ *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989).

²²² *Id.* at 737.

²²³ *Oklahoma City v. Tuttle*, 471 U.S. 808, 833 (1985) (Brennan, J., concurring).

A single decision made by the “final policy-making authority,” such as the governing body of an agency or one having the power to decide finally on its behalf, can constitute a “policy” under Section 1983 since “[t]he ‘official policy’ requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.”²²⁴

Other cases similarly hold that a decision made by the authority to whom the power to decide is delegated by a governing body is also “policy.”²²⁵ State law determines whether a particular person or entity is the “final policy-making authority.”²²⁶ As a practical matter, this rule means that a particular policy or practice adopted by a midlevel supervisor in the agency does not make the agency liable if the policy or practice results in the deprivation of federal rights. Similarly a routine established by a General Assistance unit supervisor or a Section 8 chief housing inspector does not, absent evidence of knowing acquiescence by the highest levels of the agency, constitute a custom, policy, or practice sufficient to hold the agency liable.

B. LIABILITY FOR INADEQUATE TRAINING

Often, however, the problem is not the “policy” of the agency but the agency employees’ ignorance of the policy. In some circumstances the agency’s failure to train its employees to comply with agency policy can lead to liability if, as a result of employee ignorance or inadequate training, a plaintiff is deprived of federal rights.

For example, the Supreme Court ruled that the failure to train police officers adequately to identify injured prisoners or those with serious medical conditions or mental impairments could result in the deprivation of the prisoner’s Fourteenth Amendment liberty interest in receiving adequate treatment while incarcerated. In *City of Canton v. Harris* the Court wrote that inadequate training could give rise to liability if

in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers can reasonably be said to have been deliberately indifferent to the need.²²⁷

While this issue most often arises in the context of damage suits involving incarceration, inadequate training is also relevant to the average legal services practice which routinely encounters chronic problems related to the curable ineptness of social services or housing authority employees. For instance, payment of aid pending an administrative appeal may be the formally adopted policy of the agency. An aggrieved party may be able to attack the chronic failure of agency employees to perfect “aid paid pending” by asserting that the agency is deliberately indifferent to the consequences of inadequately training its staff. The result of this inadequacy, after all, is the temporary deprivation of benefits—a property interest—from those entitled to receive them.²²⁸ The pervasiveness of incidents of this type suggests a de facto “custom or policy” which systematically results in the deprivation of due process. An injured party should accordingly be able to shoehorn the party’s claim into the parameters set by *City of Canton*.²²⁹

²²⁴See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (plurality opinion holding that a prosecutor who, having the power to do so, authorizes a forcible entry in violation of the Fourth Amendment creates a “policy”), citing as examples of the principle, *Owen v. City of Independence*, 445 U.S. 622 (1980) (firing by city counsel allegedly without due process); *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981) (cancellation of jazz concert by city council, in violation of First Amendment, because rock group was booked).

²²⁵See *Monell*, 436 U.S. at 660–61, which involved a policy which required pregnant teachers to take unpaid leaves without affording teachers due process.

²²⁶Thus, in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion), the delegation of power to a lower official did not make the official a “policymaker” if final authority still lay elsewhere. In *Jett*, a school principal was found not necessarily to be the final decision maker as to render the district responsible for alleged racial discrimination. Moreover, inaction on the part of the “final policymaker” in the face of decisions made by subordinates has been found to be an insufficient delegation of decision-making authority. *Gillette v. Delaware*, 979 F.2d 1342, 1348 (9th Cir. 1992). This situation, involving acquiescence to decisions made by subordinates, can be distinguished from those involving inaction at all levels, which can constitute “policy.”

²²⁷*City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

²²⁸The advocate should be aware, however, that where a deprivation of property without procedural due process is alleged, other procedural hurdles can arise. In essence, to overcome the rule that a tort suit couched as a deprivation of due process is not actionable under Section 1983, the plaintiff must show that her injuries evidence a systemic problem which could have been avoided had procedural safeguards been in place. Compare *Parratt v. Taylor*, 451 U.S. 527 (1981), with *Zimmerman v. Burch*, 494 U.S. 113 (1990).

²²⁹*City of Canton*, 489 U.S. at 396–97. In her concurring opinion, Justice O’Connor wrote that a plaintiff must prove the need for training in one of two ways. “First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face Second, . . . municipal liability for failure to train may be proper where it can be shown that policy-makers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such

Such a claim is not far-fetched even if brought outside the prison context. In *Davis v. Monroe County Board of Education* the Court applied the “deliberate indifference” standard to a gender discrimination claim under Title IX of the Civil Rights Act; it held that a primary or secondary school student could find a school district liable for student-on-student sexual harassment which continued as a result of the district’s refusal to address the issue despite notice of the persistent problem.²³⁰

C. GOOD-FAITH DEFENSES AND THE QUESTION OF PUNITIVE DAMAGES

To what extent can a municipality escape liability on the ground that its officials acted in “good faith”? In *Owen v. City of Independence* the Supreme Court rejected a claim that an agency—as opposed to an agency employee sued in the employee’s individual capacity—could claim qualified immunity based on the good faith of its officials.²³¹ *Owen* involved the firing of a police chief without notice of the reasons for this action, or a hearing, allegedly in violation of due process. The claim was initially dismissed on the ground that, since the applicability of due process in these circumstances was still “unclear” at the time, and because any government employee defendants sued in their personal capacity would have been entitled to claim qualified immunity, the same should apply to the city. The Court, however, ruled that granting a qualified or good-faith immunity to a *municipality* was not compatible with Section 1983’s fundamental purpose of remedying violations of federal rights.

The Court’s reasoning is that the danger of intimidation or inhibition—lurking when an *individual employee* has to act under threat of possible suit—is not present when a municipality or government agency is sued because these entities can act only through their employees or agents. Hence granting immunities to government, or to government agents sued in their *official capacity* for actions resulting from the agency’s custom, policy, or practice, would only undercut government’s incentive to conform their operational procedures to federal law or to control its employees.²³² For this reason, in an *official capacity* suit, damages may be awarded against a government agency for actions causing the deprivation of plaintiff’s rights even if these actions were “objectively reasonable.” In the Court’s words:

By creating an express federal remedy, Congress sought to “enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” How “uniquely amiss” it would be, therefore, if the government itself ... were permitted to disavow liability for the injury it has begotten. ... Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. ... The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.²³³

In short, if the employee is sued in the employee’s *official capacity* and the actions at issue are the result of a custom, policy, or practice, this rule effectively creates a “strict liability” standard for the government employer.

By contrast, governmental defendants are immune from a claim of punitive damages. Punitive damages are available in a Section 1983 action against an individual defendant on a showing of subjective ill will or malice.²³⁴ However, since government—already lacking immunity from awards of actual damages—should not be punished for the actions of

cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.” In *Bryan County v. Brown*, 520 U.S. 397 (1997), Justice O’Connor’s majority opinion reiterated that liability could not be based on a single incident without effectively undermining the *Monell* rule barring governmental *respondeat superior* liability. Several courts of appeal, in part based on the *City of Canton* analysis, found that an agency’s failure to address a problem was a “policy” actionable under Section 1983. Thus, in *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992), involving the 114-day detention of a prisoner because the sheriff somehow lost his file, liability was based on the failure to have adequate safeguards to avoid the situation. See also *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991); *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988); *Ezekwo v. New York City Health and Hospital Corp.*, 940 F.2d 775, 784 (2d Cir. 1991) (“standardless grant of authority” or “essentially unrestricted” discretion as “policies” actionable under Section 1983).

²³⁰ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

²³¹ *Owen v. City of Independence*, 445 U.S. 622 (1980).

²³² *Id.* at 655–56.

²³³ *Id.* at 651–52, quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (other citations omitted).

²³⁴ *Smith v. Wade*, 461 U.S. 30 (1983).

rogue employees, punitive damages may not be awarded against a government agency or municipality. In *Newport v. Fact Concerts Inc.* the Court stated:

Punitive damages . . . are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct . . . Regarding retribution, . . . an award of punitive damages against a municipality “punishes” only the taxpayers, who took no part in the commission of the tort. . . .²³⁵

The Court reasoned that an award of punitive damages would not clearly deter municipal officials who would not themselves pay the award; neither were punitive damages clearly the most effective method for correcting or deterring similar violations of federal law.²³⁶

D. MUNICIPAL LIABILITY FOR EMPLOYEES SUED IN OFFICIAL CAPACITIES

Generally a governmental agency can act only through its employees. If not acting as a renegade in violation of agency policy, these employees are merely implementing the entity’s custom, policy, and practice. If the result of these actions is a deprivation of federal rights, both the employee and the agency may be sued. As reviewed earlier in this chapter, while an employee may be able to invoke qualified immunity so long as the contours of the federal right were not clearly established, the governmental employer has no such defense.²³⁷ Even if the entity is being sued as a result of custom, policy, or practice, tactical reasons or pleading rules may require that the individual employee be named as the defendant, and not the agency itself. For example, a claim for an injunction might name the head of the agency as a defendant in order to hold the agency head or the agency head’s successor responsible for future compliance with a court order. Nevertheless, as a practical matter, so long as the employee is sued in the employee’s official capacity, the action lies against the governmental agency. To avoid confusion, contrasting “personal capacity” liability with that based on “official capacity” may be useful.

A government employee may be sued in either, or both, the employee’s personal or official capacity. The distinction between the personal or official capacity hinges on the person whom or the entity that the plaintiff is ultimately holding responsible: “Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official capacity suits, in contrast, ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’”²³⁸ Furthermore, “the phrase ‘acting in their official capacities’ is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.”²³⁹ For example, in *Hafer v. Melo*, involving a state official who fired state employees because of their political affiliations after the official took over a state agency, the actions of the new head of the agency were “quintessentially official.” Nevertheless, after plaintiffs’ original “official capacity” claim had been dismissed on the ground that any award of damages would of necessity have been paid by the state and hence contrary to the Eleventh Amendment, the Supreme Court allowed the official to be sued also in her personal capacity.²⁴⁰

In “official capacity” suits, the government agency must comply with the injunction or pay the damage award. In “personal capacity” suits, the employee is liable, although agency indemnification is the usual practice. However, that the official was on the job when the official deprived the plaintiff of federal rights does not shield the government agent from personal liability and convert the action into an “official capacity” suit. A welfare caseworker who unilaterally discontinues the benefits of a food stamp recipient without the authority of agency regulations is an employee who discontinues a recipient without the authority of agency regulations and is acting on his own, in his “personal capacity,” and not in his official capacity. By the same token, an employee who discontinues a recipient by implementing a state regulation may theoretically be sued in his official capacity as well as personal capacity, although suing the agency or the head of the agency or both would be better practice. This would be particularly so if prospective equitable relief were sought.

²³⁵ *Newport v. Fact Concerts Inc.*, 453 U.S. 247, 266–67 (1981).

²³⁶ *Id.* at 268–69.

²³⁷ If the governing law was “clearly established,” the plaintiff would theoretically be entitled to damages from the employee since the employee would not have qualified immunity. However, suing the employee in her personal capacity seems pointless since (1) her employer is the “deep pocket” and (2) additional damages, such as punitives, could not be obtained from the employee because the fact that she was following agency rules probably undermines a claim that the employee possessed the requisite malice or ill will.

²³⁸ *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985), quoting *Monell*, 436 U.S. at 690 n.55.

²³⁹ *Hafer v. Melo*, 502 U.S. 21, at 26.

²⁴⁰ *Id.* at 26.