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Supreme Court Section 1983 Decisions - October 2008 Term

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SUPREME COURT § 1983 DECISIONS—OCTOBER 2008 TERM

MARTIN A. SCHWARTZ*

Section 1983 of Title 42 of the United States Code is a vital part of American law. This statute authorizes private parties to enforce their federal constitutional rights, and some federal statutory rights, against defendants who acted under color of state law.¹ These defendants include state and local officials sued in their personal capacities and municipalities and other municipal entities.² The statute is commonly referred to as “§ 1983” and claims asserted under it are referred to as “§ 1983 claims”.

The fact that a § 1983 plaintiff establishes that the defendant violated her federally protected rights does not necessarily mean that the plaintiff will obtain relief. There are numerous defenses available to § 1983 claims, including absolute and qualified immunity. Furthermore, there is no vicarious liability under § 1983.³ Thus, municipal entities⁴ and supervisory officials⁵ may not be held liable on the basis of *respondeat superior* liability, but only for the particular defendant’s own wrongs.⁶

Last term’s decision in *Safford Unified School District No. 1 v. Redding*⁷ illustrates how immunity and other defenses may thwart a plaintiff’s ability to obtain relief despite prevailing on the constitutional merits. The Court in *Redding* agreed with the plaintiff

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1. Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

2. States and state agencies are not suable “persons” under § 1983. *Will v. Mich. Dept. of St. Police*, 491 U.S. 58, 66 (1989). However, a state official sued in an official capacity is a § 1983 “person” when sued for prospective relief. *Id.* at 71 n. 10.

3. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978); *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

4. A municipality may be held liable under § 1983 only if “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” *Monell*, 436 U.S. at 690.

5. *Iqbal*, 129 S. Ct. at 1949.

6. *See infra* pt. IV.

7. 129 S. Ct. 2633, 2644 (2009); *see also infra* pt. III(B).

that the school official's strip search of 13-year old Savana Redding violated the Fourth Amendment, yet held that the defendant officials were protected from monetary liability by qualified immunity because the Fourth Amendment law was not clearly established when the search occurred.⁸ The Court remanded plaintiff's municipal liability claim against the School District; plaintiff's ability to recover on that claim will depend on whether plaintiff can establish that the search was conducted pursuant to a municipal policy or practice. This typically presents a formidable burden for § 1983 plaintiffs and, if the *Redding* plaintiffs cannot satisfy it, they will not obtain any relief.⁹

During the October 2008 term, the Supreme Court rendered several decisions resolving a broad range of important § 1983 issues. These decisions reflect a "mixed bag" of pro-plaintiff and pro-defendant rulings. However, in the author's view, on the whole § 1983 defendants fared decisively better on the most important issues. Plaintiffs obtained favorable rulings that Title IX does not preclude § 1983 constitutional claims;¹⁰ that a New York law that barred prisoner § 1983 damages claims in state court against correction officers violated the Supremacy Clause;¹¹ and that school officials' strip search of a middle school student violated the Fourteenth Amendment (although the defendant officials were found protected by qualified immunity because the Fourth Amendment law was not clearly established at the time of the search).¹² On the other hand, the Court held that the "plausibility" pleading standard governs *Bivens* and § 1983 federal court complaints and dismissed *Bivens*¹³ claims for failure to satisfy that standard,¹⁴ rejected supervisory liability as an independent form of § 1983 and *Bivens* liability,¹⁵ held that convicted criminal defendants do not have a due process right to post-conviction DNA testing,¹⁶ and rejected a § 1983 wrongful conviction claim by extending absolute prosecutorial immunity to supervisory prosecutors who allegedly failed to train, supervise, and establish information systems concerning exculpatory impeachment material.¹⁷ The Court, overruling prior precedent, held that when a defendant invokes qualified immunity, courts have discretion whether to first decide

8. See *infra* pt. III(B).

9. The interplay of qualified immunity and municipality results in a cost-allocation scheme amongst the municipality, the individual officer, and the plaintiff whose federally protected rights were violated. *Owen v. City of Indep.*, 445 U.S. 622, 657 (1980). The Supreme Court, in *Owen*, explained how the "costs" are allocated:

1. The municipality will be held liable when the violation of the plaintiff's federally protected right is attributable to enforcement of a municipal policy or practice.
2. The individual officer will be held liable when she violated plaintiff's clearly established federally protected right and, therefore, not shielded by qualified immunity.
3. The plaintiff whose federally protected right was violated will not be entitled to monetary recovery and will "absorb the loss" when the violation of his right is not attributable to a municipal policy or practice and the individual officer did not violate plaintiff's clearly established federal rights.

See *id.*

10. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009); see *infra* pt. II(A.).

11. *Haywood v. Drown*, 129 S. Ct. 2108 (2009); see *infra* pt. V.

12. *Redding*, 129 S. Ct. at 2644; see *infra* pt. III(B).

13. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (when applicable, the *Bivens* doctrine authorizes claims against federal officials).

14. *Iqbal*, 129 S. Ct. at 1951; see *infra* pt. I.

15. *Iqbal*, 129 S. Ct. at 1948; see *infra* pt. IV.

16. *D.A.'s Off. for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009); see *infra* pt. II(C).

17. *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009); see *infra* pt. III(A).

whether the plaintiff has alleged a meritorious constitutional claim or, alternatively, to bypass that issue and proceed directly to the qualified immunity issue of whether the defendant violated clearly established federal law.¹⁸ Although this could be viewed as a neutral rule of court administration, neither pro-plaintiff nor pro-defendant, it likely tilts in favor of § 1983 defendants since defendants who assert qualified immunity typically prefer that the court bypass the constitutional merits and not establish constitutional norms.¹⁹

My goal here is to analyze last term's decisions that are relevant to § 1983 litigation, placing special emphasis upon their litigation significance. The decisions discussed are organized as follows:

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Before analyzing the decisions, a prefatory point is in order. One of the Court's most important decisions of the past term for § 1983 litigators was *Ashcroft v. Iqbal*.²⁰ Because the complaint in that case asserted claims against federal officials, the claims were not asserted against defendants who acted under color of state law and, therefore, the claims were not asserted under § 1983 but pursuant to the *Bivens* doctrine.²¹ *Bivens* is a judicially-created doctrine which allows claims for damages against federal officials. The Supreme Court in *Iqbal* treated the various issues before the Court, namely, complaint pleadings requirements, supervisory liability, and qualified immunity, in a

18. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009); see *infra* pt. III(B).

19. See *infra* pt. III(B).

20. *Iqbal*, 129 S. Ct. 1937.

21. See *Bivens*, 403 U.S. 388.

manner that made clear that they should be decided in the same manner for both § 1983 and *Bivens*²² claims. At the same time, it is worth pointing out that the Court expressly articulated its negative attitude towards *Bivens* claims. As the Court in *Iqbal* stated: “Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability ‘to any new context or new category of defendant.’ ”²³

I. PLEADING § 1983 CLAIMS

The Supreme Court in *Iqbal*, in an opinion by Justice Anthony M. Kennedy, held that the newly minted “plausibility” pleading standard for federal court complaints adopted in *Bell Atlantic Corp. v. Twombly*²⁴ applies to all civil complaints filed in federal court, thus including complaints filed under § 1983 and under *Bivens*.²⁵ This holding resolves a major pleadings issue for § 1983 litigators. Although the justices divided 5-4 on whether the complaint satisfied the *Twombly* standard, no justice took issue with the applicability of *Twombly* to civil rights complaints. The decision will make it much more difficult for § 1983 plaintiffs to satisfy complaint pleading requirements. It has been widely touted as one of the most significant, if not the most significant, decisions of the term.²⁶

Federal Rule of Civil Procedure 8(a) provides that a federal court complaint must set forth “(1) a short and plain statement of the grounds for the court’s jurisdiction, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought.” In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,²⁷ the Supreme Court in 1993 held that § 1983 municipal liability claims are governed by Rule 8’s generally applicable pleading standard, which requires only that the complaint give the defendant fair notice of the plaintiff’s claim and its grounds. Relying upon the plain language of Rules 8 and 9 (which requires that certain issues, e.g., fraud and mistake, be pleaded “with particularity”), the Court in *Leatherman* rejected defendant’s argument that § 1983 municipal liability claims should be governed by a heightened pleading standard.²⁸

The Court’s decision in *Twombly*, an antitrust case decided in 2007, generated considerable uncertainty and confusion over the pleading standards for all federal court complaints, including those filed under § 1983. The Court in *Twombly* ruled that although Rule 8(a)(2) does not require “detailed factual allegations,” the complaint must provide some factual allegations of the nature of the claim and the grounds on which the

22. The Supreme Court has generally treated § 1983 claims and *Bivens* claims as the same with respect to qualified immunity. See e.g. *Malley v. Briggs*, 475 U.S. 335, 340 n. 2 (1986).

23. *Iqbal*, 129 S. Ct. at 1948 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

24. 550 U.S. 544 (2007).

25. 129 S. Ct. at 1949 (pt. IV(A)).

26. See Adam Liptak, *Case about 9/11 Could Lead to Broad Shift on Civil Lawsuits*, N.Y. Times 10 (July 21, 2009).

27. 507 U.S. 163 (1993).

28. *Id.* at 168. The Court in *Leatherman* left open whether a heightened pleading rule governs § 1983 personal-capacity claims subject to qualified immunity. See *infra* pt. II(B)(1). Relying in part upon *Leatherman*, the Supreme Court in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), held that notice pleading governs Title VII and ADEA employment discrimination claims. *Id.* at 515.

claim rests.²⁹ The plaintiff must plead “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”³⁰ The Court stated that the “[f]actual allegations must be enough to raise a right to relief above the speculative level” to a “plausibility” level.³¹ Significantly, the Court found that the district court’s ability to limit discovery did not justify relaxation of plaintiff’s pleading obligation. The Court stated:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.³²

This concern with “discovery gone wild” may well have been the critical driving force behind the Supreme Court’s ratcheting up of federal court civil complaint pleading standards.

Along the way, the Court in *Twombly* also ruled that federal courts should no longer rely on the frequently quoted statement from *Conley v. Gibson*.³³

“. . . that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.³⁴

The Court did not explain what was puzzling about the *Conley v. Gibson* rule, but nevertheless unceremoniously retired it. Although *Twombly* could be read as imposing some form of “heightened” pleading requirement, the Supreme Court disavowed any intent to do so.³⁵ The Court acknowledged that “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations” and that it was not requiring “heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”³⁶ Furthermore, the Court in *Twombly* did not purport to modify its earlier decision in *Leatherman*.³⁷ In fact, just two weeks after its decision in *Twombly*, the Court, in *Erickson v. Pardus*,³⁸ applied notice pleading to a *pro se* prisoner’s § 1983 Eighth Amendment medical treatment claim and found that the

29. *Twombly*, 550 U.S. at 555.

30. *Id.*

31. *Id.*; *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556.) (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”).

32. *Twombly*, 550 U.S. at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989)).

33. 355 U.S. 41 (1957).

34. *Twombly*, 550 U.S. at 561, 563 (quoting *Conley*, 355 U.S. at 45–46).

35. *Id.* at 570.

36. *Id.* at 555, 570.

37. Nor did the Court state that it was modifying its decision in *Swierkiewicz*. See *supra* n. 28 and accompanying text.

38. 551 U.S. 89 (2007).

complaint satisfied Rule 8's notice pleading standard.

It was unclear whether the *Twombly* plausibility pleading standard was limited to antitrust cases or whether it was intended to apply to federal court civil complaints generally, including those asserting civil rights claims. The Court in *Iqbal* held that because *Twombly* was based upon an interpretation of Rule 8, it is not limited to antitrust cases and, therefore, governs all federal court civil complaints, thus encompassing § 1983 and *Bivens* complaints.

That brings us to the *Bivens* complaint filed by Javaid Iqbal. "In the wake of the September 11, 2001, terrorist attacks[,]” the plaintiff, Javaid Iqbal, a citizen of Pakistan and a Muslim was arrested by FBI and Immigration and Naturalization Service Agents on “charges of fraud in relation to identification documents and conspiracy to defraud the United States.”³⁹ He asserted constitutional claims for damages against various federal officials under the *Bivens* doctrine arising out of his treatment after being designated a “person of high interest” while detained pending trial at the Administrative Maximum Special Housing Unit at the Metropolitan Detention Center (MDC) in Brooklyn, New York. The complaint named numerous federal officers as defendants, ranging “from the correctional officers who had day-to-day contact with [Iqbal] during the term of his confinement, to the wardens of the MDC facility, all the way” to the defendants before the Supreme Court, former Attorney General John Ashcroft and FBI Director Robert Mueller.⁴⁰

Iqbal's complaint alleged that while detained at MDC, jailers, without justification, “kicked him in the stomach, punched him in the face, and dragged him across” his cell, and also “subjected him to serial strip and body-cavity searches[.]. . . and refused to let him and other Muslims pray because there would be [n]o prayers for terrorists[.]”⁴¹ The complaint alleged that defendants Ashcroft and Mueller “. . . knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest’ . . .” and that Ashcroft was the “principal architect” of this invidious policy and Mueller was “instrumental” in adopting and executing it.⁴²

Defendants asserted qualified immunity and moved to dismiss the complaint on the grounds that it failed to state sufficient allegations of their own involvement in clearly established unconstitutional conduct. The Court in *Iqbal* stated that determining whether a complaint contains factual allegations constituting a plausible claim for relief is a “context-specific task” requiring application of “judicial experience and common sense.”⁴³ Furthermore, when complaint allegations establish a plausible claim of discrimination but there are other “more likely explanations” for defendants' conduct, the complaint will not satisfy the plausibility standard.⁴⁴

In order to evaluate the sufficiency of the complaint allegations against defendants Ashcroft and Mueller, the Supreme Court had to determine the liability standard for

39. *Iqbal*, 129 S. Ct. at 1942–1943.

40. *Id.* at 1943.

41. *Id.* at 1944 (citations omitted).

42. *Id.* (citations omitted).

43. *Id.* at 1950.

44. *Iqbal*, 129 S. Ct. at 1951–1952.

constitutional claims against supervisory officials sued under § 1983 and *Bivens*.⁴⁵ Suffice it to say at this point that the Court held that, like any other official sued under § 1983 or *Bivens*, a supervisory official can be held liable only if he or she engaged in conduct that caused a violation of plaintiff's constitutional rights. The Court thus had to decide whether Iqbal's complaint alleged "plausible" claims that Ashcroft and Mueller acted with an impermissible discriminatory intent. The Court did not consider the possibility that claims subject to qualified immunity are governed by a "heightened" pleading standard.⁴⁶

The majority in *Iqbal* found that the complaint allegation, namely that defendants Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh treatment on account of his race and religion, was a mere "formulaic recitation" of the elements of his claim, and thus too conclusory to meet the *Twombly* plausibility standard.⁴⁷ The Court said that the principle that, on a motion to dismiss, a court must accept the allegations in the complaint as true applies to factual allegations but not to legal conclusions.⁴⁸ In other words, legal conclusions must be supported by factual allegations. Of course, whether a complaint asserts sufficient factual allegations or merely legal conclusions may well be unclear and, as the Court acknowledged, dependent upon the exercise of legal judgment. The dissent, reviewing the same complaint as the majority, and applying essentially the same legal standards, found the complaint allegations sufficient, "neither confined to naked legal conclusions nor consistent with legal conduct."⁴⁹ In other words, the dissent found that the plaintiff did allege a plausible claim that the defendants violated a clearly established federal law.

Although plaintiff's allegations were consistent with defendants' "purposefully designating detainees 'of high interest' because of their race, religion, or national origin[,] . . . given more likely explanations, they do not plausibly establish this purpose."⁵⁰ The "more likely," more plausible explanation "is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."⁵¹

Reiterating an important theme articulated in *Twombly*, the *Iqbal* majority ruled that when the sufficiency of complaint allegations are challenged on a motion to dismiss, it is irrelevant that the district court may be able to carefully control discovery.⁵² This is

45. *See infra* pt. IV.

46. At the oral argument, the Solicitor General represented that defendants were not asking for a heightened pleading rule. Oral Argument at 11, *Iqbal*, 129 S. Ct. 1937 (available at 2008 WL 5168391).

47. *Iqbal*, 129 S. Ct. at 1961 (Souter, J. dissenting).

48. *Id.* at 1949 (majority).

49. *Id.* at 1960 (Souter, J. dissenting). Justice Souter's dissent states that the only exception to the principal "that a court must take the [complaint] allegations as true, no matter how skeptical the court may be[.]" is for allegations that are "sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here." *Id.* at 1959. Justice Souter found *Twombly* distinguishable on the ground that the conduct alleged, while consistent with an unlawful antitrust conspiracy, was equally consistent with legitimate business practices. *Id.* at 1959–1960.

50. *Iqbal*, 129 S. Ct. at 1951.

51. *Id.* at 1952.

52. *Id.* at 1953. The Court in *Iqbal* quoted *Twombly*'s reference to "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Id.* (quoting *Twombly*, 129 S.

especially so when government officials assert qualified immunity, because this immunity is designed in part to shield officials from the demands of discovery which divert their time and energy from their official responsibilities.⁵³ Thus, the fact that the court of appeals sought to carefully control plaintiff's discovery did not save his complaint.

The Court in *Iqbal* also made an important ruling concerning Federal Rule of Civil Procedure 9(b), which requires particularity of pleading of "fraud or mistake" but allows "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." The Court found that Rule 9(b) did not save the plaintiff because it "merely excuses a party from pleading discriminatory intent under an elevated pleading standard[.]" but does not obviate the requirement of pleading factual allegations supporting a plausible claim.⁵⁴ In other words, conclusory allegations of discriminatory intent will not be accepted as true on a Rule 12(b)(6) motion to dismiss without supporting factual allegations.⁵⁵

To summarize, under *Iqbal* a federal district court faced with a motion must, applying its judicial experience and common sense:

1. Separate the factual allegations in the complaint from the conclusions;
2. Determine whether the factual allegations state a plausible, not merely possible, claim for relief;
3. Consider whether there is a more plausible explanation for defendant's conduct than that offered by the plaintiff; and
4. In making this determinations, the court should not take into account its ability to carefully manage discovery.

Senator Arlen Specter has introduced a bill entitled "The 2009 Notice Pleading Restoration Act,"⁵⁶ which is designed to overturn *Twombly* and *Iqbal* and "unretire" and reinstate the *Conley v. Gibson* standard that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁵⁷ Congressman Specter said that the effect of the *Iqbal* decision "will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal

Ct. at 559.)

53. *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2007) (Cabranes, J., concurring)) ("The costs of diversion are only magnified when Government officials are charged with responding to . . . 'a national and international security emergency unprecedented in the history of the American Republic.'"); *but see Iqbal*, 129 S. Ct. at 1961–1962 (Breyer, J. dissenting) (trial court "can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. . . . A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials." (citations omitted)).

54. *Id.* at 1954.

55. The Court in *Iqbal* remanded the case to the circuit court to decide in the first instance whether it should remand to the district court so that plaintiff could "seek leave to amend his deficient complaint." *Id.* at 1954. Further, the Court said that it was "important to note" that it was not passing on the sufficiency of the complaint allegations with respect to the other defendants. *Id.* at 1952.

56. *Pleading Bill Introduced That Would Make It Easier for Plaintiffs to Survive Summary Judgment*, 78 U.S. L. Week 2090 (Aug. 18, 2009) [hereinafter *Pleading Bill Introduced*]; David Ingram, *Calling Rulings 'Unwelcome Development,' Specter Aims to Reduce Pleading Standard*, N.Y.L.J. 2 (July 27, 2009).

57. *Conley*, 355 U.S. at 45–46.

redress for their injuries[.]”⁵⁸

The decision in *Iqbal* contains an important lesson for § 1983 plaintiff lawyers, namely, that § 1983 complaints must allege sufficient factual allegations, not mere legal conclusions. Plaintiffs’ lawyers, however, often face a catch-22 predicament: they need discovery in order to obtain the necessary information to satisfy the plausibility standard, but are unable to get to the discovery stage because they lack the necessary information to satisfy the pleading standard.⁵⁹ After *Iqbal*, plaintiffs’ attorneys may have to conduct more extensive investigations prior to filing suit in order to be able to satisfy the plausibility standard. Moreover, § 1983 plaintiffs’ lawyers must keep in mind that claims against a supervisory official must be supported by factual allegations that the supervisor’s own conduct violated the plaintiff’s constitutionally protected rights.

II. CONSTITUTIONAL RIGHTS ENFORCEABLE UNDER § 1983

The most fundamental principle of § 1983 law is that § 1983 itself does not establish or create any rights but authorizes a cause of action to enforce rights created by either the U.S. Constitution or, in some cases, a federal statute other than § 1983.⁶⁰ This principle has tremendous consequences for § 1983 litigators. First and foremost, it means that whether the plaintiff has been deprived of a federally-protected right depends not upon an interpretation of § 1983 but upon an interpretation of the particular provision of the federal Constitution at issue.⁶¹ For example, in *Graham v. Connor*, the Supreme Court held that a § 1983 claim that a law enforcement officer used excessive force in the course of carrying out an arrest, investigatory stop, or other seizure depends upon an interpretation of the Fourth Amendment, not upon an interpretation of § 1983.⁶² Constitutional litigators must thus be well versed in the full range of federal constitutional rights potentially enforceable under § 1983. This, of course, is no mean feat.

Although § 1983 fulfills the vital function of authorizing individuals to enforce their federal constitutional rights against state and local officials and municipalities, the value of § 1983 is greatly dependent upon the extent to which the United States Supreme Court recognizes individual rights under the federal Constitution. In other words, the significance of the Court’s pro-plaintiff interpretations of § 1983 itself will be greatly diminished if, at the same time, the Court gives a narrow interpretation to the individual rights guaranteed by the U.S. Constitution.

Last term’s decision in *Pleasant Grove City v. Summum*⁶³ illustrates how the

58. *Pleading Bill Introduced*, *supra* n. 56.

59. See Richard D. Bernstein & Frank M. Scaduto, *Court Toughens Application of Rule 8 Pleading Standards for Civil Cases*, N.Y.L.J. 3 (July 6, 2009).

60. *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Graham v. Conner*, 490 U.S. 386, 393–394 (1989); *City of Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

61. Although some federal statutory rights are enforceable under § 1983 (see Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* ch. 4 (4th ed., Aspen Publishers 2004)), for convenience purposes, we will refer to the enforcement of federal constitutional rights under § 1983.

62. 490 U.S. at 392–399. The Court in *Graham* held that whether the use of force violates the Fourth Amendment depends upon whether the force used was objectively reasonable. *Id.*

63. 129 S. Ct. 1125 (2009).

§ 1983 remedy is dependent on the Court's interpretation of the individual rights granted by the Constitution. The plaintiffs, a religious organization called Summum, sought to display a monument containing "The Seven Aphorisms of Summum," somewhat akin to the Ten Commandments, in a city park. The park already had 15 permanent displays, at least 11 of which were donated by private groups or individuals, including a Ten Commandments monument donated by the Fraternal Order of Eagles. When the city denied Summum's request, Summum brought suit against the city under § 1983 alleging that the city was engaged in content discrimination in a public forum in violation of their First Amendment right to freedom of speech.

The Supreme Court unanimously rejected Summum's free speech claim on the grounds that the City's permanent displays in the park constituted government speech. When the government is the speaker, a private party does not have the right to complain under the free speech clause.⁶⁴ As the Court put it, "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."⁶⁵

Thus, no matter how broadly the Supreme Court might interpret § 1983 itself, the plaintiff's claim failed because of the Court's interpretation of the free speech clause. This is not to suggest that *Pleasant Grove City* was wrongly decided. As the Court expressly acknowledged, practical considerations played a major role in the Court's decision because it is "not easy to imagine how government could function if it lacked this freedom" to engage in its own speech free from First Amendment free speech restraints.⁶⁶ The essential point is that Summum's § 1983 claim was rejected because of the Court's interpretation of the Constitution, and not because of an interpretation of § 1983.

During the 2009 Term there were Supreme Court decisions in three areas concerning individual federal constitutional rights that are especially important for § 1983 litigation: (A) the relationship between Title IX, which prohibits gender discrimination in federally funded educational institutions, and § 1983 Equal Protection Clause gender discrimination claims; (B) Fourth Amendment searches of students and automobiles; and (C) a criminal defendant's right of access to evidence for the purpose of post-conviction DNA testing.

A. *The Relationship Between Title IX and § 1983 Equal Protection Claims*

There is an extensive body of Supreme Court decisional law concerning the enforcement of federal statutes under § 1983.⁶⁷ By contrast, there is fairly little Supreme Court decisional law on whether a federal statute can operate to preclude the assertion of a federal constitutional claim. In fact, the Supreme Court has held in only one case that a federal statute precluded the assertion of § 1983 constitutional claims. In *Smith v. Robinson*,⁶⁸ the Supreme Court held that in enacting the Education of the Handicapped

64. Government speech may give rise to claims under the Establishment Clause (see *Pleasant Grove City*, 129 S. Ct. at 1139 (Stevens, J., concurring); *id.* at 1141 (Souter, J. concurring)) and under the Equal Protection Clause (see *id.* at 1139 (Stevens, J., concurring)).

65. *Id.* at 1131.

66. *Id.*

67. See Schwartz, *supra* n. 61, at ch. 4.

68. 468 U.S. 992, 1030 (1984).

Act (EHA),⁶⁹ Congress intended to preclude the assertion of constitutional claims under § 1983 that parallel (i.e., are analogous) to statutory claims assertable under the EHA. Last term's Supreme Court decision in *Fitzgerald v. Barnstable School Committee*⁷⁰ makes clear that the Court will "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,"⁷¹ or, for that matter, as a remedy for any constitutional claim.

The plaintiff, Lisa Fitzgerald, and her parents alleged in federal court that Lisa was the victim of student-on-student sexual harassment. The complaint included claims under Title IX against the defendant school committee (the school system's governing body) and under § 1983 for violations of Title IX and the Equal Protection Clause against both the school committee and the school superintendent. The defendants argued that Title IX's remedial scheme was sufficiently comprehensive to preclude enforcement of both Title IX and the Equal Protection Clause under § 1983. Because the circuits were in conflict over whether Title IX precludes § 1983 equal protection gender discrimination claims,⁷² the Supreme Court granted certiorari to resolve the issue.

Title IX of the Education Amendments of 1972 prohibits gender discrimination in federally funded educational institutions. Title IX's only express remedy is an administrative procedure that can result in the withdrawal of federal funds.⁷³ The Supreme Court, however, has recognized an implied right of action under Title IX against educational institutions for both monetary and equitable relief.⁷⁴ In *Fitzgerald*, the Supreme Court, in a unanimous opinion written by Justice Samuel Alito, held that Title IX does not preclude § 1983 Fourteenth Amendment equal protection gender discrimination claims. The Court drew an important distinction between the enforcement of federal statutory rights under § 1983 and enforcement of federal constitutional rights. When a § 1983 claim is based upon a federal statutory right, evidence of a congressional intent to preclude enforcement under § 1983 ". . . may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."⁷⁵ By contrast,

[i]n cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent [to preclude the § 1983 remedy] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights.⁷⁶

The Court pointed out that in the three cases in which the Supreme Court held that a federal statutory scheme precluded the § 1983 remedy, the federal statute "required

69. The Federal Education of the Handicapped was subsequently renamed the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400–1485 (2009).

70. 129 S. Ct. 788.

71. *Id.* at 796 (quoting *Smith*, 468 U.S. at 1012).

72. *See id.* at 793 (citing circuit court decisions).

73. *Id.* at 795.

74. *Franklin v. Gwinnett Co. Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon v. U. of Chi.*, 441 U.S. 677, 716 (1979).

75. *Fitzgerald*, 129 S. Ct. at 794 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)).

76. *Id.*

plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit.”⁷⁷ In these circumstances, allowing plaintiffs to utilize the § 1983 remedy would have allowed them to circumvent the specific procedural requisites in the particular federal statute, and/or obtain relief under § 1983 that is not available under the particular statute.⁷⁸ By contrast, Title IX does not contain specific procedures individuals must pursue that would be circumvented by allowing § 1983 constitutional claims.

Furthermore, Title IX does not even contain an express private claim for relief. The Court in *Fitzgerald* found that this absence of an express private right of action was:

a key consideration in determining congressional intent. . . . [The Supreme] Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation. Mindful that [the Court] should “not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,” [it saw] no basis for doing so here.⁷⁹

The Court found that in some instances, Title IX protections are narrower, and in some respects broader, than the § 1983 constitutional remedy. The Court detailed the various differences:

1. Title IX only reaches federally funded schools; § 1983 is not so limited.
2. Title IX covers private schools that are generally not suable under § 1983, which reaches only state action.
3. Title IX does not authorize suit against individual officials, while § 1983 allows claims against individual officials and municipal entities.
4. Title IX has several exemptions not applicable in § 1983 actions; “[f]or example, Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions, it exempts military service schools and traditionally single-sex public colleges from all of its provisions. Some exempted activities may form the basis of [§ 1983] equal protection claims.”⁸⁰
5. The standards of liability

may not be wholly congruent. [A] Title IX Plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference. A plaintiff stating a similar claim via § 1983 for violation of the Equal Protection Clause by a school district or other municipal entity must show that the harassment was the result of municipal custom, policy, or practice.⁸¹

Relying upon “the divergent coverage of Title IX and the Equal Protection Clause, as well as the absence of a comprehensive remedial scheme[.]” the Court found that:

77. *Id.* at 795 (citing *Rancho Palos Verdes*, 544 U.S. at 122; *Smith*, 468 U.S. at 1011–1012; *Middlesex Co. Sewerage Auth. v. Natl. Sea Clammers Assn*, 453 U.S. 1 (1981)). Of these three decisions cited by the Supreme Court, only one, *Smith*, raised the issue of whether a particular federal statutory scheme precluded the assertion of a § 1983 constitutional claim.

78. *Id.* at 795.

79. *Id.* at 796 (citations omitted).

80. *Fitzgerald*, 129 S. Ct. at 796 (citations omitted).

81. *Id.* at 797 (citations omitted).

. . . Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, [the Court held] that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.⁸²

B. Fourth Amendment Searches

One of the largest subsets of § 1983 actions are complaints alleging violations of the Fourth Amendment by state and local officials, usually law enforcement officers. These actions typically assert claims of false arrest, unconstitutional searches, and use of excessive force. Virtually every term the United States Supreme Court decides important cases fleshing out the meaning of the Fourth Amendment. Some of these decisions are rendered in the context of § 1983 actions while others are rendered in the context of criminal prosecutions. It is important for § 1983 litigators to be cognizant of the fact that Supreme Court decisions interpreting the Fourth Amendment in the context of criminal prosecutions may prove to be significant in § 1983 litigation.

The Supreme Court decided four Fourth Amendment cases last term, two of which are especially likely to be significant in § 1983 litigation.⁸³ In *Safford Unified School District No.1 v. Redding*⁸⁴ the Supreme Court held in a § 1983 action that the strip search of a 13-year old middle school student violated the Fourth Amendment, but the defendant officials were protected by qualified immunity. In *Arizona v. Gant*⁸⁵ the Court, in the context of a criminal prosecution, revamped its prior precedent and held that police officers who arrest an automobile driver or passenger may no longer automatically search the passenger compartment of the vehicle, but may do so only if the arrestee is within reaching distance of the car or if it is reasonable for the officer to believe that the vehicle contains evidence of the offense which is the subject of the arrest.

82. *Id.* The Court found that “[t]his conclusion is consistent with Title IX’s context and history.” *Id.* The Court pointed out that Title IX authorizes the Attorney General to intervene in private suits alleging gender discrimination under the Equal Protection Clause, indicating that Congress impliedly acknowledged the availability of the § 1983 constitutional remedy. Moreover, Congress modeled Title IX after Title VI, and Title VI was routinely interpreted by the circuit courts to allow “parallel and concurrent § 1983 claims.” *Id.* (citations omitted). The Supreme Court in *Fitzgerald* did not decide whether the plaintiffs alleged an actionable § 1983 equal protection claim against the school superintendent and the school committee. *Fitzgerald*, 129 S. Ct. at 798.

83. The other two decisions may be significant in some § 1983 actions. In *Arizona v. Johnson*, 129 S. Ct. 781 (2009), the Court held that when a police officer makes a lawful traffic stop and has reasonable suspicion that a passenger is armed and dangerous, the officer may conduct a *Terry* frisk of the passenger. *See also Terry v. Ohio*, 392 U.S. 1 (1968). The Court found that the reasonableness of the frisk is established when the officer makes a lawful stop of an automobile because, for the duration of the traffic stop, “a police officer effectively seizes ‘everyone in the vehicle,’ the driver and all passengers.” *Johnson*, 129 S. Ct. at 784 (quoting *Brendlin v. California*, 551 U.S. 249, 255 (2007)). The other Fourth Amendment decision has application only to criminal prosecutions. In *Herring v. U.S.*, 129 S. Ct. 695 (2009), the Court held that the Fourth Amendment exclusionary rule does apply to unconstitutional searches resulting from erroneous information in law enforcement computer records stemming from isolated negligence as opposed to deliberate or systemic wrongdoing.

84. 129 S. Ct. 2633.

85. 129 S. Ct.1710, 1723 (2009).

1. Student Searches

In a case that attracted great attention from the public and the media, the Court in *Redding*⁸⁶ held that the defendant school officials' "strip search" of 13-year old Savana Redding, a middle school student suspected of possessing prescription strength Ibuprofen, violated the Fourth Amendment, but that the defendant school officials were protected from liability by qualified immunity. Justice Souter wrote the opinion for the Court. Justices Stevens and Ginsburg wrote separate opinions, concurring in part and dissenting in part, in which they agreed with the Court that the search violated the Fourth Amendment but concluded that the officials should not have been protected by qualified immunity.⁸⁷ Justice Thomas, concurring in the judgment, found that the search did not violate the Fourth Amendment. The Court did not reach plaintiff's municipal liability *Monell* claim⁸⁸ against the school district, which was remanded for consideration.

The case pitted the state's interests in drug free schools, student safety, and compliance with school rules, against the student's Fourth Amendment privacy interests. Savana Redding's classmate and friend, Marissa, told the assistant principal of the school, Kerry Wilson, that she, Marissa, had obtained Ibuprofen from Savana. A female administrative assistant and Wilson searched Savana's backpack, but found nothing. Wilson instructed the assistant to take Savana to the school nurse. Savana was asked to remove her pants and T-shirt and "told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found."⁸⁹

Savana's mother brought a § 1983 action against the assistant principal, the administrative assistant, the school nurse, and the school district. The Ninth Circuit held that the strip search violated the Fourth Amendment principles established for school officials' searches of students in *New Jersey v. T.L.O.*⁹⁰ and that, because the search violated clearly established Fourth Amendment law, assistant principal Wilson was not protected by qualified immunity.⁹¹

During the oral argument, the justices struggled with the need to provide guidance for school administrators and with deciding where to draw the line between constitutional and unconstitutional student searches. Even some of the more liberal justices seemed inclined to give school officials broad discretion in cases involving schools and drugs. Justice Souter suggested that it might be better to have a student embarrassed by a strip search "than to have some other kids dead because the stuff is distributed at lunchtime and things go awry."⁹² Justice Breyer tended to downplay the

86. 129 S. Ct. at 2644.

87. See *infra* pt. III(B) (discussing qualified immunity). Justices Stevens and Ginsburg each joined in the other's separate opinion.

88. See *Monell*, 436 U.S. 658. A *Monell* claim requires the plaintiff to demonstrate that the violation of her federally protected rights is attributable to enforcement of a municipal policy or practice.

89. *Redding*, 129 S. Ct. at 2638.

90. 469 U.S. 325 (1985).

91. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071 (9th Cir. 2008) (en banc). The circuit court held that the administrative assistant and school nurse were not liable because they did not act as independent decision makers. See *Redding*, 129 S. Ct. at 2638 (describing circuit court decisions); *Safford Unified*, 531 F.3d at 1089.

92. Oral Argument at 48:22–24, *Redding*, 129 S. Ct. 2633 (available at 2009 WL 1064200).

intrusiveness and humiliation of the search, suggesting that it was fairly analogous to changing into gym clothes.⁹³ This seemed to frustrate Justice Ginsburg, at the time the only female justice, who, in an unusual post-argument interview with USA Today reporter Joan Biskupic, stated that her colleagues could not appreciate the humiliation Savana endured because “[t]hey have never been a 13-year-old girl” and that “[i]t’s a very sensitive age for a girl.”⁹⁴

The Supreme Court agreed with the circuit court that the search violated the Fourth Amendment, but disagreed with the circuit court’s determination that the search violated clearly established Fourth Amendment law. The circuit court correctly found that the Fourth Amendment issue was governed by the framework of principles established in *T.L.O.* The Court in *T.L.O.*, taking into account the special concerns in the school environment, modified its normal Fourth Amendment principles and, balancing the competing interests of the student and school, held that a school official’s search of a student does not require a search warrant, but does require: (1) reasonable suspicion (rather than probable cause) to conclude that the student violated the law or a school rule, and (2) the scope and manner of the search must be reasonable in relation to its objective.⁹⁵ A school search “will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁹⁶ The Court upheld the search of a student’s purse by school principal Theodore Chaplick based upon the report of a teacher who observed the student smoking in the restroom, in violation of school rules. The search discovered cigarettes, rolling papers, and marijuana.

The Court in *Redding* said that probable cause means a “fair probability” or “substantial chance”⁹⁷ that a law enforcement officer’s search will uncover criminal evidence, while the “lesser standard” of “reasonable suspicion” for school searches is “a moderate chance of finding evidence of wrongdoing.”⁹⁸ The Court said that because school officials have the expertise in determining the rules needed for school administration, “[e]xcept in patently arbitrary instances, Fourth Amendment analysis takes the [school] rule as a given.”⁹⁹ The school policy in *Redding* strictly prohibited non-medical use, possession, or sale of drugs on school grounds.¹⁰⁰ This flat ban makes sense because “[t]eachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast.”¹⁰¹

For purposes of Fourth Amendment analysis, the Court separated the search of Savana’s outer clothing and backpack from the strip search. The Court found that the statement from Marissa that she got the Ibuprofen from Savana constituted reasonable

93. *Id.* at 44–45, 58.

94. Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA Today 1A (May 6, 2009).

95. *T.L.O.*, 469 U.S. at 340. The Court found that the warrant requirement was “unsuited” in the school context, because it would delay school officials who may have to act “on the spot” and, presumably, because school officials are not well versed in Fourth Amendment warrant law. *See id.*

96. *Id.* at 342.

97. *Redding*, 129 S. Ct. at 2639 (quoting *Ill. v. Gates*, 462 U.S. 213, 238, 244 n. 13 (1983)).

98. *Id.*

99. *Id.* at 2640 n. 1.

100. *Id.* at 2639–2640.

101. *Id.* at 2640 n. 1.

suspicion “to justify a search of Savana’s backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall”¹⁰²

The strip search, however, was another matter entirely. Because the strip search was so intrusive, it required a separate Fourth Amendment analysis and evaluation compared to the search of the outer clothing and backpack. It is a “quantum leap” from a backpack/outer clothing search to a search exposing a student’s intimate areas.¹⁰³ The meaning, degradation and intrusiveness of a strip place such a search “in a category of its own demanding its own specific suspicions.”¹⁰⁴

The Court found that the defendant school officials did not have reasonable suspicion to make Savana pull her bra out and shake it, and pull out the elastic on her underpants which, the Court said, was fairly described as a “strip search.”¹⁰⁵ Whether or not the student was strip searched should not depend upon “who was looking and how much was seen.”¹⁰⁶ The Court found that this strip search infringed Savana’s subjective and reasonably objective expectation of privacy:

The very fact of Savana’s pulling her underwear away from her body in the presence of the two [school] officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.¹⁰⁷

The Court found that “Savana’s subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating[.]” and that “[t]he reasonableness of her expectation . . . is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.”¹⁰⁸

The Court made clear that the context in which a school search occurs is critical. “Changing for gym is getting ready for play[.]” but “exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.”¹⁰⁹ Although the “indignity” of a search does not necessarily mean that it violates the Fourth Amendment, the strip search was unreasonable in *Redding* because of its extreme intrusiveness in relation to the information possessed by the school officials. The Court stated:

[W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to

102. *Redding*, 129 S. Ct. at 2641.

103. *Id.* at 2643.

104. *Id.*

105. *Id.* at 2641 (“The exact label . . . is not important, though strip search is a fair way to speak of it.”).

106. *Id.*

107. *Redding*, 129 S. Ct. at 2641.

108. *Id.* (citations omitted).

109. *Id.* at 2642 (citing a N.Y.C. Department of Education Policy prohibiting all strip searches of students).

suppose that Savana was carrying pills in her underwear . . . [T]he combination of these deficiencies was fatal to finding the search reasonable.¹¹⁰

Nevertheless, because the Court found that the Fourth Amendment law was not clearly established when the search occurred, the defendant officials were protected from liability by qualified immunity.¹¹¹

The Court's Fourth Amendment analysis suggests that the Court was not banning all strip searches of public school students.¹¹² Although there was an insufficient justification to strip search Savana Redding, there might be justification if school officials have information that there is a danger to the students or that drugs are secreted in the student's underwear. Savana Redding's lawyer, Adam Wolf of the American Civil Liberties Union, said that the "decision sends a clear signal to school officials that they can strip search students only in the most extraordinary situations."¹¹³ By contrast, Matthew W. Wright, the attorney for the school defendants, bemoaned the fact that the Court's decision limits "the ability of school officials to protect students from the harmful effects of drugs and weapons on school campuses."¹¹⁴

Justice Thomas, concurring in the judgment for the defendants but dissenting on the Fourth Amendment determination, lamented the Court's failure to defer to the judgment of school officials who have the necessary expertise in school administration and are charged with the difficult ongoing task of maintaining discipline in the schools, and preventing "ugly" drug use and violent crime.¹¹⁵ In his view, "the Court has undercut student safety and undermined the authority of school administrators and local officials."¹¹⁶ He advocated, as he had in his concurrence in *Morse v. Frederick*,¹¹⁷ a return to the common-law doctrine of *in loco parentis*, under which courts are reluctant to interfere with the routine decisions of school officials.

2. Automobile Searches

In *Arizona v. Gant*, the Supreme Court, in a 5-4 decision written by Justice Stevens, substantially modified, if not downright overturned,¹¹⁸ its prior decisions in *New York v. Belton*¹¹⁹ and *Thornton v. U.S.*¹²⁰ by limiting the circumstances in which an officer may search a vehicle incident to the arrest of its driver or passenger.¹²¹ The decisions in *Belton* and *Thornton* gave the officer automatic authority to make a

110. *Id.* at 2642–2643.

111. *Infra* pt. III(B).

112. *See Redding*, 129 S. Ct. at 2642.

113. Jesse J. Holland, *Justices: Strip Search of Teen Illegal*, *The Journal News B4* (June 26, 2009).

114. Adam Liptak, *School Search of Girl by School Officials Seeking Drugs Was Illegal, Justices Rule*, *N.Y. Times A16* (June 26, 2009).

115. *Redding*, 129 S. Ct. at 2646 (Thomas, J., dissenting in part and concurring in part).

116. *Id.* at 2657.

117. 551 U.S. 393, 414 (2007) (Thomas, J., concurring).

118. *See Gant*, 129 S. Ct. at 1722 n. 9. The majority disagreed with the dissent's view that the Court overruled *Belton*. *Id.*

119. 453 U.S. 454 (1981).

120. 541 U.S. 615 (2004).

121. *Gant*, 129 S. Ct. at 1712–1713. Justice Stevens wrote the opinion for the Court, which was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Justice Alito dissented, joined by Chief Justice Roberts, Justices Kennedy and Breyer. *Id.* at 1713–1714.

warrantless search of the passenger compartment of a car incident to the arrest of the driver or passenger. The *Belton-Thornton* doctrine was a subset of the broader search incident to arrest doctrine, which allows an officer to search the arrestee and the area within the arrestee's immediate control, i.e., the so-called "grabbing" or lunging area.¹²² The twin rationales for the search incident to arrest doctrine are officer safety—the arrestee might have or lunge for a weapon—and the preservation of criminal evidence the arrestee might seek to secret or destroy. By allowing the arresting officer to search the compartment of the vehicle, the *Belton-Thornton* doctrine, in effect, created a rather large lunging area.

The *Belton-Thornton* doctrine was intended to give the arresting officer an easy to follow "bright line" rule. This point was stressed in Justice Alito's dissent in *Gant*.¹²³ On the other hand, Justice Stevens' opinion for the majority focused upon the fact that the rationale of *Belton-Thornton* was based on what was normally a highly improbable scenario in which an arrestee that is securely in police custody, perhaps handcuffed in back of the police car, nevertheless breaks away from the police and gains entry into his automobile to obtain a weapon or criminal evidence.¹²⁴ For example, in *Gant*, Rodney Gant, who was arrested for driving with a suspended license, was handcuffed and locked in the back of patrol car when the officers searched his car and found cocaine. To think that Gant and other arrestees in like circumstances might somehow break free from police custody and gain entry into his car and obtain a weapon or criminal evidence conjures up images of comical, bumbling, incompetent police. So the Court, responding to a "chorus" of courts, scholars, and Supreme Court justices who called for a reexamination of *Belton*,¹²⁵ did just that. The majority held that police officers may no longer automatically search the automobile incident to the arrest of the driver or passenger.¹²⁶

The Court in *Gant* held that the officer may search the passenger compartment of the car in two situations: (1) when the arrestee is not securely in police custody and the passenger compartment is "within reaching distance" of the arrestee,¹²⁷ or (2) "when it is reasonable [for the officer] to believe that evidence of the offense of arrest might be found in the vehicle."¹²⁸ Because the first possibility is fairly unlikely, litigation in both

122. See *Chimel v. Cal.*, 395 U.S. 752 (1969).

123. *Gant*, 129 S. Ct. at 1727 (Alito, J. dissenting).

124. *Id.* at 1718–1719 (majority).

125. *Id.* at 1716.

126. Justice Scalia, concurring, expressed the view that the police officer may search the vehicle incident to arrest "only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred." *Id.* at 1725 (Scalia, J., concurring). No other justice took this position to break the 4–4 tie. Justice Scalia aligned himself with the position of the Stevens group, explained in the text below, rather than with the Alito dissent, which sought to maintain the *Belton-Thornton* rule. *Id.*

127. *Gant*, 129 S. Ct. at 1723 (majority).

128. *Id.* at 1714. As the Court indicated, when a warrantless search of the car cannot be justified as incident to the arrest of the driver or passenger, it may be justified under the separate "automobile exception" which allows a warrantless search of a vehicle, or part of a vehicle, when the officer has probable cause to conclude that the vehicle contains criminal evidence. *Id.* at 1721 (citing *U.S. v. Ross*, 456 U.S. 798 (1992)). In addition, an officer may search a vehicle's passenger compartment when he has reasonable suspicion that an individual is dangerous and might gain access to the vehicle to obtain a weapon. *Id.* (citing *Michigan v. Long*, 463 U.S. 1032 (1983)).

criminal prosecutions and § 1983 actions is likely to focus on the second possibility, i.e., whether it was “reasonable” for the arresting officer to believe that evidence of the offense of the arrest might be found in the vehicle. One of the uncertainties not discussed by the Court is whether, and if so, how, this reasonableness standard differs from probable cause. Presumably it does differ, for otherwise the court would have invoked the generally applicable probable cause standard. In any case, whether the officer’s belief was reasonable will require case-by-case adjudication. In close § 1983 cases when a court finds that the officer’s belief was not reasonable, the officer may still be protected from personal liability by qualified immunity.¹²⁹

C. No Due Process Right to Post-Conviction DNA Testing

DNA evidence is powerful, having “an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty[.]”¹³⁰ and has led to extraordinary numbers of exonerations.¹³¹ Despite this acknowledgement, the Supreme Court, in *District Attorney’s Office for the Third Judicial District v. Osborne*,¹³² held 5-4 that a convicted criminal defendant does not have either a procedural or substantive due process right to post-conviction DNA testing of evidence, even at his own expense. The Court, in reversing the Ninth Circuit Court of Appeals, split along its typical ideological lines. Chief Justice Roberts wrote the opinion for the Court, in which Justices Scalia, Kennedy, Thomas and Alito joined. Justice Alito wrote a concurring opinion, joined by Justice Kennedy and, as to Part II, by Justice Thomas. Justice Stevens wrote the main dissent, joined by Justices Ginsburg and Breyer and, as to Part I, by Justice Souter. Justice Souter wrote a separate dissent.

The case had a somewhat lengthy history. In brief, Osborne was convicted in Alaska state court of kidnapping, assault, and sexual assault. He was sentenced to 26 years in prison. His conviction and sentence were affirmed on appeal, and his attempts for post conviction relief in state court failed. He filed a § 1983 action in federal district court asserting a constitutional right to access evidence for DNA testing at his own expense. (He sought to utilize a sophisticated form of DNA testing not available at the time of his criminal trial). The case was in the Ninth Circuit twice. On the first go round, the circuit court held that Osborne had a right to assert his constitutional claims under § 1983.¹³³ The second time around, the circuit court held for Osborne on his due process claims, finding that the prosecutor’s due process duty to disclose exculpatory material

Justice Alito, dissenting in *Gant*, opined that the court’s decision will lead to reexamination of searches incident to arrest in the home. *Id.* at 1731 (Alito, J., dissenting).

129. See pt. III(B); see e.g. *Anderson v. Creighton*, 483 U.S. 635 (1989). In *Gant*, the Court said that “[b]ecause a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted [pre-*Gant*] in reasonable reliance on that understanding.” *Gant*, 129 S. Ct. at 1722 n. 11.

130. *Osborne*, 129 S. Ct. at 2312.

131. *Id.* at 2337, 2337 n. 9 (Stevens, J., dissenting) (citing authorities). During the past two decades, DNA evidence has exonerated 232 wrongly convicted individuals, including 17 on death row. Bill Mears, *Supreme Court Denies DNA Test to Rapist*, <http://www.cnn.com/2009/CRIME/06/18/rapist.dna/index.html> (June 18, 2009).

132. 129 S. Ct. 2308.

133. *Osborne v. D.A.’s Off. for Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005).

extends to post-conviction proceedings.¹³⁴

The Supreme Court granted certiorari on two issues: (1) whether Osborne's due process claims could be asserted under § 1983, as opposed to in a federal habeas corpus proceeding, and (2) whether Osborne had a due process right to post-conviction access to the State's evidence for DNA testing. The first issue is essentially procedural in nature. Constitutional claims asserted by convicted state court defendants may come literally within both § 1983 and the federal habeas corpus statute.¹³⁵ In *Preiser v. Rodriguez*,¹³⁶ the Supreme Court in 1973 held that when a state prisoner seeks immediate or speedier release from confinement, the claim comes within the "core" of habeas corpus and must be filed under federal habeas corpus rather than § 1983. Unlike § 1983, a federal habeas corpus claim requires exhaustion of state judicial remedies.¹³⁷ *Preiser's* rationale is that the more specific federal habeas remedy prevails over the more general § 1983 remedy, and that state prisoners should not be able to obviate habeas corpus limitations by the simple expedient of labeling the pleading a § 1983 complaint. Since the decision in *Preiser*, both the Supreme Court and the lower federal courts have frequently struggled with the § 1983/habeas corpus distinction.¹³⁸

In *Osborne*, the Supreme Court sidestepped "this difficult issue" by assuming that Osborne's claim was properly asserted under § 1983 because, "[e]ven under this assumption," the Court held that the circuit court erred in finding a due process violation.¹³⁹ In rejecting Osborne's claimed due process right to post-conviction access to the State's evidence for DNA testing, the Court relied heavily upon the rather pervasive, thoughtful legislative responses to the issue. In recent years, forty-six states,

134. *Osborne v. D.A.'s Off. for Third Judicial Dist.*, 521 F.3d 1118 (9th Cir. 2008).

135. 28 U.S.C. § 2254 (2009).

136. 411 U.S. 475 (1973).

137. 28 U.S.C. § 2254(b)(1)(A).

138. The decisional law on the issue is voluminous. See Schwartz, *supra* n. 61, at §§ 10.05–10.07.

139. *Osborne*, 129 S. Ct. at 2319. The Court in *Osborne* articulated the arguments on both sides of the § 1983 habeas corpus issue. Plaintiff argued that he sought access to DNA testing and, even if DNA testing exonerated him, his conviction would not be automatically invalidated; that his claim was analogous to *Wilkinson v. Dotson*, 544 U.S. 74 (2005), where the Court held that a procedural due process claim by prisoners seeking new hearings for parole eligibility could be filed under § 1983 because relief for plaintiffs would not itself bring about earlier release; and that all circuit courts that considered the issue post-*Dotson* found that a post conviction claim of access to DNA evidence is assertable under § 1983 because success on the claim does not necessarily mean speedier release. See e.g. *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006); *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2007); *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002).

The dissent agreed with plaintiff's position. See *Osborne*, 129 S. Ct. at 2331 n. 1. The State, however, argued that Osborne was in essence asserting a claim of actual innocence within the core of habeas corpus, and that *Dotson* was distinguishable because, inter alia, the challenged procedures in that case "did not affect the ultimate 'exercise of discretion by the parole board.'" *Id.* at 2318–2319 (quoting Br. for Pet. at 32, *Osborne*, 129 S.Ct 2308).

Justice Alito, concurring, joined by Justice Kennedy, acknowledged that although it is sometimes difficult to decide the § 1983/habeas corpus distinction, the *Osborne* case fell on the habeas side of the line because, like *Brady v. Maryland*, 373 U.S. 83 (1963) claims, Osborne's claimed right to DNA evidence, if successful, would undermine his guilt or punishment, and thus falls within the core of habeas corpus. *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring). "It is no answer to say....that [plaintiff] simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application, a state clemency petition, or a request for relief by means of prosecutorial consent[.]" because these factors "implicate precisely the same federalism and comity concerns that motivated our decisions (and Congress') to impose exhaustion requirements and discovery limits in federal habeas proceedings." *Id.* at 2325 (citation omitted).

the District of Columbia, and Congress enacted DNA testing statutes.¹⁴⁰ Only four states, Alabama, Alaska, Massachusetts, and Oklahoma, had not.¹⁴¹ But Alaska did have general procedures authorizing prisoners to obtain access to evidence that might prove their innocence.¹⁴² The majority found that recognizing a due process right to post-conviction DNA testing “would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause”¹⁴³ or, in other words, “short-circuit what looks to be a prompt and considered legislative response.”¹⁴⁴ The Court in *Osborne* analogized to *Washington v. Glucksberg*¹⁴⁵ where the Court, in rejecting a claimed substantive due process right to physician-assisted suicide, relied partly on the fact that the states were “engaged in serious, thoughtful examinations” of the issue,¹⁴⁶ and that constitutionalizing the issue would “to a great extent [have placed] the matter outside the arena of public debate and legislative action.”¹⁴⁷ However, this was not the heart of the Court’s analysis in *Glucksberg*, but more in the nature of a “by the way” afterthought of a wholesome byproduct of rejecting the claimed due process right to physician-assisted suicide.

In the author’s view, this aspect of the Court’s analysis in *Osborne* is highly troublesome. To begin with, *Glucksberg* did not present circumstances analogous to those in *Osborne*. In fact, *Glucksberg* could be viewed as the direct opposite of *Osborne* since, when *Glucksberg* was decided, only one state, Oregon, had a law legalizing physician-assisted suicide for competent, terminally ill adults and, as the Court acknowledged, while many proposals were introduced in states’ legislatures to legalize assisted suicide, none were enacted at that time.¹⁴⁸ The Supreme Court in *Glucksberg* pointed to the lack of widespread physician-assisted suicide to lend support to its conclusion that it is not an activity that was “deeply rooted in this Nation’s history and tradition.”¹⁴⁹ In *Osborne* the Court relied upon widespread legislative recognition of the right to justify denial of the due process right because “[t]o suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response,” and there is no reason to think that the answers of the federal courts would “be any better than those of state courts and legislatures.”¹⁵⁰

Lawyers and their clients who assert due process claims should thus be forgiven if they feel that the Court has them coming and going. The Court will deny the claimed due process right when state legislatures are by and large recognizing the right, as in

140. *Id.* at 2322 (majority). *See also id.* at 2326 n. 2 (Alito, J. concurring) (compilation of statutes); *id.* at 2335 (Stevens, J., dissenting).

141. *Osborne*, 129 S. Ct. at 2326 n. 2 (Alito, J., concurring).

142. Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4) (2009).

143. *Osborne*, 129 S. Ct. at 2312.

144. *Id.* at 2322.

145. 521 U.S. 702 (1997).

146. *Id.* at 719.

147. *Id.* at 720.

148. *Id.* at 717.

149. *Id.* at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

150. *Osborne*, 129 S. Ct. at 2323; *see also Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006) (in denying First Amendment protection for public employee speech pursuant to official duties, court noted a “powerful network of legislative enactments . . . available to those who seek to expose wrongdoing”).

Osborne, and when by and large they are not, as in *Glucksberg*.

Most fundamentally, individual federal constitutional rights should be guaranteed regardless of the will or whim of legislative bodies. In other words, federal constitutional guarantees should stand firm and provide protection regardless of policies legislative bodies may in their prerogative choose to adopt. A right as fundamental as one's procedural due process right to an opportunity to be heard should not be dependent on the will of state legislatures. Furthermore, legislative policies differ from jurisdiction to jurisdiction, with different degrees of protections and limitations. Some legislative policies may comport with the Constitution while others do not. Regardless, they simply cannot substitute for a protection guaranteed uniformly by the federal Constitution. To put it bluntly, either a right is guaranteed by the Constitution or it is not; Osborne's due process rights were either violated or they were not violated. But the answer to these constitutional questions should not depend upon the policies state legislatures around the country decided to adopt. Justice Jackson in his landmark opinion in *West Virginia State Board of Education v. Barnette* stated it well:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁵¹

Unfortunately, the Court in *Osborne* did not heed Justice Jackson's wisdom and its deference to legislative enactments heavily colored its due process analysis against the plaintiff.¹⁵²

The Court analyzed separately the procedural and substantive due process claims asserted by Osborne.¹⁵³ In rejecting the procedural due process claim, the Court held that the prosecutor's *Brady v. Maryland*¹⁵⁴ due process obligation to disclose exculpatory material to the defense is a fair trial right that does not apply post-conviction. Nevertheless, the Court did find that Osborne had a state-created liberty interest in access to evidence for post-conviction DNA testing in order to demonstrate his innocence. Although "noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state

151. 319 U.S. 634, 638 (1934)); *see also Bd. of Commrs. v. Umbehr*, 518 U.S. 668, 680 (1996); *Garretti*, 547 U.S. at 448 (Souter, J. dissenting).

152. It is interesting to contrast the Court's decision in *Osborne* with its decision in *Caperton v. A.J. Massey Coal Co.*, 129 S. Ct. 2252 (2009). The Court in *Caperton* held, 5-4, that the plaintiff had a due process right to recusal of a state court appeals judge who had received extraordinary campaign contributions from and on behalf of the corporate defendant. The Court recognized a due process right of recusal when, from an objective standpoint, there is a serious risk of actual bias, even though every jurisdiction has some kind of recusal policy. Justice Kennedy, who joined the majority in *Osborne*, wrote the majority opinion, joined by Justice Stevens, Souter, Ginsberg and Breyer. Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissented. Thus, Justice Kennedy cast the critical fifth vote in each case.

153. Justice Souter, dissenting, agreed with Circuit Court Judge Lutwig that "there is no hermetic line between the substantive and the procedural in due process analysis . . . and in this case one could argue back and forth about the better characterization of various state conditions as being one or the other." *Osborne*, 129 S. Ct. at 2342 n. 2 (Souter, J., dissenting) (citation omitted).

154. 373 U.S. 83.

law[.]”¹⁵⁵ Osborne did have a state-created liberty interest in demonstrating his innocence. As the Court recognized, in some circumstances, a state-created liberty interest may generate procedural due process requirements.¹⁵⁶

This liberty interest, however, was rather limited because a convicted defendant found guilty after a fair trial has a significantly diminished liberty interest compared to a presumptively innocent person:

The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief . . . Osborne’s right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.¹⁵⁷

The Court ruled that the pertinent question is whether the State’s post-conviction procedures “ ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’ or ‘transgresses any recognized principle of fundamental fairness in operation.’ ”¹⁵⁸ In other words, “[f]ederal courts may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.”¹⁵⁹ The Court found that Alaska’s postconviction procedures were facially adequate to obtain access to evidence for DNA testing. Further, Osborne did not demonstrate that Alaska’s postconviction procedures were inadequate in operation. The Court stated:

This is not to say that Osborne must exhaust state-law remedies. But it is Osborne’s burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.¹⁶⁰

This is consistent with the position of numerous lower federal courts that § 1983 claimants who allege procedural due process claims must pursue the available procedures and demonstrate their inadequacy.¹⁶¹ This is not considered an exhaustion requirement but is in effect an element of a procedural due process claim.

The Court had little difficulty rejecting Osborne’s claimed substantive due process right to post-conviction DNA testing. The Court reiterated its strong reluctance to expand substantive due process rights because “guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”¹⁶² The Court found “no long history of

155. *Osborne*, 129 S. Ct. at 2319 (citing *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)).

156. The state-created liberty interest was based upon Alaska law, which provides “that those who use ‘newly discovered evidence’ to ‘establis[h] by clear and convincing evidence that [they are] innocent may obtain ‘vacation of [their] conviction or sentence in the interest of justice.’ ” *Id.* at 2319 (quoting Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4)).

157. *Id.* at 2320.

158. *Id.* at 2320 (quoting *Medina v. Ca.*, 505 U.S. 427, 446 (1992)). Interestingly, this is one of the tests used by the Supreme Court to determine whether provisions of the Bill of Rights should be incorporated into the Fourteenth Amendment and made applicable to the states. See e.g. *Palko v. Connecticut*, 302 U.S. 319 (1937).

159. *Osborne*, 129 S. Ct. at 2320.

160. *Id.* at 2321 (citations omitted). Although Osborne asserted an “actual innocence” claim, he conceded that such a claim would have to be asserted in a federal habeas corpus proceeding. *Id.* at 2321–2322.

161. See Schwartz, *supra* n. 61, at § 10.3.

162. *Osborne*, 129 S. Ct. at 2322 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)); see also *Glucksburg*, 521 U.S. 702.

such a right [to postconviction DNA testing], and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'"¹⁶³

The Court in *Osborne* found that recognizing a substantive due process right to postconviction DNA testing would not only interfere with the ongoing legislative responses, but "would cast these statutes into constitutional doubt and [the Court would] be forced to take over the issue of DNA access" itself.¹⁶⁴ Furthermore, constitutionalizing "a freestanding right to access DNA evidence for testing" would force the Court to act as a policymaker, potentially enmeshing the Court in numerous details surrounding the right, including, whether there is a "constitutional obligation to preserve forensic evidence that might later be tested . . . and, [i]f so, for how long[.] Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?"¹⁶⁵ "[I]t is hard to imagine what tools federal courts would use to answer them."¹⁶⁶ In other words, recognizing a new due process right to post conviction DNA testing would likely usher in a new wave of ongoing § 1983 (or federal habeas) litigation attempting to flesh out the contours of the right. The Court made clear that, in its view, this would not be a wholesome development.¹⁶⁷

Justice Stevens, dissenting, found that a convicted defendant has a procedural due process right to post-conviction DNA testing. He invoked the principle that "[a]lthough States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause[.]"¹⁶⁸ He found that Alaska's statute pertaining to post-conviction relief is not facially deficient, but "the state courts' application of [it] raises serious questions whether the State's procedures are fundamentally unfair in their operation."¹⁶⁹ Alaska never provided "any concrete reason for denying Osborne the DNA testing he seeks, and none is apparent."¹⁷⁰ In contrast to the majority, Justice Stevens advanced the view that a prosecutor's *Brady* obligations should extend postconviction because the fundamental fairness concerns that motivated the *Brady* doctrine "are equally present when convicted persons . . . seek access to dispositive DNA evidence following conviction."¹⁷¹ As a matter of substantive due process, Justice Stevens found that "the State's refusal to provide Osborne with access to evidence for DNA testing qualifies as arbitrary."¹⁷² There were persuasive reasons to require the DNA testing and no good

163. *Osborne*, 129 S. Ct. at 2322 (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)).

164. *Id.* at 2322.

165. *Id.* at 2323.

166. *Id.*

167. Justice Alito, concurring, opined in Part I of his concurrence that Osborne's claim must be asserted in a federal habeas corpus proceeding, not under § 1983, and in Part II of his concurrence, in which Justices Kennedy and Thomas joined, agreed with the majority that the Court should not interfere with legislative efforts of the federal Government and the States. He also pointed out that the DNA does not provide absolute proof of anything, in part because of DNA evidence entails risks associated with mishandling and contamination of evidence. *Id.* at 2327 (Alito, J. concurring).

168. *Osborne*, 129 S. Ct. at 2332 (Stevens, J., dissenting) (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)).

169. *Id.* at 2332 (Stevens, J., dissenting).

170. *Id.* at 2336.

171. *Id.* at 2335.

172. *Id.* at 2336.

reason to deny it. Justice Stevens also disagreed with the Court's reliance on its goal of not interfering with legislative developments. "[A] decision to recognize a limited [due process] right of postconviction access to DNA testing would not prevent the States from creating procedures by which litigants request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary."¹⁷³ Not surprisingly, groups dedicated to exonerating the wrongfully convicted criticized the Court's decision.¹⁷⁴

III. IMMUNITIES

Officials who are sued for money damages under § 1983 may be entitled to assert an absolute or qualified immunity. In general, officials who carry out judicial, prosecutorial, and legislative functions are protected by an absolute immunity, while officials who carry out executive and administrative functions are protected by qualified immunity. Although quite formidable, qualified immunity provides less protection than an absolute immunity.

Whether an official is entitled to absolute or qualified immunity depends on the "nature of the function performed, not the identity of the actor who performed it."¹⁷⁵ In other words, the immunity that an official is entitled to assert depends upon the nature of the function carried out, rather than the official's title. As a result, an official may be entitled to absolute immunity for carrying out one function, and qualified immunity for another function. For example, a judge may assert absolute judicial immunity for conduct relating to her judicial functions, but qualified immunity for conduct relating to executive and administrative functions, such as hiring and firing court employees.¹⁷⁶

As discussed below, the Supreme Court last term rendered an important decision concerning prosecutorial immunity and three important decisions concerning qualified immunity.

A. Prosecutorial Immunity

Victims of wrongful convictions suffered a serious setback in *Osborne*.¹⁷⁷ They suffered a second set back in *Van de Kamp v. Goldstein*.¹⁷⁸ In the seminal case of *Imbler v. Pachtman*, the Supreme Court held that prosecutors are absolutely immune when acting as an advocate for the state and engaging in conduct "intimately associated with

173. *Osborne*, 129 S. Ct. at 2339. Justice Stevens concluded that "Osborne has demonstrated a constitutionally protected right to due process which the State of Alaska thus far has not vindicated and which this Court is both empowered and obliged to safeguard." *Id.*

In his separate dissent, Justice Souter concluded that Alaska violated Osborne's procedural due process liberty interest by failing to afford him effective process "for vindicating the liberty interest in demonstrating innocence that the state law recognizes." *Id.* at 2340 (Souter, J., dissenting). He stated: "[T]he record convinces me that, while Alaska has created an entitlement of access to DNA evidence under conditions that are facially reasonable, the State has demonstrated a combination of inattentiveness and intransigence in applying those conditions that add up to procedural unfairness that violates the Due Process Clause." *Id.* at 2343. Justice Souter saw no need to reach the substantive due process issue.

174. See *No Constitutional Due Process Right Exists to Evidence for Post-Conviction DNA Testing*, 77 U.S. L. Week 1794 (June 23, 2009).

175. *Forrester v. White*, 484 U.S. 219, 229 (1988); accord *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997).

176. *Forrester*, 484 U.S. at 219.

177. See *infra* pt. II(C).

178. 129 S. Ct. 855.

the judicial phase of the criminal process[.]”¹⁷⁹ Thus, prosecutors are absolutely immune for “initiating a prosecution and in presenting the State’s case.”¹⁸⁰ The prosecutor in *Imbler* was absolutely immune even for knowingly using false testimony at trial and the deliberate suppression of exculpatory evidence.¹⁸¹ Prosecutors, however, have not normally been protected by absolute immunity for their investigative and administrative functions not related to trial preparation. For example, prosecutors are not absolutely immune for engaging in investigative activity prior to the establishment of probable cause to arrest,¹⁸² giving the police legal advice during the investigative phase,¹⁸³ and holding a press conference.¹⁸⁴

Last term, in *Van de Kamp*,¹⁸⁵ the Court held that absolute prosecutorial immunity protected a District Attorney and his Chief Deputy from monetary liability on a § 1983 wrongful conviction claim. In an unanimous opinion written by Justice Stephen G. Breyer, the Court found that prosecutorial immunity encompassed allegations that the District Attorney and his Chief Deputy failed to adequately train and supervise prosecutors in their office on their *Brady* obligations and also failed to establish an internal information system concerning impeachment material.¹⁸⁶

Although prosecutorial immunity has long been strong medicine, *Van de Kamp* strengthens it even more. Ironically, the Supreme Court’s decisions in *Van de Kamp* and *Osborne* were rendered during a time of increased public concern about wrongful convictions. DNA testing has documented increasing numbers of wrongful conviction cases.¹⁸⁷ Close on the heels of the New York State Bar Association’s creation of a task force to study wrongful convictions in New York, newly appointed Chief Judge of the New York Court of Appeals Jonathan Lippman recently created another task force to study the subject, including the exploring of measures to minimize wrongful convictions. In announcing the task force, Chief Judge Lippman asked: “What could be worse for the branch of government whose constitutional responsibility is to administer justice than to have an injustice, a wrongful conviction?”¹⁸⁸

Wrongful convictions have been attributed to a variety of causes. The most prevalent culprits are ineffective assistance of counsel, mistaken eyewitness identifications, mishandling forensic evidence, false confessions, prosecutors’ use of false testimony and fabricated evidence, and police and prosecutorial suppression of exculpatory evidence.¹⁸⁹ Nevertheless, claims for damages based upon prosecutorial misconduct are almost always met with the defense of prosecutorial immunity. And,

179. 424 U.S. 409, 430 (1976).

180. *Id.* at 431.

181. *Id.* at 409, 431.

182. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277–278 (1993).

183. *Burns v. Reed*, 500 U.S. 478, 492–496 (1991).

184. *Buckley*, 509 U.S. at 277–278.

185. 129 S. Ct. 855.

186. *Id.* at 862–865.

187. *Infra* pt. II(C).

188. Joel Stashenko, *Lippman Forms Task Force to Study Ways to Avoid Wrongful Convictions*, N.Y.L.J. A1 (May 1, 2009).

189. N.Y. Bar Assn., *Preliminary Report of the New York Bar Association’s Task Force on Wrongful Convictions* (Jan. 30, 2009) (available at www.reentry.net/ny/library/attachment.147932).

when prosecutorial immunity applies, it shields even blatantly unconstitutional conduct.

Thomas Goldstein alleged in his federal court § 1983 complaint that the Los Angeles prosecutors' failure to disclose vital impeachment evidence led to his wrongful homicide conviction. He alleged that he was convicted of murder in 1980,

that his conviction depended in critical part upon the testimony of Edward Floyd Fink, a jailhouse informant; that Fink's testimony was unreliable, indeed false; that Fink had previously received reduced sentences for providing prosecutors with favorable testimony in other cases; that at least some prosecutors in the Los Angeles County District Attorney's Office knew about the favorable treatment; that the office had not provided Goldstein's attorney with that information; and that . . . the prosecution's failure to provide Goldstein's attorney with this potential impeachment information had led to his erroneous conviction.¹⁹⁰

The allegations in Goldstein's § 1983 complaint were substantiated by the decision in his previously filed federal habeas corpus proceeding. After holding an evidentiary hearing, the federal habeas court found that Fink did not give truthful testimony and that if the prosecution had told Goldstein's lawyer that "Fink had received prior rewards in return for favorable testimony it might have made a difference."¹⁹¹ The habeas corpus court ordered the state to either grant Goldstein a new trial or to release him. After the circuit court affirmed the decision of the district court in the habeas proceeding, the state decided to release Goldstein, who had already served 24 years of his sentence.

At this point, Goldstein filed his § 1983 action in federal district court. The complaint asserted that the trial prosecutors' failure to turn over *Giglio* exculpatory impeachment material¹⁹² violated his due process *Brady* right to receive exculpatory material, and that this constitutional violation was attributable to the failures of the Los Angeles District Attorney and his Chief Deputy to adequately train and supervise their prosecutors concerning *Brady* impeachment material and to establish an information system within the District Attorney's office regarding impeachment material about jailhouse informants.¹⁹³

Recent years have seen a proliferation of § 1983 *Brady* claims.¹⁹⁴ Plaintiffs' lawyers, however, know all too well that a § 1983 claim against the prosecutor who tried the criminal case based upon her failure to turn over *Brady* materials would be doomed for failure by prosecutorial immunity because *Brady* obligations are part of the prosecutor's advocacy functions.¹⁹⁵ To avoid dismissal based upon prosecutorial immunity, plaintiffs' lawyers sometimes seek to hold a police officer responsible for failing to disclose exculpatory material to the prosecutor.¹⁹⁶ But what if the *Brady* violation cannot be attributed to a police officer? Goldstein's counsel attempted an alternative strategy of asserting the § 1983 claim against the supervising attorneys in the D.A.'s office, namely, the District Attorney and his Chief Deputy. Then, in response to

190. *Van de Kamp*, 129 S. Ct. at 859.

191. *Id.*

192. *See Giglio v. U.S.*, 405 U.S. 150 (1972).

193. *Van de Kamp*, 129 S. Ct. at 859.

194. *See* Martin A. Schwartz, *Section 1983 Brady Claims*, N.Y.L.J. 3 (Apr. 18, 2008).

195. *See e.g. Imbler*, 424 U.S. 409, 430–431; *Yarris v. Co. of Del.*, 465 F.3d 129 (3d Cir. 2006).

196. *See e.g. Moldowan v. City of Warren*, 573 F.3d. 309 (6th Cir. 2009).

the defendant's assertion of prosecutorial immunity, Goldstein's counsel argued that the alleged wrongdoing of the supervisors was an "administrative" action rather than advocacy, and thus not within absolute prosecutorial immunity.¹⁹⁷

The strategy worked in the lower courts. Both the federal district court and Ninth Circuit held that absolute immunity did not defeat Goldstein's § 1983 claims because the complaint alleged administrative rather than advocacy actions by the defendants.¹⁹⁸ However, when the Supreme Court granted defendants' petition for certiorari, the Ninth Circuit's decision seemed to be in serious jeopardy. After all, Goldstein's formulation of his § 1983 claims against the District Attorney and his Deputy was a rather transparent attempt to circumvent prosecutorial immunity. It seemed likely that the Supreme Court would reverse, but it was unclear on what basis.

In fact, the oral argument in *Van de Kamp* was permeated with references by counsel for the defendant officials, the United States as amicus curiae in support of defendants, as well as by Chief Justice Roberts, about plaintiff's attempt to "circumvent" and make an "end-run" around prosecutorial immunity.¹⁹⁹ Sure enough, this became a major basis of the Supreme Court's decision overturning the Ninth Circuit, and holding that the District Attorney and his Chief Deputy were protected by absolute prosecutorial immunity.

The purpose of absolute prosecutorial immunity is to allow prosecutors to carry out their advocacy functions independently without looking over their shoulder fearing monetary liability and to prevent deflection of prosecutorial energies to the defense of claims for damages.²⁰⁰ However, as the Court in *Van de Kamp* recognized, prosecutorial immunity does not extend to a prosecutor's conduct that is not intimately related to the judicial process. The Court in *Van de Kamp* stated:

In the years since *Imbler*, we have held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, or appears in court to present evidence in support of a search warrant application, [but not] when a prosecutor gives advice to police during a criminal investigation, when the prosecutor makes statements to the press, or when a prosecutor acts as a complaining witness in support of a warrant application. [*Van de Kamp*], unlike these earlier cases, requires us to consider how immunity applies where a prosecutor is engaged in certain administrative activities.²⁰¹

The Court agreed with Goldstein that his § 1983 complaint attacked the D.A. "office's administrative procedures."²⁰² Nevertheless, and even assuming that the District Attorney and his Chief Deputy had "certain" due process obligations "as to training, supervision, or information-system management[.]" the Court held "that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here."²⁰³ The Court reasoned that prosecutorial immunity was applicable because defendants' contested

197. *Van de Kamp*, 129 S. Ct. at 859.

198. *Goldstein v. Long Beach*, 481 F.3d 1170 (9th Cir. 2007).

199. Oral Argument 13–14, 19, 21, 43, *Van de Kamp*, 129 S. Ct. 855 (available at 2008 WL 4804009).

200. *Van De Kamp*, 129 S. Ct. at 860.

201. *Id.* at 861 (citations omitted).

202. *Id.*

203. *Id.* at 861–862.

administrative actions were intimately connected to the criminal prosecution against Goldstein. The Court put it this way:

Here, unlike other [§ 1983] claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management.²⁰⁴

The Court fortified its reasoning with a hypothetical example of a claim against a supervisory prosecutor clearly covered by prosecutorial immunity. Assume that Goldstein asserted a claim for damages not only against the trial prosecutor, but also against a supervisory prosecutor on the grounds that they should have turned over impeachment material. Such a claim would contest trial preparation intimately associated with the judicial process and thus lie within the heart of absolute prosecutorial immunity. The only difference between a trial prosecutor's suppression of exculpatory material and the hypothetical is:

That, in our hypothetical case, a prosecutorial supervisor . . . might himself be liable for damages *instead of* the trial prosecutor. But we cannot find that difference (in the pattern of liability among prosecutors within a single office) to be critical. Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office.²⁰⁵

The Court in *Van de Kamp* found that the fact that the defendants' *general* supervisory, training, and information-management actions were at issue rather than supervision of a particular prosecution was not significant. The Court stated that this

difference does not preclude an intimate connection between prosecutorial activity and the trial process. The management tasks at issue . . . concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties. And, in terms of *Imbler's* functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial . . . and a suit charging that a supervisor trained and supervised inadequately . . . would seem very much alike.²⁰⁶

In other words, like trial prosecutors, supervisory prosecutors should be able to make decisions relating to trial advocacy free of the fear of personal liability. The Court was also concerned that it may often prove difficult to draw a line between *general* office supervision or training, *e.g.*, relating to *Brady* material, and "*specific* supervision or training related to a particular case."²⁰⁷

The Court saw no reason to distinguish between the trial prosecutor and supervisory prosecutor. The training, supervision, and information-management claims

204. *Id.* at 862.

205. *Van De Kamp*, 129 S. Ct. at 862 (emphasis in original).

206. *Id.* at 862–863.

207. *Id.* at 863.

in *Van de Kamp* rested on the direct *Brady* error by the trial prosecutor.²⁰⁸ In the Court's view, just as the individual prosecutor should be able to make decisions free of the fear of personal liability, so too should supervisory prosecutors. The Court found that

[t]o permit this suit to go forward would create practical anomalies. A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* [impeachment] material; but her supervisor might be liable for *negligent* training or supervision. Small prosecution offices where supervisors can personally participate in all of the cases would likewise remain immune from prosecution; but large offices, making use of more general office-wide supervision and training, would not.²⁰⁹

The Court had no trouble seeing through the plaintiff's strategy. It made clear that it will not allow § 1983 plaintiffs' attorneys to work an end run around prosecutorial immunity, because "the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*."²¹⁰

The Court's rationale for applying absolute immunity to plaintiff's training and supervision claims also applied to his information-system claim, even if that claim was even more "purely administrative" in nature. "Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training" in that each process requires knowledge of the law.²¹¹

This type of information system would require courts to determine whether there is a need for an information-system, if so, what kind of system, "and whether an appropriate system would have included *Giglio*-related information *about one particular kind of trial informant*."²¹² These decisions, too, are intimately associated with the judicial phase of the criminal process. "Consequently, where a § 1983 plaintiff claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself."²¹³

The upshot of *Van de Kamp* is that characterizations of a prosecutor's actions as "administrative" will not necessarily negate prosecutorial immunity. This appears to be the first time that the Supreme Court has characterized a prosecutor's conduct as "administrative," yet applied absolute immunity.²¹⁴

208. *Id.* at 857, 863 (defendants' management tasks at issue are "directly connected with the prosecutor's basic trial advocacy duties"; plaintiff's claims rest "in necessary part upon a consequent error by an individual prosecutor in the midst of trial").

209. *Id.* at 863 (emphasis in original).

210. *Van De Kamp*, 129 S. Ct. at 863.

211. *Id.* at 864.

212. *Id.*

213. *Id.* at 864–865.

214. *Id.* at 862. Prior to the decision in *Van de Kamp*, some lower courts held that the formulation of prosecutorial policies was shielded by absolute prosecutorial immunity. *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987) (holding that a prosecutor is absolutely immune for prosecuting an individual under a policy of pursuing criminal charges against individuals who refuse to waive civil suits against police officers for false arrest) ("The decision to focus prosecutorial energies upon particular classes of law violations or violators clearly bears many features in common with a decision to commence a single proceeding."); *Whitfield v. City of Phila.*, 587 F. Supp. 2d 657, 671 (E.D. Pa. 2008) (holding that a prosecutor is absolutely immune

B. Qualified Immunity

Officials sued under § 1983 in their personal capacities for money damages for carrying out executive and administrative functions may assert the defense of qualified immunity.²¹⁵ This defense protects officials who acted in an objectively reasonable manner. An official who violated the plaintiff's federally protected rights, but not clearly established federal law, acted in an objectively reasonable manner and will be shielded from personal liability.²¹⁶ Conversely, an official who not only violated the plaintiff's federally protected rights, but in so doing violated clearly established federal law, did not act in an objectively reasonable manner and will not be protected from personal liability.²¹⁷

Qualified immunity is the most important defense in § 1983 litigation. For one thing, it is very frequently asserted in defense of § 1983 damages claims. The voluminous § 1983 claims against law enforcement officers asserting unconstitutional arrests, searches, and use of force are subject to qualified immunity.²¹⁸ Then, too, a fairly high percentage of § 1983 claims are resolved in favor of defendant officials on the basis of qualified immunity. Furthermore, qualified immunity is not just an immunity from liability, but also an "immunity from suit," meaning that the defendant is immune from the burdens of having to defend the suit, including the burdens of discovery.²¹⁹

1. "Clearly Established Federal Law"

The Supreme Court applied the qualified immunity defense in *Redding*.²²⁰ The § 1983 complaint alleged that a strip search of a female middle school student violated the Fourth Amendment. The defendants included three school officials sued for damages in their personal capacities. The Supreme Court held that although the school officials' strip search violated the Fourth Amendment,²²¹ the officials were protected by qualified immunity because there was "reason to question the clarity with which the right was

from employing a policy or custom of appealing vacatur of sentences entered on technical procedural grounds because such a policy "is virtually indistinguishable from the decision to appeal the vacatur in [this] case alone"); *Eisenberg v. D.A. for Co. of Kings*, 847 F. Supp. 1029 (E.D. N.Y. 1994) (holding that a District Attorney's alleged policy of prosecuting sex crimes despite lack of supporting evidence was shielded by absolute immunity, that there is no meaningful distinction between formulating policy to prosecute a particular type of crime and prosecuting an individual for that crime, and that merely characterizing a District Attorney's decision as "policy" does not deprive it of absolute immunity).

215. See e.g. *Pearson*, 129 S. Ct. 808; *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Malley v. Briggs*, 475 U.S. 335 (1986).

216. See e.g. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982).

217. See e.g. *Groh*, 540 U.S. at 552; *Hope*, 536 U.S. at 731. In *Pearson*, discussed *infra* nn. 240–264, the Court quoted Justice Kennedy's dissenting opinion in *Grohin* dictum, that "[t]he protection of qualified immunity applies regardless of whether the government official's error is a 'mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 129 S. Ct. at 815 (quoting *Groh*, 540 U.S. at 567 (Kennedy, J. dissenting)). This position is contrary to the Court's holding in *Saucier v. Katz*, 533 U.S. 194, 205 (2001), that qualified immunity protects officials from reasonable errors of law, not from errors of fact.

218. See e.g. *Pearson*, 129 S. Ct. at 809; *Brosseau*, 543 U.S. 194; *Groh*, 540 U.S. 551; *Saucier*, 533 U.S. 194; *Malley*, 475 U.S. 335.

219. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *accord Iqbal*, 129 S. Ct. at 1953; *Saucier*, 533 U.S. at 200–201.

220. 129 S. Ct. 2633.

221. *Infra* pt. II(B).

established”²²²

The Court acknowledged that federal law can be clearly established even in the absence of controlling precedent because, as Judge Posner stated, the “easiest cases” involving the most outrageous official conduct do not always arise.²²³ However, even if conduct is not outrageous, officials are not protected by qualified immunity when, even in novel circumstances, federal law puts them on notice that their conduct violates clearly established constitutional principles.²²⁴

In *Redding* there was circuit court authority on the Fourth Amendment issue, but it reflected a divergence, rather than a consensus, of opinion.²²⁵ Differences of opinion among circuit court judges around the country were “substantial enough” to convince the Supreme Court to grant qualified “immunity for the school officials in this case [C]ases viewing school strip searches differently from the way [the Supreme Court views] them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that [the Court was] sufficiently clear in the prior statement of law.”²²⁶ The Court cautioned, however, that qualified immunity is not always “the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if [the Court has] been clear.”²²⁷

Justices Stevens and Ginsburg, in their separate dissents on the qualified immunity issue, found that the school officials should not be protected by qualified immunity because they violated clearly established United States Supreme Court precedent.²²⁸ In their view, the strip search violated the principles clearly established by *T.L.O.*²²⁹ and “the clarity of a well-established right should not depend on whether [circuit court] jurists have misread our precedents.”²³⁰ It did not take a “constitutional scholar” to figure out that the search was unconstitutional.²³¹ According to Justice Thomas, dissenting, the defendant officials were protected by qualified immunity because the search did not violate the Fourth Amendment.²³² The decision in *Redding* thus illustrates that there can be difficulty determining whether federal law was clearly established for purposes of qualified immunity. Eight justices found that the strip search violated the Fourth Amendment, but of those, six found that the federal law was not clearly established while two justices found otherwise. One justice found no Fourth Amendment violation at all.

222. *Redding*, 129 S. Ct. at 2637–2638.

223. *Id.* at 2643 (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

224. *Id.* (relying on *Hope*, 536 U.S. at 741).

225. *Id.* at 2643–2644 (citing circuit court authorities).

226. *Id.* at 2644.

227. *Redding*, 129 S. Ct. at 2644.

228. *Id.* at 2644–2646. Justices Stevens and Ginsburg joined in each other’s opinion, concurring in the judgment and dissenting in part.

229. 469 U.S. 325, 333–337 (1985).

230. *Redding*, 129 S. Ct. at 2645 (Stevens, J., concurring in part and dissenting in part).

231. *Id.* at 2644 (quoting *T.L.O.*, 469 U.S. at 382 (Stevens, J., concurring in part and dissenting in part) (in turn quoting *Doe v. Renfrow*, 631 F.3d 91, 92–93 (7th Cir. 1980))).

232. *Id.* at 2655.

2. Procedural Aspects of Qualified Immunity

A voluminous body of Supreme Court and lower court decisional law has developed over the myriad facets of qualified immunity.²³³ Many of the issues are procedural in nature.²³⁴ Last term the Supreme Court rendered rulings concerning three important procedural aspects of qualified immunity: (1) complaint pleading requirements for claims subject to qualified immunity; (2) the decision-making methodology for qualified immunity, specifically whether a court must first determine whether the complaint states a violation of a federally protected right; and (3) the scope of the defendant's right to take an immediate appeal from a district court's denial of qualified immunity.

a. Pleading Requirements

In 1993, the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*²³⁵ held that Federal Rule of Civil Procedure 8(a)'s "notice" pleading standard governs § 1983 municipal liability claims but left open whether a "heightened" pleading standard applies to § 1983 personal-capacity claims subject to qualified immunity.²³⁶ The *Leatherman* Court's reservation of this issue created uncertainty about a plaintiff's pleading burden when a § 1983 damages claim is subject to qualified immunity. Although the great majority of the circuits applied the "notice" pleading standard,²³⁷ some courts, most notably the Eleventh Circuit, imposed a heightened pleading rule.²³⁸

The Supreme Court's decision in *Twombly*²³⁹ generated added uncertainty and confusion. In *Twombly*, an antitrust case, the Court ruled that although Rule 8 notice pleading does not require "detailed factual allegations[,]"²⁴⁰ the complaint must plead more than labels and conclusions and must support the claims asserted with factual allegations. These "[f]actual allegations must be enough to raise a right to relief above the speculative level" to a "plausibility" level.²⁴¹ It was unclear, however, whether the new *Twombly* pleading plausibility standard was specifically designed for anti-trust cases, or whether it was intended to apply to civil actions generally.

As discussed earlier,²⁴² the Supreme Court in *Iqbal* held that the *Twombly* pleading standards apply to all federal court civil complaints, thus encompassing complaints filed under § 1983 and the *Bivens* doctrine.²⁴³ Because the only claims before the Supreme Court in *Iqbal* were personal-capacity damages claims the

233. See Schwartz, *supra* n. 61, at vol. 1(A), ch. 9(A).

234. *Id.*

235. 507 U.S. 163, 164 (1993).

236. *Id.* at 166–167.

237. See Martin A. Schwartz & Kathryn R. Urbonya, *Section 1983 Litigation* 10 (2d ed., Fed. Jud. Ctr. 2008) (available at [http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/\\$file/sec19832.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/$file/sec19832.pdf)).

238. *GJR Invs., Inc. v. Co. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998).

239. 550 U.S. 544.

240. *Twombly*, 550 U.S. at 555.

241. *Id.* (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* vol. 5, § 1216, (3d ed., West 2004)).

242. See *supra* pt. I.

243. 129 S. Ct. 1937, 1953 (2009).

defendants sought to dismiss under qualified immunity, the Court's decision in *Iqbal* effectively holds that the *Twombly* plausibility pleading standard governs § 1983 claims subject to qualified immunity. Interestingly, the Supreme Court in *Iqbal* did not even mention the possibility that these claims might be subject to a heightened pleading standard.

The *Twombly* plausibility pleading standard seems to lie somewhere between the rather "bare bones" notice pleading standard that generally pertained pre-*Twombly* and a heightened pleading standard. So viewed, *Iqbal* reflects a compromise between the advocates of notice pleading and heightened pleading for claims subject to qualified immunity.

b. *Qualified Immunity Decision-making Protocol*

Last term, in *Pearson v. Callahan*, the Supreme Court, in an unanimous opinion by Justice Samuel A. Alito, Jr., held that when qualified immunity is asserted as a defense, a court has the discretion to first decide whether the complaint asserts a violation of a federally protected right or to proceed directly to the qualified immunity issue of whether the defendant violated clearly established federal law.²⁴⁴ Prior to the decision in *Pearson*, the Supreme Court in *Saucier v. Katz* had mandated a two step protocol for deciding qualified immunity which required a court to first decide whether the complaint stated a violation of a federally protected right.²⁴⁵ A determination in a defendant's favor on that issue would entitle the defendant to judgment as a matter of law. However, if the court found for the plaintiff on this issue, it would then have to decide if the federal right was clearly established. The Court in *Pearson* overruled *Saucier* and gave the courts discretion over the sequencing of issues. In the author's view, the decision in *Pearson* is likely to have a major impact on the qualified immunity decision making process.

To be sure, adherence to the *Saucier* requirement that courts first decide whether the complaint states a violation of a federally protected right has its advantages. Most significantly, this methodology promotes the development and clarification of federal constitutional standards. This is especially so for constitutional issues not likely to arise outside the § 1983 damages qualified immunity context, such as in injunction actions and criminal prosecutions. As the Court in *Pearson* put it, "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."²⁴⁶ In addition, there are cases in which it may be "difficult to decide whether a right is clearly established without first deciding precisely what the constitutional right happens to be."²⁴⁷

On the other hand, like most inflexible mandatory rules, adherence to the *Saucier* methodology did not always make sense. Take a case like *Pearson* which presented a difficult unresolved Fourth Amendment issue, namely, whether a home resident's consent which allows an undercover agent to enter the premises carries with it consent

244. 129 S. Ct. at 818.

245. 533 U.S. at 207.

246. *Pearson*, 129 S. Ct. at 818.

247. *Id.* (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

for back-up police officers to enter as well, under what some courts term the “consent once removed” doctrine. This doctrine, however, has never been sanctioned by the U.S. Supreme Court and is not universally recognized by the lower courts. Under these circumstances, absent binding circuit court precedent, the one thing that was clear is that when the police entered the premises the Fourth Amendment law was not clearly established. In other words, it was clear that the federal law was unclear. In these circumstances, which are not uncommon, there is a strong argument that, absent some special circumstance, a lower court should not have to struggle with the constitutional merits when it can easily conclude that the federal law was not clearly established.²⁴⁸

The inflexible rigidity of the *Saucier* two-step dance provoked rather vigorous opposition. Several Justices of the Supreme Court voiced their criticism²⁴⁹ as did some circuit court judges who, having “had the task of applying the *Saucier* rule on a regular basis for the past eight years, [were not] reticent in their criticism of *Saucier*’s ‘rigid order of battle.’ ”²⁵⁰ Second Circuit Judge Pierre Leval was the most forceful critic.²⁵¹

The expectation in § 1983 circles was that at some point the Supreme Court would reexamine the rigid *Saucier* methodology. Sure enough, on March 29, 2008, the Supreme Court in *Pearson*, when granting the defendant officers’ petition for certiorari, directed the parties to brief and argue whether *Saucier* should be overruled.²⁵²

There were major indicators at the oral argument in *Pearson* that *Saucier* had seen better days. For one thing, the Justices were struggling with the merits of the plaintiff’s Fourth Amendment claim that consent to the undercover agent did not extend to the other officers. Chief Justice John Roberts stated that when he was a circuit court judge he

thought it was very odd that I had to go and decide a difficult constitutional issue and then not worry about it because in one sentence you say well, but the issue is not clearly established and so it’s qualified immunity.

[I]n my experience it was unworkable, or at least frustrating, in that we had to decide . . . a constitutional question where it wasn’t necessary.²⁵³

He suggested that when a court rules for the defendant because the law was not clearly established, the court’s ruling on the constitutional merits is “purely an advisory opinion . . . ”²⁵⁴ Justice Breyer, too, questioned why courts shouldn’t be able to take the “easier path” by proceeding directly to the “clearly established” law issue.²⁵⁵

So, it did not exactly come as a shock when the Court in *Pearson* overturned *Saucier* and held “that the *Saucier* protocol should not be regarded as mandatory in all cases . . . ”²⁵⁶ The criticism of the mandatory protocol by Supreme Court Justices and

248. *Id.*

249. *Id.* at 817–818 (citing various authorities).

250. *Id.* at 817.

251. See Pierre Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275–1277 (2006) (cited in *Pearson*, 129 S. Ct. at 817).

252. *Pearson*, 129 S. Ct. at 1702.

253. Oral Argument at 36, *Pearson*, 129 S. Ct. at 808 (available at 2008 WL 4565749).

254. *Id.* at 25.

255. *Id.* at 23–25.

256. *Pearson*, 129 S. Ct. at 818.

circuit court judges provided the justification for overturning the *Saucier* precedent and thus not adhering to *stare decisis*. At the same time, the Court in *Pearson* acknowledged that following the *Saucier* methodology “is often beneficial[,]”²⁵⁷ that its “decision [in *Pearson*] does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.”²⁵⁸

The Court detailed several circumstances in which it may make sense for a court to bypass the “constitutional merits” step and proceed directly to the “clearly established” law issue.

1. Where “it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right;”²⁵⁹

2. Where “the constitutional question is so fact-bound that the decision provides little guidance for future cases;”²⁶⁰

3. Where it is likely that the constitutional question will soon be decided by a higher court or by an en banc court;²⁶¹

4. Where the constitutional decision rests “on an uncertain interpretation of state law[,]” rendering the constitutional ruling “of doubtful precedential importance;”²⁶² and

5. Where “qualified immunity is asserted at the pleading stage, [and] the precise factual basis for the plaintiff’s claim . . . may be hard to identify.”²⁶³

Furthermore, as a general proposition, following the *Saucier* two-step dance runs counter to *Ashwander v. Tennessee Valley Authority*’s²⁶⁴ principle of judicial self-restraint that federal courts decide federal constitutional issues only when necessary, that is, as a last resort rather than as a first resort.²⁶⁵ The Court in *Pearson* was confident that deviation from the *Saucier* methodology would not leave significant numbers of constitutional issues unresolved. “Most” constitutional issues that are presented in § 1983 actions subject to qualified immunity are also likely to arise in other types of actions, such as criminal cases, § 1983 municipal liability actions, and § 1983 suits for injunctive relief.²⁶⁶

How is *Pearson* likely to impact the adjudication and litigation of qualified immunity? Under the *Saucier* regime, courts were mandated to adhere to the two-step protocol. Armed with this knowledge, the attorneys for the parties knew that they had to brief and be prepared to orally argue both *Saucier* steps, the constitutional merits and the clearly established federal law issue. That certainty was one of the virtues of the mandatory approach. By contrast, under *Pearson*, a court has discretion whether to

257. *Id.*

258. *Id.* at 821.

259. *Id.* at 818.

260. *Id.* at 819.

261. *Pearson*, 129 S. Ct. at 819.

262. *Id.* at 819.

263. *Id.*

264. 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

265. *Pearson*, 129 S. Ct. at 821; see also *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009); *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009).

266. *Pearson*, 129 S. Ct. at 821–822. The Court in *Pearson* did “not think that relaxation of *Saucier*’s mandate is likely to result in a proliferation of damages claims against local governments.” *Id.* at 822.

follow or deviate from the *Saucier* methodology. Because a court *may* choose to follow the two-step approach, the attorneys should, as they would pre-*Pearson*, brief both issues and be prepared to argue both, even though the court may decide to bypass the first step and proceed directly to the clearly established federal law issue.

Under *Pearson*, counsel for the parties may choose to convince the court as to how it should exercise its discretion over whether or not to follow the two-step approach. Plaintiffs generally favor the two-step approach because resolution of the constitutional merits in the plaintiff's favor may enhance the likelihood of the court also rejecting the qualified immunity defense. Then, too, the two-step approach promotes the development of constitutional standards, thereby enhancing the likelihood of plaintiffs being able to overcome qualified immunity in future cases. By contrast, defendants generally prefer that courts proceed directly to the "clearly established" qualified immunity issue, because this approach both enhances the likelihood of prevailing under qualified immunity in the case at hand and slows the judicial process of establishing constitutional norms. Nevertheless, the *Pearson* Court thought it unlikely that its decision will result in a "new cottage industry of litigation" over the standards for exercising this discretion.²⁶⁷ Only time will tell whether or not a new "cottage industry" will in fact evolve.

The Supreme Court in *Pearson* decided to bypass the constitutional merits issue and, on the clearly established issue, had no difficulty ruling for the defendant officers. The Court found that lower court decisional law adopting the "consent-once-removed" doctrine demonstrated that the defendant officers' reliance upon the doctrine was not unreasonable, even though their own circuit (the Tenth) had not yet passed on the issue when defendants conducted their search. The Court reasoned that because "the divergence of views on the consent-once-removed doctrine was created by the decision of the [Tenth Circuit] Court of Appeals in this case, it is improper to subject [defendants] to money damages for their conduct."²⁶⁸

c. *Qualified Immunity Appeals*

Normally, only final decisions of the federal district courts are appealable to the court of appeals.²⁶⁹ However, it has been settled since 1985 that, pursuant to the *Cohen* collateral order doctrine,²⁷⁰ a district court order denying a defendant officer qualified immunity on a motion for summary judgment may be immediately appealed.²⁷¹ The rationale of allowing an immediate appeal is that, because qualified immunity is both a defense to liability and an "entitlement not to stand trial or face the other burdens of litigation," the immunity would be effectively lost if a district court erroneously denied qualified immunity and the defendant was subjected to the burdens of litigation.²⁷² In

267. *Id.* (citation omitted).

268. *Id.* at 823.

269. 28 U.S.C. § 1291 (2009).

270. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Under the collateral order doctrine a non-final district court order is immediately appealable when the order finally determines an issue separable from, and collateral to the rights asserted in the action, the issue is too important to be denied review, "and too independent of the cause . . . [to] be deferred until the whole case is adjudicated." *Id.*

271. *Mitchell*, 472 U.S. at 526–527.

272. *Id.* at 526.

other words, the denial of qualified immunity is “effectively unreviewable on appeal from a final judgment.”²⁷³

However, and this is an important proviso, the defendant has the right to take an immediate appeal from the denial of qualified immunity only when the immunity defense “turns on an issue of law”²⁷⁴ The rationale for this limitation is that the circuit courts should not, on interlocutory appeal, have to fine comb through a “vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.”²⁷⁵ “That process generally involves matters more within a district court’s ken and may replicate inefficiently questions that will arise on appeal following final judgment.”²⁷⁶

In *Iqbal*, the defendant supervisory officials moved to dismiss the plaintiff’s *Bivens* claims on the basis of qualified immunity because, they argued, the complaint failed “to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct.”²⁷⁷ The district court denied the motion and, on defendants’ interlocutory appeal, the Second Circuit Court of Appeals affirmed.²⁷⁸ In the United States Supreme Court, the plaintiff argued that although the court of appeals had “jurisdiction to determine whether his complaint avers a clearly established constitutional violation[,] . . . it lacked jurisdiction to pass on the [factual] sufficiency of [the] pleadings.”²⁷⁹

The Supreme Court had little difficulty rejecting plaintiff’s argument. Although the justices divided 5-4 on the merits, none of the justices agreed with plaintiff that the defendant did not have the right to an immediate appeal. The Court relied in part upon its ruling in *Behrens v. Pelletier* that a district court order denying qualified immunity is immediately appealable.²⁸⁰ This makes sense because in these circumstances the immunity appeal presents a pure issue of law within the expertise of the circuit court, namely, whether, assuming the factual allegations of the complaint to be true, the allegations state a violation of clearly established federal law.²⁸¹ It is not a big leap to conclude that a court of appeals has jurisdiction on interlocutory immunity appeal to decide whether the complaint alleges *sufficient* facts to constitute a violation of clearly established federal law. This, too, is a pure question of law within the expertise of the court of appeals. As the Supreme Court put it, whether the “complaint has the ‘heft’ to state a claim is a task well within an appellate court’s core competency.”²⁸²

273. *Id.* at 527.

274. *Id.* at 530; accord *Johnson v. Jones*, 515 U.S. 304, 319–320 (1995).

275. *Johnson*, 515 U.S. at 316.

276. *Iqbal*, 129 S. Ct. at 1947 (citing *Johnson*, 515 U.S. at 316).

277. *Id.* at 1944.

278. *Hasty*, 490 F.3d at 147.

279. *Iqbal*, 129 S. Ct. at 1946.

280. 516 U.S. 299, 307 (1996); see *Iqbal*, 129 S. Ct. at 1947.

281. See *McKenna v. Wright*, 386 F.3d 432, 435–436 (2d Cir. 2004).

282. *Iqbal*, 129 S. Ct. at 1947 (quoting *Twombly*, 550 U.S. at 597).

IV. SUPERVISORY LIABILITY

As discussed in Part I, the Supreme Court in *Iqbal* made important rulings concerning civil rights pleadings and qualified immunity. The Court made another highly significant ruling, namely, its unexpected knockout blow rejecting supervisory liability for § 1983 and *Bivens* claims. This was unexpected both because (1) the defendant supervisory officials conceded that they would be subject to supervisory liability if they had “actual knowledge” of subordinates’ unconstitutional discrimination conduct and were “deliberately indifferent to that discrimination[.]”²⁸³ and (2) because there was “no briefing or argument on the proper scope of supervisory liability”²⁸⁴

Prior to its decision in *Iqbal*, the Supreme Court had not resolved the question of the liability of supervisory officers for constitutional violations committed directly by subordinate employees, either in § 1983 or in *Bivens* actions.²⁸⁵ The Court had resolved in its landmark decision in *Monell v. Department of Social Services*²⁸⁶ that although municipalities are subject to § 1983 liability, there is no vicarious liability under § 1983. In other words, a municipality may not be held liable under § 1983 simply because it employed a constitutional wrongdoer. This means that each § 1983 defendant may be held liable only for his, her, or its own conduct that was the proximate cause of the violation of the plaintiff’s federally protected rights.²⁸⁷ In the context of § 1983 municipal liability, this means that a municipal entity may be held liable under § 1983 only when the violation of plaintiff’s federally protected rights can be attributable to enforcement of a municipal policy, practice, or decision of a final municipal policymaker. In other words, “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”²⁸⁸ In fact, a highly complex body of Supreme Court and lower court decisional law has evolved attempting to flesh out the types of municipal policies and culpability that warrants the imposition of § 1983 municipal liability.²⁸⁹ This led Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, to criticize the “highly complex body of interpretive law” that has developed attempting to maintain and perpetuate the distinction between direct and vicarious liability and called for reexamination of “the legal soundness of that basic distinction itself.”²⁹⁰

Although municipal liability is a form of entity liability, a supervisor’s liability is a form of personal liability. A common thread for municipal and supervisor liability is that in each case the plaintiff normally attempts to hold the defendant liable for the

283. *Id.* at 1956 (quoting Br. for Pet. at 50) (Souter, J., dissenting); *see also id.* at 1954–1955.

284. *Id.* at 1957.

285. *Rizzo v. Goode*, 423 U.S. 362 (1976). Here, the Court’s decision is ambiguous as to whether supervisory liability was at issue. Schwartz, *supra* n. 61, at ch. 7. The Court in *Iqbal* did not refer to *Rizzo*.

286. 436 U.S. 658.

287. There is a proximate cause element in § 1983 actions. *See* Schwartz, *supra* n. 61, at § 6.03; *see e.g. Martinez v. Cal.*, 444 U.S. 277, 284–285 (1980).

288. *Monell*, 436 U.S. at 694.

289. *See* Schwartz, *supra* n. 61, at ch. 7.

290. *Bd. of Co. Commrs. of Bryan Co., Okla. v. Brown*, 520 U.S. 397, 430–431 (1997) (Breyer, J., dissenting).

constitutional wrongs directly committed by subordinate officials. And, so, it was not surprising that the circuit courts, when faced with § 1983 supervisory liability claims, would borrow and analogize from the law of § 1983 municipal liability. In fact, in § 1983 actions, a fairly extensive body of decisional law developed in the circuits which formulated a variety of culpability standards for supervisory liability claims.²⁹¹ Although the standards differed somewhat from circuit to circuit, the circuits were fairly consistent in holding that a supervisor may be held liable for a subordinate's unconstitutional conduct if the plaintiff demonstrated that the supervisory defendant either acquiesced in or was deliberately indifferent to the subordinate's unconstitutional conduct and that the supervisor's action or inaction was "affirmatively linked" to the deprivation of plaintiff's federal rights.²⁹²

The plaintiff in *Iqbal* asserted two different theories of supervisory liability. First, he alleged that defendants Ashcroft and Mueller adopted a policy calling for harsh treatment of post 9/11 detainees based upon their religion, race, and/or national origin. The Court ruled that this claim did not allege a plausible claim, both because it was conclusory and because there was a more plausible explanation for defendants' adoption of the alleged policy, namely, that it was adopted for national security reasons rather than for discriminating reasons.²⁹³

The plaintiff in *Iqbal* also argued that "under a theory of 'supervisory liability' [defendants] can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees."²⁹⁴ In other words "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."²⁹⁵ The Court emphatically "reject[ed] this argument."²⁹⁶

The Supreme Court, without so much as referring to the extensive circuit court authority, jettisoned the very concept of supervisory liability and held that a supervisor may be found liable under § 1983 or *Bivens* only when it is shown that the supervisor himself or herself engaged in unconstitutional conduct. In *Iqbal*, this would require a showing that the supervisor adopted a policy, or directed action by a subordinate, with the constitutionally impermissible discriminatory intent alleged by the defendant, or otherwise set the wheels in motion that caused the violation of plaintiff's constitutional rights. The Court, however, rejected the very concept of supervisory liability. The Court reasoned that because there is no vicarious liability under § 1983 or *Bivens*,

"supervisory liability" is a misnomer. [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, [discriminatory] purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official

291. See Schwartz, *supra* n. 61, at § 7.19.

292. See Schwartz & Urbonya, *supra* n. 237, at 120.

293. *Iqbal*, 129 S. Ct. at 1951.

294. *Id.* at 1949 (quoting Br. for Respt. Javaid Iqbal at 45–46, *Iqbal*, 129 S. Ct. 1937 (available at 2008 WL 4734962)).

295. *Id.*

296. *Id.*

charged with violations arising from his or her superintendent responsibilities.²⁹⁷

Thus, defendants Ashcroft and Mueller “cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic.”²⁹⁸ This is likely to lead to a new wave of § 1983 decisional law in which courts determine when official conduct of supervisors is itself unconstitutional. Like other officials, supervisors should be found liable when they set the unconstitutional wheels in motion that caused the plaintiff’s injury, even though they did not directly inflict the injury.²⁹⁹

The dissent was fully cognizant of the severe implications of the Court’s decision on § 1983 supervisory liability. Justice Souter stated:

Lest there be any mistake . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* [and § 1983] supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects.

[The majority] rests on the assumption that only two outcomes are possible here: respondeat superior liability, in which “an employer is subject to liability for torts committed by employees while acting within the scope of their employment,” or no supervisory liability at all.

In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate’s constitutional violation and acquiesces . . . or where supervisors “know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,” or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate . . .³⁰⁰

Although it is possible for a dissenting opinion to mischaracterize the Court’s holding, including overstating it, the dissent in *Iqbal* appears to characterize the Courts supervisory liability holding accurately. Furthermore, the dissent seemingly had no interest in overstating the Court’s holding. In the author’s view, the *Iqbal* Court’s elimination of § 1983 supervisory liability represents a serious setback for § 1983 plaintiffs.

V. STATE COURT § 1983 ACTIONS: CLAIMS AGAINST CORRECTION OFFICERS

The great majority of § 1983 actions are filed in the federal courts. This is not surprising since, as the Supreme Court recognizes, “[t]he very purpose of § 1983 was to interpose the *federal courts* between the States and the people, as guardians of the

297. *Id.* at 1949.

298. *Iqbal*, 129 S. Ct. at 1952.

299. A federal district court, distinguishing *Iqbal*, found that complaint allegations against John Yoo, former Deputy Attorney General in the Office of Legal Counsel under President George W. Bush, violated the constitutional rights of the plaintiff “enemy combatant” by promulgating memoranda that constituted direct participation in the decision to detain the plaintiff and created the legal constraint designed to justify the harsh interrogation methods used against him. *Padilla v. Yoo*, N.D.Cal.No. C08-00035 JSW (June 12, 2009).

300. *Iqbal*, 129 S. Ct. at 1957–1958 (Souter, J., dissenting) (citations omitted).

people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether the action be executive, legislative, or judicial.' ”³⁰¹ At the same time it is established that “§ 1983 actions may be brought in state courts”³⁰² because state and federal courts have concurrent jurisdiction over § 1983 claims.³⁰³ In fact, substantial numbers of § 1983 claims are filed in the state courts on an ongoing basis. The Supreme Court, however, has “never held that state courts must entertain § 1983 suits.”³⁰⁴

In *Haywood v. Drown* the Supreme Court held, 5-4, that New York Correction Law § 24, which bars prison inmates from filing § 1983 claims for damages against correction officers in their personal capacities in New York State courts, violates the Supremacy Clause.³⁰⁵ New York's policy of generally allowing § 1983 claims to be filed in its courts of general jurisdiction but barring for state policy reasons § 1983 damages claims against correction officers conflicted with § 1983's essential purpose of providing a federal remedy for constitutional violations by state and municipal officers.

Justice Stevens wrote the opinion for the Court, which was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas wrote a dissenting opinion, only Part III of which was joined by Chief Justice Roberts, Justice Scalia, and Justice Alito.

New York Correction Law § 24(1) is a fairly unusual statute. It divests New York's Supreme Courts—the State's trial courts of general jurisdiction—of authority over § 1983 damages claims against correction officers even though New York allows § 1983 claims to be asserted in its courts against other state officials, such as police officers. The statute does not purport to prevent New York prisoners from seeking declaratory or injunctive relief in state court or from suing correction officers for any type of relief in federal court. Further, § 24(2) provides that a claim for damages based upon official conduct by a correction officer must be brought in the New York Court of Claims “as a claim against the state.”³⁰⁶ A court of claims action, however, is not equivalent to a claim against the officer. Besides the fact that the action must be brought against the State rather than against the official personally, plaintiffs who sue in the Court of Claims must comply with a 90-day notice-of-claim requirement,³⁰⁷ are not entitled to a jury trial, and may not recover attorney's fees, punitive damages, or injunctive relief.³⁰⁸ Furthermore, plaintiffs cannot assert § 1983 claims against the state (or state entity) in the Court of Claims because the State is not a suable “person” under § 1983.³⁰⁹

The New York Court of Appeals upheld Correction Law § 24 on the grounds that it was “neutral state rule regarding the administration of [New York's] courts” and thus a “valid excuse” for New York's refusal to hear § 1983 claims against correction

301. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)) (emphasis added); accord *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 503 (1982).

302. *Me. v. Thiboutot*, 448 U.S. 1, 10–11 (1980); accord *Haywood*, 129 S. Ct. at 2114; *Howlett v. Rose*, 493 U.S. 356 (1990).

303. *Haywood*, 129 S. Ct. at 2114; *Howlett v. Rose*, 496 U.S. 356 (1990).

304. *Natl. Private Truck Council, Inc. v. Okla. Tax Commn.*, 515 U.S. 582, 587 n. 4 (1995).

305. 129 S. Ct. 2108.

306. N.Y. Correct. L. § 24(2).

307. N.Y. Ct. Claims Act § 9. Section 1983 does not have a notice-of-claim requirement. *Felder v. Casey*, 487 U.S. 131 (1988).

308. See *Haywood*, 129 S. Ct. at 2113.

309. *Will*, 491 U.S. at 66.

officers.³¹⁰ Judge Jones, dissenting, found that the State rule was not neutral because New York trial courts hear all other § 1983 damages actions, and concluded that “once a state opens its courts to hear Section 1983 actions, it may not selectively exclude certain Section 1983 actions by denominating state policies as jurisdictional.”³¹¹ The U.S. Supreme Court reversed, rejecting New York’s argument that § 24 was a mere neutral rule of court administration and finding the New York policy in conflict with § 1983.

U.S. Supreme Court precedent established that state rules which treat federal and state claims equally may provide a “valid excuse” for a state court’s refusal to adjudicate a federal claim³¹² On the other hand, the “Supreme Court has suggested repeatedly that state courts may not discriminate against federal causes of action.”³¹³ New York Correction Law § 24 does not discriminate against § 1983 claims; it treats them equally in that it bars *all* claims for damages against correction officers, whether based upon state or federal law. Nevertheless, the Supreme Court held that § 24 violated the Supremacy Clause because it frustrated the policies of § 1983. The Court stated that, to the extent that its decisions created a “misconception” that state law treating federal and state claims equally will be upheld,

we now make clear that equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action.

Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear . . . Ensuring equality of treatment is thus the beginning, not the end, of the Supremacy Clause analysis.³¹⁴

New York’s refusal to allow § 1983 suits against correction officers was based on the State’s belief that these suits are “too numerous or too frivolous (or both)”³¹⁵ New York’s policy, however, “is contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages.”³¹⁶ In other words, a state may not simply assume that a whole category of § 1983 claims is frivolous, but must determine the merits of the claims on a case-by-case basis.³¹⁷

The mere fact that New York considers and labels § 24 “jurisdictional” did not shield the state statute from Supremacy Clause scrutiny.³¹⁸ In fact, because New York’s Supreme Courts generally have personal jurisdiction in § 1983 actions and “hear the

310. *Haywood v. Drown*, 9 N.Y. 3d 481, 487 (2007).

311. *Id.* at 497 (Jones, J. dissenting).

312. *See e.g. Herb v. Pitcairn*, 324 U.S. 117 (1945); *Douglas v. N.Y.*, 279 U.S. 377 (1929).

313. Richard H. Fallon, Jr., Henry M. Hart, Herber Wechsler, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 447 (5th ed., Foundation Press 2003); *see e.g. Testa v. Katt*, 330 U.S. 386 (1947); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934); *Mondou v. N.Y., N.H. & H.R. Co.*, 223 U.S. 1 (1912).

314. *Haywood*, 129 S. Ct. at 2116.

315. *Id.* at 2115.

316. *Id.*

317. “A State may not . . . relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the [particular] claim has no merit, that judgment is not up to the States to make.” *Id.* at 2115 (quoting *Howlett*, 496 U.S. at 380).

318. *Id.* 129 S. Ct. at 2114–2118.

lion's share of all other § 1983 actions," § 24 did not implicate essential concerns of either *in personam* or subject matter jurisdiction.³¹⁹ Rather, § 24 "is effectively an immunity statute cloaked in jurisdictional garb."³²⁰ And, as an immunity statute, § 24 violates the related principles established in *Howlett v. Rose* that (1) the elements of and defenses to the § 1983 claim for relief are defined by federal law, and, therefore, (2) state law may not expand immunity from § 1983 liability beyond the immunities authorized by federal law.³²¹

The Court said that it was only addressing New York's "unique scheme" shielding particular defendants (correction officers) from particular liability (damages) brought by particular plaintiffs (prisoners).³²² Nevertheless, in the author's view, the decision in *Haywood* supports the broader principle that once a state grants its state courts jurisdiction to hear § 1983 claims, it cannot pick and choose, allowing them to hear some categories of § 1983 claims but not others, and the mere fact the state labels its policy "jurisdictional" does not call for a different result. As the Court couched its holding, New York, having created courts of general jurisdiction that regularly hear § 1983 suits against other officers, may not "shut the courthouse door to federal claims that it considers at odds with its local policy."³²³

Justice Thomas's dissenting opinion paints with a very broad textualistic, federalism brush. He advanced the view that under the Constitution the states have "unfettered authority" to determine whether a state's courts may hear a federal claim for relief.³²⁴ Fortunately, no other Justice joined this position. As for the Supremacy Clause, Justice Thomas again, speaking only for himself, opined that its "exclusive function is to disable state laws that are substantively inconsistent with federal law—not to require state courts to hear federal claims over which the [state] courts lack jurisdiction."³²⁵ Under these principles, of course, Correction Law § 24 would clearly be constitutional. The majority, however, while acknowledging that a "State's authority to organize its courts [is] considerable,"³²⁶ found that the Constitution does impose limitations on that authority, specifically in the Supremacy Clause principle that a state law may not burden or frustrate a federal claim for relief.³²⁷ Furthermore, Justice Thomas disagreed with Supreme Court precedent holding that states may not discriminate against federal claims, stating that "[i]n the end, of course, 'the ultimate touchstone of constitutionality is the

319. *Haywood*, 129 S. Ct. at 2117, 2137; see also *id.* at 2118 n. 9 (state may not refuse to hear a federal claim simply by calling its rule "jurisdictional").

320. *Id.* at 2118.

321. 496 U.S. 356; see also *Haywood*, 129 S. Ct. at 2115 n. 5.

322. *Haywood*, 129 S. Ct. at 2118. Because New York generally authorizes its court to hear § 1983 claims, the Court was not required to decide the broader question of whether Congress may require a state to hear § 1983 claims. *Id.* at 2116.

323. *Id.* at 2117 (footnote omitted) (pt. IV); see also *id.* at 2137 (Thomas, J., dissenting) (pt. III of dissent).

324. *Id.* at 2122 (pt. I of dissent).

325. *Haywood*, 129 S. Ct. at 2124.

326. *Id.* at 2117 (majority).

327. See e.g. *Felder*, 487 U.S. 131 (holding that a state court § 1983 claim need not satisfy a state law notice-of-claim requirement because the state rule creates an "unnecessary burden" that interferes with and frustrates the federal § 1983 claim for relief. Justice Thomas's dissent in *Haywood* expressed disagreement with the approach in *Felder*. *Haywood*, 129 S. Ct. at 2137 (Thomas, J., dissenting) (pt. II(B) of dissent).

Constitution itself and not what we have said about it.’ ”³²⁸ Finally, in Part III of his dissent, which articulates a more moderate position and in which the Chief Justice and Justices Scalia and Alito joined, Justice Thomas reasoned that even assuming the validity of the non-discrimination principle, Correction Law § 24 is a jurisdictional rule that evenhandedly deprives New York courts of jurisdiction over state and federal claims for damages by inmates against correction officers. To the majority, however, neither non-discrimination nor the jurisdictional label marked the end of the analysis. Rather, the critical point was that New York’s policy of prohibiting constitutional claims for damages against correction officers was inconsistent with § 1983’s authorization of such claims.

Although the decision in *Haywood* is strictly limited to the invalidation of New York Correction Law § 24, the decision appears to support a broader principle. The essential principle of the Court’s decision is that once a state agrees to allow § 1983 claims to be asserted in its state courts, under the Supremacy Clause the state cannot preclude a subset of § 1983 claims on the grounds that the state finds them at odds with state policy.

CONCLUSION

The Court decided an unusual number of § 1983 issues during the October, 2008 term. Although plaintiffs prevailed on some issues, such as the holding that Title IX does not preclude § 1983 constitutional claims, imposing limitations on student and motor vehicle searches, and striking down New York’s prohibition against state court § 1983 suits against correction officers, defendants prevailed on the important issues. The Court substantially tightened § 1983 pleading requirements, rejected due process claims to postconviction DNA testing, fortified prosecutorial immunity, vigilantly applied qualified immunity, and rejected the doctrine of supervisory liability.

328. *Haywood*, 129 S. Ct. at 2131 (quoting *Graves v. N.Y. ex rel. O’Keefe*, 306 U.S. 466, 491–492 (1939) (Frankfurter, J., concurring)).

