42 U.S.C. § 1983 states:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Enforcing Federal Rights Under Section 1983
Enforcing Federal Rights: The Law of Section 1983

(Part 1)

by Robert P. Capistrano

[Editor’s note: This is a two-part article on Section 1983. The first part, below, examines the principal U.S. Supreme Court decisions construing 42 U.S.C. § 1983 and describes the basic elements of the claim. The second part, scheduled to be published in the next issue of CLEARINGHOUSE REVIEW, reviews claims brought under the due process clause of the Fourteenth Amendment, procedural issues in bringing a Section 1983 claim, and available remedies and defenses.]

Federal law has long been an important source of substantive rights for low-income people. These rights include a number of housing, health, and income benefit programs administered by state or local government agencies under arrangements with the federal government. When the inevitable breakdowns occur in the delivery system for any of these benefits, or the state refuses to honor its substantive federal obligations, the governing federal statute or regulation is consulted to set the standard by which the agency’s performance is to be measured. If the state or local agency refuses to acknowledge any error, recourse is often found only in the courts.

I. Introduction

For the advocate representing the aggrieved client, the trick has always been to find in the statutory or regulatory promises an affirmative right to sue for a meaningful remedy. Perhaps a landlord has invoked city nuisance abatement proceedings to evict a tenant without affording her a hearing, or the housing authority has given the advocate’s client a notice terminating a Section 8 certificate for having in her unit an unauthorized cotenant, in this case, the tenant’s mother who has just suffered a stroke and has nowhere else to go. Maybe the client’s food stamps have been stopped under the state’s peculiar interpretation of federal employment and training regulations. Still another client is justifiably upset because local police appear to enforce domestic violence restraining orders only sporadically.

These situations share two fundamental characteristics: all involve governmental action, and each action presents a potential violation of federal law. They also illustrate the importance of understanding available federal remedies.

Similar cases appear on the doorsteps of legal services offices somewhere in the United States. The agency is the landlord, the local government, or the state, and the advocate is the legal service attorney who has the obligation to serve the client with the substantive legal rights that exist.

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country on a daily basis. The advocate who is not conversant with the legal vehicles for addressing these problems would be committing a gross disservice to the client, and perhaps malpractice. In this article I give the legal services lawyer an overview of the principal U.S. Supreme Court decisions construing 42 U.S.C. § 1983—one of the most important tools to help an individual client enforce federal rights against state and local governments.

II. Stating a Claim under Section 1983

Section 1983 provides:

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

Its origins in the Reconstruction Era Civil Rights Act enacted to enforce the Fourteenth Amendment, Section 1983 was essentially a dead letter until the convergence of the civil rights movement with the Warren Court's emphasis on individual rights. After nearly a century of disuse, Section 1983 was reborn in the seminal case of Monroe v. Pape. Addressing the misconduct of Chicago police officers, Monroe established that this statute's fundamental purpose was to make federal courts available for the vindication of federally endowed rights in the face of hostile or recalcitrant state or local governments. From this flowed a couple of conclusions:

- Section 1983 could be used to sue government agents and officials for violating federal law even if the agents' actions were contrary to state law. These actions, after all, were performed "under color" of the ostensible authority granted by government employment.

- Since Section 1983 exists to enforce federal rights, a plaintiff not only could sue directly in federal court without first having gone to state court but also could resort to Section 1983 without first relying on a cause of action created by state law or exhausting other available state remedies.

Moreover, after Monell v. New York City Department of Social Services, cities and local governments could be sued under Section 1983 for deprivations of federal rights caused by an agency custom, policy, or practice. Perhaps most important for legal services advocates, the Supreme Court held in Maine v. Thiboutot that federal statutes are enforceable under Section 1983.

Later Supreme Court decisions confirmed that Section 1983 claims could be brought in state court and that, if filed there, had to be heard by the state court if that tribunal considered similar state law.

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1 I would like to thank Gill DeFord, Deborah Perluss, Brian Lawlor, and Gary Smith for reading and critiquing this article, and Julie Balovitch for researching particular issues and editing the final draft. The advocate must be aware of potential forums in addition to potential vehicles. Suppose that lawsuits in the above cases are filed in state court and raise the federal claim. The advocate must anticipate removal of the case to federal court pursuant to 28 U.S.C. § 1441 and hence understand the possible federal jurisdiction ramifications on how the claim is presented and litigated.

2 While the Supreme Court has set the overall framework for Section 1983 litigation, the circuit courts of appeals have been primarily responsible for fine-tuning the doctrine. Space considerations preclude any in-depth exploration in this article of the decisions of the appellate courts.


5 Maine v. Thiboutot, 448 U.S. 1 (1980) (involving the Social Security Act and the Aid to Families with Dependent Children program) (Clearinghouse No. 18,409).
Given Section 1983’s purpose of vindicating federal rights, suit could be brought even if state law immunities would have barred similar state law claims against government agents.

Because of the potential benefits to their clients of effectively wielding Section 1983, legal services advocates must have a basic understanding of the scope of this statute. Relief is available under this law for claims with two basic elements: the claim must involve the deprivation of a “right” granted to the plaintiff by the federal constitution, statute, or regulation, and the deprivation must be by a “person” acting “under color” of state law.

A. Implying a Private Right of Action

Given its origin as a civil rights statute, Section 1983 is usually conceived as a tool for redressing the violation of individual guarantees arising out of the U.S. Constitution, many of whose protections, thanks to the Warren Court’s interpretation of the Fourteenth Amendment, have been extended to protect against actions taken by state and local governments. But, as I will discuss later, Section 1983 is also a vehicle for attacking state and local governmental violations of federal statutes and regulations by conferring on injured prospective plaintiffs a “private right of action” permitting them to sue an agency defendant, regardless of whether the federal government or other enforcement agency intends to address the violations.

Central to the enforcement of federal statutory rights by an aggrieved individual is, of course, the determination of whether a statute in question allows an “implied private right of action” on the grievant. Before plaintiff can file the action, she must have the right to sue. Some statutes, such as the Americans with Disabilities Act or the Fair Housing Act, explicitly give aggrieved parties that option. But when the statute is vague or silent, there must be some indication that Congress intended the statute to grant a private individual a “right of action.” The courts have outlined two avenues for asserting such a right: first, by implying one directly from the text of statute itself or, second, by operation of Section 1983’s explicit pledge to provide a remedy for any violation of the “constitution and laws” carried out under color of law.

Federal courts have been reluctant to imply a right to sue where the statute is silent. This hesitation is rooted in the doctrine of separation of powers, under which the creation of new causes of action is generally committed to the legislature. Nevertheless, a plaintiff may sue directly under a federal statute without resorting to Section 1983 if a four-part test is met.

First, plaintiff must show that he or she is a member of the class for whose special benefit the statute was enacted. Second, there must be affirmative evidence of Congress’ intent to confer a private remedy. Third, plaintiff must show that implying a private right of action would be consistent with the underlying purposes of the statute. And, fourth, plaintiff must establish that the cause of action is not one traditionally relegated to state law or in an area basically the concern of state law to the degree that implying a private right of action under federal law would be inappropriate.

Under this test, plaintiff bears the onerous burden of showing that Congress intended to grant a private right of action. The difficulty of this test has made Section 1983 all the more attractive to those seeking to enforce federal statutes against state and local officials, particularly because

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6 Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (confirming that Section 1983 claims can be brought in state court). Howlett v. Rose, 496 U.S. 356, 375 (1990) (if filed in state court, Section 1983 claims have to be heard there if that tribunal considers similar state law claims).

7 See generally Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (identifying those portions of the Bill of Rights which, under the Fourteenth Amendment, also apply to the states).

8 Thiboutot, 448 U.S. at 1.


Section 1983 is presumed to provide a private right of action for federal constitutional and statutory deprivations. As the Supreme Court succinctly put it, "[i]f there is a state deprivation of a 'right' secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." In short, when Section 1983 is used, the burden of disproving a private right of action is shifted to the party opposing the claim.

The benefits of the presumption in favor of a Section 1983 remedy are shown in the case of a public housing tenant seeking to enforce the provisions of the U.S. Housing Act—such as the Brooke Amendment or the right to a grievance proceeding—against a public housing authority. While the tenant would have little trouble showing that she is a beneficiary of the statute or that enforcement of federal rights is not a traditional function of state courts (the first and fourth prongs of the Ash/Touche Ross test), and even though a modicum of creativity should establish that private enforcement would further the statutory purposes (prong three), the plaintiff may be hard-pressed to show affirmatively that Congress intended to provide a private right of action. The beauty of Section 1983 is that it makes such an inquiry irrelevant.

B. Implying a Right to Sue Under Section 1983

The first issue facing a plaintiff who wishes to use Section 1983 to enforce a federal statute is whether the enactment grants plaintiff a privately enforceable "right." The Supreme Court has recognized two basic circumstances which defeat a Section 1983 statutory claim: (1) when defendant can argue that the statute sued on does not create specific duties that the state agency must carry out and that a private party cannot enforce and (2) when the statute contains a "comprehensive enforcement mechanism" even if specific government action is mandated by the statute.

Section 1983 may be invoked only if the statute sued on has created an enforceable mandate. For example, a federal statute might declare Congress' intent to end unemployment, but a displaced worker could not enforce such good intention unless she could also point to a violation of a particular statutory provision requiring the state or local government to take concrete action toward this end. To demarcate where such congressional "puffery" ends and an enforceable mandate begins, the Supreme Court has devised a three-part test: First, is the provision sought to be enforced so vague and amorphous as to make judicial enforcement difficult or impractical? Second, does the statute unambiguously impose a binding obligation on the government? And, third, did Congress intend the particular statutory provision to benefit the plaintiff?

On the issue of vagueness of the statutory mandate, Pennhurst State School & Hospital v. Halderman addressed a statutory declaration of congressional policy contained in the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which set forth a "bill of rights" seemingly promising that [p]ersons with developmental disabilities have a right to

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12 Witness the impotence of the Humphrey-Hawkins Full Employment and Balanced Growth Act, 15 U.S.C. § 1021(b): "The Congress further declares and establishes as a national goal the fulfillment of the right to full opportunities for useful paid employment at fair rates of compensation of all individuals able, willing, and seeking to work."

appropriate treatment, services, and habilitation for such disabilities [which should be] . . . designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person’s personal liberty.”

This language was held to be essentially rhetorical and did not by itself create any enforceable right because the balance of the statute simply did not require that compliance with this “bill of rights” would be a condition for receiving federal funds. Similarly, in *Suter v. Artist M.*, a requirement of the Adoption Assistance and Child Welfare Act that a state make “reasonable efforts” to avoid the removal of children from their parents’ homes did not create a privately enforceable right because the statute failed to set forth standards to judge the “reasonableness” of the state’s compliance with the law.

On the other hand, the Supreme Court has held that an otherwise vague mandate can be privately enforced as a “specific right” if it is fleshed out by more precise statutory definitions—or even requirements set forth in the implementing regulations—which define the scope of the government’s duties. This is a central issue in many government benefit programs, such as Medicaid, food stamps, or public and Section 8 housing, that are integral to a legal services practice. There Congress has given the Department of Housing and Urban Development, Department of Health and Human Services, or the Department of Agriculture the power to interpret oftentimes broad statutory language as they deem appropriate.

Thus, in *Wilder v. Virginia Hospital Association*, plaintiffs were able to challenge the “reasonableness” of the state’s Medicaid reimbursement rates because they could point to the definitions found elsewhere in the statute to fill in what was meant by the term “reasonable.”

In a somewhat similar vein, in *Wright v. Roanoke Redevelopment and Housing Authority*, inadequate public housing utility allowances were challenged as violating the Brooke Amendment, the statutory mandate setting the amount of rent as a percentage of the tenant’s income.

Although the statute nowhere set a standard for “adequacy” of an allowance, HUD’s classification of a utility allowance as a component of “rent” was found to be a justifiable reading under the statute’s definition of “rent.” Since the contract rent plus the cost of utilities paid by tenants but not reimbursed by the utility allowance exceeded the percentage of tenant income allowable for rent under federal law, plaintiffs had a right of action under Section 1983 to redress the housing authority’s deprivation of the right to lower rent payments.

In determining whether a privately enforceable right exists, the Supreme Court also asks whether the statute at issue imposes a binding obligation on the state or local government. Usually this question overlaps with the earlier question of whether the statute is too vague to be enforceable and consequently would share the same answer. But what if a less than clear statute has been interpreted by the administering federal agency—through the promulgation of

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15 Suter v. Artist M., 503 U.S. 347, 359–64 (1992) (Clearinghouse No. 48,036). Congress has limited *Suter* somewhat by legislatively affirming that a private right of action may exist to enforce “state plans” adopted to carry out the various subchapters of the Social Security Act (except the Adoption Assistance Act), to the extent that a right to sue existed before *Suter*. 42 U.S.C. § 1320a-2 (1994).

16 In *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 873, 843–44 (1984), the Court ruled that “if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

17 *Wilder*, 496 U.S. at 498.

18 *Wright*, 479 U.S. at 431–32.
binding regulations—in a manner that imposes clear obligations on the state?

Before Wright v. Roanoke, discussed earlier, there was some question as to the enforceability under Section 1983 of obligations imposed by federal regulations. Wright, holding that the term “constitutions and laws” included valid regulations, gave the correct answer for beneficiaries of federal programs.19 The importance of this ruling cannot be understated. It may permit an aggrieved legal services client to rely on even the most arcane subprovisions of the Code of Federal Regulations as a club against state or local action that contravenes the regulation to the plaintiff’s detriment.

Nevertheless, advocates should recall that a regulation—not being a statute—does not stand alone but, like the moon, enjoys only the reflected authority emanating from an Act of Congress. Hence several published appellate opinions have held that a regulation creates privately enforceable rights only if the agency interpretation can be directly tied to an obligation or right manifested in the statute itself.20

The Supreme Court has identified a third inquiry to be made to determine whether a statute is privately enforceable: was the statutory provision intended to benefit the plaintiff directly? Even though the overall intent of a statute may be to benefit the class of which plaintiff is a member, that may not be true for each particular clause in the law. Some statutory provisions have been interpreted as having been enacted not to directly benefit individuals served by the program created by the statute but rather only to allow federal supervision or administration of a program. Although the Food Stamp Act may have been intended to benefit poor people directly, courts may interpret the Act’s quality-control requirements as not intended to benefit poor people directly and dismiss their claims under those provisions.

Hence, in Blessing v. Freestone, recipients of child support collected by the local child support enforcement agency sued to require the state to comply with certain reporting and other mandates set forth in subchapter IV-D of the Social Security Act.21 The plaintiffs were ultimately denied a private right of action when the Supreme Court held that these sections of the statute were primarily aimed at ensuring federal government oversight of child support enforcement and would not directly benefit child support recipients. Accordingly only the federal government could compel compliance.22

In practical terms Blessing requires the careful advocate to articulate a direct connection between the violation of federal law and the harm caused to plaintiff. Suppose a plaintiff seeks to enforce against an agency a federal requirement that certain reports periodically be submitted to Washington. Unless the plaintiff can show that failure to submit these data so impedes the operation of the program

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19 Id. at 420 n.3.
20 Harris v. James, 127 F.3d 995, 1009–10 (11th Cir. 1997) (rights enforceable under Section 1983 are not created by a federal regulation unless “the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right ...” citing Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987)). The reply to this argument is that to the extent that the federal agency has lawfully been delegated the authority, as recognized by Chevron, to interpret a statute in the manner set forth in the regulation sought to be enforced, that regulation expresses congressional intent and must be acknowledged by the courts as a law of the United States enforceable under Section 1983.
22 Similar issues are raised by the statute creating the Temporary Assistance for Needy Families program. Based on Congress’ statement that “[t]his part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part” (42 U.S.C. § 601(b)), states can be expected to argue that no property right sufficient to confer standing to enforce the statute was intended under federal law for the ultimate recipients of that program’s funding. State law may nevertheless create a right to benefits protected by due process (discussed in part 2 of this article in the next issue of CLEARINGHOUSE REVIEW).
as to affect plaintiff and other beneficiaries, a defendant can, with some success, argue that only the federal government can enforce a lack of compliance with the reporting requirement. Usually, however, the typical legal services case which asserts the deprivation of rights secured by a regulation (e.g., in the Food Stamp Program or the Section 8 program) involves a direct cause-and-effect relationship between the government breach and the resulting private harm.

Even if the statute sets forth obligations which are binding on the state or local government agency, a private right of action under Section 1983 will be denied if the statute sets forth an administrative scheme that is so comprehensive as to suggest that Congress intended that only the government or other entity could enforce the statute.

Thus, in Middlesex County Sewerage Authority v. National Sea Clammers Association, environmentalists were denied a right of action to enjoin the dumping of waste in the Atlantic Ocean. The Supreme Court found that both the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act had created an elaborate and comprehensive oversight mechanism which committed enforcement of these statutes solely to the Environmental Protection Agency and not to private litigants.

On the other hand, extensive federal regulation of the field does not necessarily demonstrate an intent to create a comprehensive enforcement mechanism. The U.S. Housing Act, with its elaborate provisions for funding and defunding housing authorities, seemed in years past to suggest a regulatory scheme which left no place for private enforcement. Yet in Wright v. Roanoke, discussed earlier, the Supreme Court pointed to heavily regulated housing authorities being nevertheless statutorily required to provide grievance procedures to their tenants—a vehicle for "private enforcement," which implied Congress' intent to confer the power to sue if necessary to vindicate rights founded not only on the U.S. Housing Act but also on the regulations implementing the Act. The private grievance remedy sufficiently distinguished Wright from National Sea Clammers.

C. Private Parties and the State Action Requirement

A Section 1983 action may be brought only against a person acting "under color of [state] law." Liability lies 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." When the defendant is a government employee doing his or her job and acting under apparent government authority, he or she is probably a "state actor." But when a private actor is involved, as is increasingly the case with the trend toward "privatization" of public functions, the waters are somewhat murkier.

Consider, for example, the duties of a private health maintenance organization

26 "State action" under the Fourteenth Amendment and the "under color of law" requirement of Section 1983 have the same meaning. Lugar v. Edmondson Oil Co., 457 U.S. 922, 928–29, 935 (1982) (Clearinghouse No. 30,966).
28 On the other hand, a government employee or subcontractor such as a public defender, whose fundamental loyalties are owed to the criminal defendant and accordingly adverse to the government, is not a "state actor" whose alleged malpractice is actionable under Section 1983 when it results in a deprivation of constitutional rights. Polk County v. Dodson, 454 U.S. 312 (1981). This exception is very narrowly construed. See West v. Atkins, 487 U.S. 42 (1988), in which a contract prison doctor who owed a professional obligation to his patient, did not as a result have interests which were necessarily so adverse to the government as to preclude a Section 1983 claim. The government, after all, has an obligation to look after its inmates' health.
that enrolls Medicaid patients, or a private prison funded by the state legislature to house those incarcerated by order of the government. Unlike private landlords receiving Section 8 subsidies, the health maintenance organization or private prison may not be subject to a body of regulations specifically prescribing the obligations that run with the government dollar. Given the relative novelty of the practice of privatizing formerly government functions, as well as the undeveloped state of the law, finding “state action” in such circumstances can be problematic, to say the least.

1. Private Party’s Exercise of Delegated State Authority

In determining whether a private party has engaged in “state action,” a court must weigh “whether the claimed . . . deprivation resulted from the exercise of a right or privilege having its source in state authority” and “whether the private party charged with the deprivation could be described in all fairness as a state actor.” Hence a deprivation of federal rights by a private party can constitute state action if the government has delegated its authority to the private actor, created the legal framework necessary to carry out the private action, or knowingly accepted the benefits of an unconstitutional practice.

Delegation of a state responsibility to a private party can make the party a state actor even if the function delegated is not one traditionally performed by the state. This principle is illustrated by West v. Atkins, which closed the door on an agency’s claim that no state action was involved when the negligence of a private doctor, under contract to provide care for inmates, injured the plaintiff in violation of the prison’s constitutional duty to avoid “deliberate indifference” to the medical needs of those in its custody.

Somewhat closer to the experience of legal services practitioners, the principle set forth in West would, for example, find state action when a community-based organization under contract with the county to host the initial orientation of welfare applicants or to ensure that such recipients receive adequate child care arbitrarily denies admission to individuals it considers morally unacceptable or otherwise undesirable. The same should be true with respect to private collection agencies which are seeking to recover defaulted student loans for the federal government and are now required, upon debtor’s request, to hold administrative hearings to determine whether wage garnishment should continue.

Joint activity by a private party and a government agent can also transform the private party into a state actor when the purpose of the collusion is to violate the federal rights of the plaintiff. This was the result in Adickes v. S. H. Kress Co., which involved a conspiracy between a “dime store” and local deputy sheriffs to prevent

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29 Lugar, 457 U.S. at 937. In Lugar the fact that a court had issued a warrant authorizing a private party to attach plaintiff’s property converted the subsequent seizure—alleged to have been without due process—into “state action.”

30 NCAA v. Tarkanian, 488 U.S. 179, 192 (1988) (citing West v. Atkins, 487 U.S. at 42 (delegation to prison contract doctor of responsibility for the care of a prisoner-patient), North Georgia Finishing v. Di-Chem., 419 U.S. 601 (1975) (court ordered attachment which failed to afford the debtor due process) (Clearinghouse No. 14,344), and Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (profits derived from a segregated parking garage)). In Tarkanian the Court held that NCAA did not act on the state’s behalf when it recommended suspension of a state university basketball coach for recruiting “irregularities,” first, because the disciplinary function had not been delegated to the NCAA and, second, because NCAA was actually acting on behalf of all NCAA members against the efforts of Tarkanian’s state employer to forstall the suspension of its most successful coach.

31 West, 487 U.S. at 42.
the integration of a southern lunch counter during the heroic period of the civil rights movement.\textsuperscript{32} The same reasoning would permit a private landlord to be sued under Section 1983 for the deprivation of property without due process if that landlord utilized the local emergency nuisance abatement proceedings to empty a building of tenants—without prior notice of the abatement hearing to the tenants—to avoid resorting to the eviction procedures sanctioned by state law or simply got a friendly police officer to throw the tenants out on the street unilaterally.

Cases not involving delegation or joint action, however, are more difficult to pigeonhole. The Supreme Court has set forth a three-part inquiry which weighs (1) the extent to which the actor relies on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function, and (3) whether the injury caused was aggravated in a unique way by the incidents of governmental authority.\textsuperscript{33} These factors are nevertheless quite opaque, requiring a case-by-case review to understand the lines the court draws to distinguish private from state action.

2. \textbf{Governmental Regulation and State Action}

One of the most important Section 1983 issues for legal services advocates is the degree to which one can imply state action from the defendant having received government funding or being extensively regulated by the state. Generally government regulation does not make the recipient or the regulated party “a state actor” unless one can show such a close connection between the government and the act complained of that the action taken “may be fairly treated as that of the State itself.”\textsuperscript{34} A private landlord participating in the Section 8 program is a state actor while taking actions required by federal regulations but is not if she locks out her tenant in violation of those regulations. Courts may analyze the facts and find that the act of forcible eviction is an expression of her private will and not compelled by government fiat.

Several Supreme Court decisions have accordingly confirmed that, absent delegation or joint activity, state action by a private party is rarely found absent compulsion from the government on the private entity to act in a particular way. For instance, in \textit{Jackson v. Metropolitan Edison Co.}, a highly regulated utility was not a state actor when, without prior notice to its customer, it terminated her power for nonpayment of the utility bill. The court saw no “nexus” between government regulation and the company’s action sufficient to implicate due process since the decision to cut off power was prompted by economic concerns and was made by the company with little relation to its business being highly regulated.\textsuperscript{35}

A similar conclusion was reached in \textit{Blum v. Yaretsky}, in which a nursing home that received Medicaid funding...
decided to lower the level of care for particular patients. Given that Medicaid regulations did not specifically require any particular level of care, the nursing home’s decision could not be imputed to the state. Indirect government involvement resulting from the regulatory requirement that the state be notified of any change did not alter this conclusion. The Court wrote: “A State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”

Most recently the Court held in Sullivan v. American Manufacturers Mutual Insurance Co. that a private workers’ compensation insurer did not become a state actor by invoking a state “utilization review” of certain medical costs which resulted in the withholding of payments without prior notice to the worker. The purpose of a utilization review is to assess the necessity for a particular procedure to determine whether the costs should be borne by the workers’ compensation carrier. In Sullivan even if it could be assumed that the state, by providing a utilization review procedure, had “subtly encouraged” insurers to withhold payments pending the review, invocation of the procedure was not required or coerced by the state.

3. Governmental Funding and State Action

Blum v. Yaretsky also discounted the contention that extensive public funding converted the nursing home’s decision into state action. In essence there was no cause-and-effect relationship between the fact of public funding and the nursing home’s allegedly unlawful act. Similarly, in the case of the private Section 8 landlord who locks out her tenant in violation of federal regulations, the government’s paying 70 percent of the rent has no apparent relationship to the motives which impelled the landlord’s action.

This issue was also addressed in Rendell-Baker v. Kohn, involving the termination of teachers and counselors critical of management by a private school that was primarily dependent on federal funding for the education of “troubled” children. In order to ensure that school staff met certain minimum requirements, state regulations did require government to be notified whenever the school hired or dismissed its counseling staff. Nevertheless, the court found no state action. First, “the decisions to discharge the petitioners were

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37 Id. at 1004.
39 Even if one ignores the fact that the workers’ compensation systems as a whole are state-created programs enacted to supplement employees’ common-law tort remedies against employers, the decision skirts the thorny narrower issue of private resort to public procedures (addressed in this article’s part 2, supra note 22). E.g., while “state action” has heretofore been found when a private creditor used constitutionally flawed attachment procedures requiring a court order (e.g., Lugar), the American Manufacturers Mutual case also involves the private use of state procedures. In American Manufacturers Mutual the court saw the provision of the utilization review procedure as more analogous to the requirement in the Rendell-Baker case (discussed below) that any new hiring by a private agency, albeit wholly government funded, be reported to the state. In any event, the “state action” discussion in American Manufacturers Mutual could be argued to be actually dicta. The court found that there could not be a deprivation of due process because the plaintiff did not have an existing property interest in the workers’ compensation payments before entitlement had been established. In the absence of an interest protected by due process, the court presumably had no reason to determine whether the deprivation of that interest was done under color of state law. Its state action discussion is therefore unnecessary to the holding. On the other hand, as noted in this article’s part 2, the court’s restrictive view of a “property right” is also troubling, placing plaintiff’s attorneys in the unenviable position of having to choose their poison.
not compelled or even influenced by any state regulation.” Second, the “facts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”

4. Private Party’s Fulfilling a Public Function

A half-century ago the Supreme Court found that private parties performing “public functions” could be considered state actors. In *Marsh v. State of Alabama* it held that a company town that performed all of the essential functions carried out elsewhere by a municipality could not suppress the First Amendment rights of its residents. The scope of this doctrine has narrowed over the years. Thus, in *Lloyd Corp. v. Tanner* and *Hudgens v. NLRB*, the court ruled that two privately owned shopping malls were not the “functional equivalent” of a company town and were therefore not subject to the First Amendment, as suitable under Section 1983, when they denied the plaintiffs in these two cases the rights to leaflet and organize.

Nor has the historic involvement of government in delivering a particular service been decisive. In *Rendell-Baker v. Kohn*, discussed earlier, the court explained that, before state action could be found, the “public function” performed by the private party had to be one which traditionally had been the “exclusive prerogative of the state.” Government’s traditional role in providing public education was held insufficient to meet this exclusivity criterion.

Unfortunately the Supreme Court has also reacted negatively to arguments that point to the importance of the service in question to the operation of modern society. In *Jackson v. Metropolitan Edison Co.* the defendant utility’s being a monopoly which provided a necessary public service did not convince the court that the utility performed a “public function” in the absence of any state obligation to provide light and power.

Even when a private party acts in the context of an apparent state obligation to provide the service in question, this may be insufficient to create state action unless the obligation has the effect of compelling the act, which caused the deprivation. For example, in *Blum v. Yaretsky*, discussed earlier, the plaintiffs argued that both the Medicaid statute and the state constitution made the state responsible for providing every Medicaid patient with nursing home services. The court countered that the laws cited “do no more than authorize the legislature to provide funds for the care of the needy” and implied that there needed to be a more direct link between the “state obligation” and a recognized “exclusive state prerogative.”

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41 Id. at 840–41. To be sure of finding state action in these types of circumstances, advocates should ask whether the private actor is standing in for the government, or involved in what amounts to “joint action,” either because the joint action could not take place without government involvement or is compelled by government policy.

42 Marsh v. Alabama, 326 U.S. 501 (1946). Affirming the connection between the court and the historical context within which it operates, this case, one should note, preceded the passage of the Taft-Hartley Act.

43 Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972), and Hudgens v. NLRB, 424 U.S. 507, 520 (1976), respectively.

44 *Rendell-Baker*, 457 U.S. at 842.


46 *Blum*, 457 U.S. at 1011. “Even if [plaintiffs] characterization[s] of the State’s duties were correct, . . . it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public.” *Id.* at 1011–12. As privatization gathers speed, finding such “exclusive state prerogatives” could become very difficult indeed, requiring the advocate to make tortured analogies to the world of the “founding fathers” for answers to modern questions.
And, as noted, the necessity of governmental compulsion as the basis of state action by a private party is perhaps the central theme of *Sullivan v. American Manufacturers Mutual Insurance Co.*47

5. **State Action, Private Parties, and Government**

State action has been found when the government profits from a private enterprise that violates its customers' civil rights. Thus the decision in *Burton v. Wilmington Parking Authority*, finding state action where a segregated restaurant located in a publicly owned garage excluded African American diners, turned on this landlord and its tenant's "symbiotic relationship," under which the garage relied on the restaurant for rent and customers, and the restaurant was assured of convenient parking.48

On the other hand, the lone fact that government receives some insubstantial benefit from an arrangement is not enough to find state action. Accordingly government receipt of licensing fees has been found too incidental to convert a segregated private club that paid the fee into a state actor.49

More important, perhaps, is to understand that *Burton* and *Marsh v. Alabama*, for that matter, were respectively decided at the height of the civil rights and union organizing movements in this country. Hence the holdings in these cases may be confined to their facts and of more historical interest than practical application today.

6. **Statutory Authorization for a Private Party's Action**

Sometimes an action may appear to have been taken under color of law yet does not make the defendant a state actor. For instance, that the particular action taken by a private individual is authorized by state statute does not convert that act into "state action" absent the government's actual involvement, which facilitates or results in the deprivation of federal rights. For example, depending on the law of a particular state, the remedy of attachment may be invoked unilaterally by a creditor or may require the creditor to obtain a court order first. While in either case the effect is the same—seizure of the debtor's property—not all attachment procedures involve state action so as to allow use of Section 1983.

In *Flagg Bros. v. Brooks*, the court contrasted a private party's use of court enforcement procedures with the party's resort to self-help attachment procedures sanctioned by New York law but not requiring court intervention.50 While the first scenario—presented by *Lugar v. Edmondson Oil Co.*—does involve state compulsion and permits the use of Section 1983, the absence of a court order—as in *Flagg Bros.*—negates a finding of "state action."51

The controversy some years ago over the U.S. Olympic Committee's refusal to allow use of the term "Gay Olympics" presented an analogous situation. That the U.S. Olympic Committee, a private agency, had been granted licensing authority of the "Olympic" name by act of Congress did not, said the Supreme Court, make the agency a state actor when it denied an applicant a license, absent governmental compulsion or active involvement in making decisions as to who would or would not be licensed.52

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49 See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 165 (1972) (issuance of a government liquor license to a segregated club did not make the club a state actor when the state received no direct benefit other than the license fee).
50 *Flagg Bros.*, 436 U.S. at 149.
52 *San Francisco Arts & Athletic*, 485 U.S. at 522 (denial of use of the term "Gay Olympics" was not state action). See also *American Mfrs. Mut. Ins. Co.*, 119 S. Ct. at 977 (workers' compensation insurance company not a state actor where its invocation of "utilization review" is authorized by state law).
7. Victims in a Special Relationship with Government

Section 1983 can be used to sue a government agency for injuries caused by a nongovernmental third party if, as the result of a “special relationship” with the agency, the victim has been put in a position which severely hampers his or her ability to protect himself or herself. Such a relationship most clearly exists when the victim has been incarcerated in jail or prison or committed in state institutions but has on occasion been found where government action has placed the plaintiff in such obviously dangerous circumstances as to make government responsible for plaintiff’s well-being.53

A noncustodial “special relationship” is found only in rare circumstances. Thus, in the case creating this standard, DeShaney v. Winnebago County Department of Social Services, the victim was a child who had been reported to the county as having been repeatedly abused by his father, the custodial parent.54 Despite these reports and a subsequent investigation, the county did not remove the child from his home. After a severe beating left the child permanently injured, the county was sued by the noncustodial parent, who contended that the failure to take action deprived the child of substantive due process rights. The Court found that, even though the county knew of the potential harm to the victim and continued to monitor his situation, this did not create with the county a “special relationship” sufficient to make the government liable. The Court stated:

[When the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [Citations omitted.] The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.55

An arrest, incarceration, involuntary commitment, or a foster care placement resulting from a dependency proceeding would create a “special relationship” necessary to establish liability.56

The moral of these cases is that private parties can become “state actors” if the action complained of is required by government as a result of a delegation or joint activity (Sullivan v. American Manufacturers Mutual Insurance, Metropolitan Edison, Blum, Rendell-Baker, and San Francisco Arts and Athletics), or the action complained of can occur only with direct government intervention (Flagg Bros., Lugar, Pennzoil), or the injured party is in government custody or has been placed in a vulnerable situation by its actions (DeShaney). In rare cases, state action can be found when the private actor has a “symbiotic relationship” with government (Wilmington Parking Authority), or the private actor is carrying out functions that were traditionally the “exclusive prerogative” of government (Rendell-Baker), or the private act is inextricably bound up with a core state function (Edmondson).

54 DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989) (Clearinghouse No. 44,786).
55 Id. at 199–200.
56 An example of a court of appeals decision finding such a “special relationship” outside of the typical custodial situation is Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989), cert. denied, 498 U.S.938 (1990). In this case a woman formerly held in custody by a highway patrolman was raped after being released in a high-crime area without a car at 2:30 a.m.
D. Injuries Resulting from Governmental Practices

Legal services advocates regularly face the problem of individually vindictive or incompetent government workers whose actions have deprived clients of the level of public assistance or other benefit to which they are entitled. These actions are often taken by agency employees in violation of that agency's own stated policies. For this reason, such actions generally cannot be imputed to the agency and—even if they result in a violation of federal constitutional, statutory, or regulatory rights—cannot give rise to agency liability under Section 1983. This is because agency liability must be found on a deprivation caused by an agency custom, policy, or practice and not the result of aberrant behavior by a rogue employee. This rule stems from the status of Section 1983 as an exception to the common-law rule that government should be immune from suit.

While injunctive relief has long been available to compel government compliance with federal law, albeit through the guise of suing the director of the agency, suits for damages to be paid from the public coffers were for years dismissed under the traditional defense that the sovereign may not be sued. Indeed *Monroe v. Pape*, the decision which breathed new life into Section 1983, itself only ruled that a government agent or employee acting under color of law could be individually sued and held personally liable for injuries caused by the agent's deprivation of federal rights. Unfortunately, in the absence of agency indemnification of its employees, a finding of "individual" or "personal capacity" liability is of little comfort to a plaintiff seeking a "deep pocket" to pay the judgment.

The Supreme Court clarified the issue in *Monell v. New York City Department of Social Services*, in which, ruling that a municipality could be a "person" for purposes of Section 1983, the Court limited the scope of the agency's liability to instances where the deprivation resulted from that agency's custom, policy, or practice. *Monell* establishes the principle that government should be liable only for actions for which it is directly responsible. The rule gives plaintiff several options. She can sue defendant employee in her personal or official capacity, or both; and she can name as an additional defendant—or even the sole defendant—either the agency itself, or its titular head, who is sued in his or her official capacity. Naming the entity or its head is particularly important when injunctive relief binding the entire agency is sought. An order entered against the agency head in her or his official capacity will bind any successor officer.

1. Personal- and Official-Capacity Liability

The difference between personal and official capacity is that "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." [60]

In official-capacity suits the government agency must comply with the injunction or pay the damage award. In personal-capacity suits the employee alone is liable, although agency indemnification is the usual practice. However, that the official was on the job when he or she deprived plaintiff of federal rights does not shield the government agent from personal liability and convert the action into an official-capacity suit. A welfare worker who unilaterally discontinues the benefits of a food stamp recipient without the authority of agency

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57 See this article's part 2, supra note 22, discussing the Fourteenth Amendment and sovereign immunity.

58 *Monell*, 436 U.S. at 690–92.

59 Will v. Michigan Dept of State Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against an official but rather a suit against the official's office.").

regulations is acting on his own—in his personal capacity and not in an official capacity. And, while the unjustly terminated recipient may seek restoration of benefits from the agency, she may not sue the agency for emotional distress resulting from the violation of food stamp regulations because this injury is not the result of any official policy. The Court in
Hafer v. Melo stated: “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.”

A government employee may, however, be simultaneously sued in both a personal and an official capacity. Thus Hafer v. Melo involved a state official who, after taking over a state agency following an election, had fired state employees because of their political affiliations. Since defendant was the new head of the agency, her actions were quintessentially “official.” Nevertheless, after plaintiffs’ original “official capacity” claim had been dismissed on the Eleventh Amendment ground that any award of damages would of necessity have been paid by the state, the Supreme Court ruled that the official could also be sued in her personal capacity.

By the same token, a food stamp worker who had followed state policy in terminating a recipient—a policy which, unbeknownst to her, violated federal law—could be sued under Section 1983 both as an individual and as a representative of the government.

To recapitulate, even if government is the “deep pocket” in most Section 1983 cases, the fact that the state actor was a government employee acting within the scope of his or her employment does not make the government liable for all actions of the employee.

2. No Governmental Respondent Superior Liability

The Supreme Court, in Monell v. New York City Department of Social Services, rejected respondent superior liability for government agencies; it reasoned that “the touchstone of a Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation.”

The Court reasoned that a governmental strict liability rule would run counter to the statutory intent that only when official policy was the culprit could

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the agency be held accountable. Hence the government entity—as opposed to the individual government employee or agent—is liable only for acts of its employee or agent 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.” For obvious reasons, establishing the existence of a policy or practice plays a crucial role in Section 1983 litigation.

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.

3. Final Policymaking Authority

Under Section 1983 an unwritten “standard operating procedure” can amount to a “custom, policy, or practice”

62 Id. at 26. See part II.E below for a discussion of the Eleventh Amendment.
63 As explained in this article’s part 2, supra note 22, the worker would probably escape personal liability for damages under the doctrine of qualified immunity.
64 Monell, 436 U.S. at 690.
65 The policy or practice, however, must be that of the entity sued. If the local agency is carrying out a state policy that 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).
if carried out with the acquiescence of the agency heads. Thus, in *Jett v. Dallas Independent School District*, involving an alleged unwritten custom of racial discrimination, 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 . . . .” 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 almost always requires proof of repeated incidents suggesting a pattern. As the Court summarized in one case, “the scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful act of a single city employee not authorized to make city policy.” However, this is not always the case.

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 “the official policy” requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. Thus, in *Hafer v. Melo*, noted earlier, which admittedly did not discuss the issue in these terms, the newly elected agency head’s single unilateral act of firing all agency employees who were members of the wrong political party evidenced a policy that, but for the Eleventh Amendment bar on an award of damages against a state, would have been sufficient to establish agency liability.

Other cases have similarly held that a decision made by the authority to which a governing body has delegated the power to decide is also “policy.” State law determines whether a particular person or entity is the “final policy-making authority.” As a practical matter, this 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. 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.

Despite this rather cursory treatment, whether the agency is liable for the prac-

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67 *Id.* at 737.
69 See *Pembaur v. City of Cincinnati*, 475 U.S. 409, 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, Inc.*, 453 U.S. 247 (1981) (cancellation of jazz concert by city council because rock group was booked, in violation of First Amendment)).
70 *Hafer*, 502 U.S. at 21.
71 See *Monell*, 436 U.S. at 658, involving a policy that required pregnant teachers to take unpaid leaves without affording teachers due process.
72 Thus, 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 to necessarily be the final decision maker as to render the district responsible for alleged racial discrimination, 491 U.S. 701. Moreover, action on the part of the “final policy-maker” in the face of decisions made by subordinates has been found to be an insufficient delegation of decision-making authority. *Gillette v. Delmore*, 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.”
tice and to being enjoined when the practice violates federal law is a complex issue. For clarity, an advocate with such a problem has to study closely the decisions of the respective circuit court.

4. Failure to Train Staff

If government inaction, or its failure to train staff adequately, or even its lack of any policy at all results in the systematic deprivation of federal rights, the agency’s default may be a “custom or practice” actionable under Section 1983. For example, the Supreme Court has ruled that the failure to train police officers adequately to identify prisoners who are injured, or who have serious medical conditions or mental impairments, can 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.73

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 has been deliberately indifferent to the consequences of inadequately training its staff. The result of this inadequacy, after all, is that those entitled to receive benefits—a property interest—are temporarily deprived of them.74

If incidents of this type are fairly pervasive, this suggests a de facto custom or policy systematically resulting in the deprivation of due process. An injured party should accordingly be able to shoe horn her or his claim into the parameters set by City of Canton.75

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74 The advocate should be aware, however, that where a deprivation of property without procedural due process is alleged, other procedural hurdles can arise. See this article’s part 2, supra note 22. 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 Zinermon v. Burch, 494 U.S. 113 (1990).

75 Thus, in her opinion concurring on this issue, 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 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.” City of Canton, 489 U.S. 395–97. In Bryan County v. Brown, 520 U.S. 397, 137 L. Ed. 2d 626, 640 (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 appeals, in part based on the City of Canton analysis, have found that an agency’s failure to address a problem is 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 Hosp. Corp., 940 F.2d 775, 784 (2d Cir. 1991) (“standardless grant of authority” or “essentially unrestricted” discretion as “policies” actionable under Section 1983).
The Supreme Court ruled that Section 1983 suits against state officials could seek only prospective injunctive or declaratory relief; and not damages or retroactive benefits, no matter what label is used.

Such a claim is not far-fetched if brought outside of the context of incarceration. Applying the "deliberate indifference" standard to a gender discrimination claim under Title IX of the Civil Rights Act, the Supreme Court, in Davis v. Monroe County Board of Education, recently held that a primary or secondary school student could hold 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.

E. Sovereign Immunity

Although intended to curb "state action" which deprives a plaintiff of federal rights, Section 1983 may not be used to sue a state directly. This anomaly poses the issue of sovereign immunity and the Eleventh Amendment, which bars a Section 1983 action directly against the State but not against state officials or employees sued in their official capacities.

Over a century ago the Supreme Court found that the Eleventh Amendment prohibited a state from being sued in federal court by private parties absent a waiver of sovereign immunity. More recently it ruled that in some cases a statute enacted pursuant to section 5 of the Fourteenth Amendment was excepted from the Eleventh Amendment prohibition. As explained in this section, Section 1983 suits are subject to the bar on suits directly against the state.

In general, the Eleventh Amendment—enacted in the early 1800s during the high tide of "states rights"—bars the use of federal courts for suits by private individuals and entities against any of the states of the union. The Fourteenth Amendment, on the other hand, adopted after the crushing of the Confederacy, seeks to curb the use of state power to facilitate violations of federal civil rights. Enacted pursuant to section 5 of the Fourteenth Amendment, Section 1983 provides redress for the deprivation "by any person" of federal rights under color of state law. And in Fitzpatrick v. Bitzer, construing Title VII of the Civil Rights Act, the Supreme Court allowed states to be directly sued under statutes enacted under the authority of section 5 of the Fourteenth Amendment.

Nevertheless, based on a somewhat tortuous dissection of the debate which took place in the Reconstruction Era Congress, the Court subsequently ruled that the legislature had not intended Section 1983—ironically the workhorse of the Fourteenth Amendment—to abrogate state sovereign immunity codified in the

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78 Will, 491 U.S. at 66.
Eleventh Amendment. Hence, while Section 1983 may be used to sue state and local government agents and employees in their personal capacity, and local government entities, for actions taken under color of state law, it may not be used to sue the state as such, even in state courts.

However, beginning with Ex Parte Young, federal courts have nonetheless permitted plaintiffs to get around the Eleventh Amendment by seeking injunctive relief against the individual heading the state agency on the premise that an official who acts unlawfully is thereby "stripped" of his or her official capacity. Suit is permitted even though the practical effect of granting an injunction against the official would be to require the state agency to comply with the order. Indeed, under Federal Rule of Civil Procedure 17(b), requiring that suit be brought against a real party in interest as determined by state law, an action to enjoin a state agency will probably be successful only if the officer empowered to carry out the court order is named as a defendant.

In past years enterprising legal services lawyers sought to couch monetary awards as injunctive relief, for example, by seeking an order enjoining the state welfare department to make "equitable restitution" to those who had been erroneously underpaid benefits as a result of the state's misinterpretation of federal Aid to Families with Dependent Children requirements. However, holding that the purpose of the Eleventh Amendment was to protect state treasuries from money damages awarded by federal courts, the Supreme Court ruled in Edelman v. Jordan that Section 1983 suits against state officials could seek only prospective

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80 Quern v. Jordan, 440 U.S. 332, 345 (1979); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (Pennhurst II) (also holding that the Eleventh Amendment forbade federal courts from asserting what is now supplemental jurisdiction (see 28 U.S.C. § 1367) over state law claims against the state). However, federal courts do have removal jurisdiction over a case raising federal claims, which also include a claim that would be barred under the Eleventh Amendment. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998) (also confirming that an Eleventh Amendment defense is waived if not asserted timely). In Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Clearinghouse No. 51,112), the Court ruled that § 5 of the Fourteenth Amendment is the only constitutional source of Congress' power to abrogate the Eleventh Amendment. Hence federal statutes enacted under any other power—such as the Commerce Clause—permitting suits in federal court directly against the states are, to that extent, unenforceable if the statute does not permit the agency head to be sued in his or her official capacity. Seminole Tribe was taken to its logical conclusion in Alden v. Maine, 119 S. Ct. 2240 (1999) (Clearinghouse No. 52,332) (holding that state employees were not allowed to sue their employers in state court for violation of the Fair Labor Standards Act), and Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) (a patent holder was not allowed to sue a state in federal court for stealing its patent) even though no state court remedy existed in either case. These 5-4 decisions essentially hold that the federal courts will not entertain damage suits against states if such suits are brought under statutes not enacted pursuant to the Fourteenth Amendment, nor may Congress require state courts to hear such claims, thus undermining the enforceability against the states of much social legislation dating back to the New Deal.

81 Will, 491 U.S. at 66 (holding that Congress could not have intended "to create a cause of action against States to be brought in State courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983").

82 Ex parte Young, 209 U.S. 123, 159-60 (1908). Young was not a Section 1983 case. Despite being "stripped" of official authority for purposes of the Eleventh Amendment by acting unlawfully, the official is considered by the court nonetheless to be engaging in "state action" for purposes of the Fourteenth Amendment if the action was taken "under color" of the apparent authority conferred by official position. Home Tel. & Tel. v. Los Angeles, 227 U.S. 278 (1913).
injunctive or declaratory relief, and not damages or retroactive benefits, no matter what label is used. On the other hand, in *Monell v. New York City Department of Social Services*, the Supreme Court ruled that cities, municipalities, counties, and other local government agencies were suitable "persons" under Section 1983 since sovereign immunity applied only to the state and state agencies. This is also true for Section 1983 suits brought against local agencies in state court, in which circumstance the Supreme Court ruled that municipalities could not raise defenses based on the Eleventh Amendment or state law sovereign immunity because allowing such defenses would defeat Section 1983's intent of providing a remedy for the violation of federal rights.

Since a charade of the *Ex Parte Young* type is unnecessary in bringing a Section 1983 action against a municipality or local agency, plaintiffs need not resort to the fig leaf of suing the official in charge of the agency for injunctive relief. And, since the Eleventh Amendment does not apply, such federal court plaintiffs may recover money damages, including retroactive monetary benefits, directly from the agency's coffers.

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83 Edelman v. Jordan, 425 U.S. 651 (1974). Nevertheless, an award of "ancillary" monetary expenses to facilitate enforcement of an injunction, or a notice to class members that they could invoke a state fair hearing to determine their potential eligibility for retroactive benefits pursuant to the judgment, does not run afoul of the Fourteenth Amendment (compare *Quern v. Jordan*, 440 U.S. at 348 (involving a notice ancillary to an injunction), with *Green v. Mansour*, 474 U.S. 64, 71 (1985) (invalidating notice where the federal claim became moot before an injunction could be issued)). Moreover, attorney fees can be awarded even though they would be paid directly from the state treasury since 42 U.S.C. § 1988, unlike Section 1983, has been construed as abrogating a state's sovereign immunity pursuant to section 5 of the Fourteenth Amendment. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Hutto v. Finney*, 437 U.S. 678 (1978) (Clearinghouse No. 13,915).


86 In some states, however, pleading rules for specific claims for relief such as mandamus may require that the agency head be named as a defendant. Advocates should follow these rules if only to avoid the wasted effort involved in fending off a demurrer or motion to dismiss.