

Constitutional Litigation Under Section 1983

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Chapter 1. Official Liability for Constitutional Wrongs

E. Federal Statutory Violations

Add the following to the end of Note 4 on page 25:

See also Department of Transportation v. Ass'n of American Railroads, 575 U.S. 43 (2015) (concluding that Amtrak is government actor and stating "practical reality of [government] control and supervision prevails over [government's] disclaimer of Amtrak's governmental status"); *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (holding that municipally created but privately run public access cable television station was not engaged in state action).

Add the following to the end of Note 4 on page 39:

See also Kingsley v. Hendrickson, 576 U.S. 389 (2015) (holding under Due Process Clause that a pretrial detainee need only show that force purposely or knowingly used against him constitutes objectively unreasonable "excessive force" akin to that proscribed by Fourth Amendment).

Add the following to the end of Note 6 on page 40:

In *Torres v. Madrid*, 141 S. Ct. 989 (2021), the Supreme Court in a 5-3 decision by the Chief Justice ruled that a police shooting of a fleeing suspect constituted a seizure within the meaning of the Fourth Amendment even though the suspect escaped: "the officers' shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her." The majority cautioned, however, that the Fourth Amendment required not only an "intent to restrain," but that "a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any '*continuing* arrest during the period of fugitivity.'" (emphasis original). "The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial. But brief seizures are seizures all the same."

Add the following to end of first paragraph in Note 2 on page 56:

In *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), the Court in a 5 to 4 opinion authored by Justice Scalia ruled that the Supremacy Clause itself does not imply a federal cause of action:

It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land." They must not give effect to state laws that conflict with federal laws. It is equally apparent that the Supremacy Clause is not the " 'source of any federal rights,' " and certainly does not create a cause of action. It instructs courts what to do when state

and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.

The Court noted in this case brought against state officials in their official capacities under the federal Medicaid Act that the plaintiffs did not rely on 42 U.S.C. § 1983.

Justice Breyer added a fifth vote to the majority opinion and stated in his concurrence: "I would not characterize the question before us in terms of a Supremacy Clause 'cause of action.' Rather, I would ask whether 'federal courts may in [these] circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.' I believe the answer to this question is no." Justice Sotomayor spoke for four in dissent: "[a] suit, like this one, that seeks relief against state officials acting pursuant to a state law allegedly preempted by a federal statute falls comfortably within th[e] doctrine [of *Ex parte Young*, 209 U.S. 123 (1908) (discussed in Chapter 3.B., *infra*)]."

Replace citation at the end of Note 4 on page 58:

Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), *certiorari dismissed as improvidently granted*, 571 U.S. 1 (2013).

Add to Note 6 on page 60:

The Supreme Court in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), in a 4 to 2 decision authored by Justice Kennedy, ruled that a *Bivens* remedy does not extend to Due Process and Equal Protection claims challenging the conditions of confinement imposed on those arrested pursuant to a formal policy adopted by Executive Branch officials in the wake of the September 11, 2001 attacks on the World Trade Center and Pentagon.

In *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), in a 5-4 decision authored by Justice Alito ruled that the family of a fifteen-year-old Mexican national killed by a federal agent in a cross-border shooting possessed no direct constitutional cause of action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), stating that it will not extend *Bivens* to a "new context" and "a claim based on a cross-border shooting arises in a context that is markedly new."

Chapter 2. Official Immunities

B. Qualified Immunity

Add the following at the end of the first paragraph of Note 1 following *Harlow v. Fitzgerald* on page 96:

Compare Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021) (reporting that 19th century common law afforded absolute immunity to high-ranking executive-branch officials and that the qualified immunity protecting other executive officials was unavailable if a plaintiff produced clear evidence of the defendant's "subjective improper purpose"), with William Baude, *Is Quasi-Judicial Immunity Qualified*

Immunity?, 73 STAN. L. REV. ONLINE (forthcoming 2021) (responding that the common law version of qualified immunity more closely resembled quasi-judicial immunity in that it applied to “quasi-judicial acts like election administration and tax assessment” but not “ordinary law enforcement decisions”).

Add the following at the end of Note 1 following *Harlow v. Fitzgerald* on page 97:

For a Symposium addressing the pros and cons of qualified immunity, see Symposium, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018).

Following the death of George Floyd in May of 2020, reform legislation was introduced in Congress that would, among other things, prevent law enforcement officials from raising the qualified immunity defense in federal civil rights suits. The House passed the George Floyd Justice in Policing Act of 2021, H.R. 1280, and a bipartisan group of Senators is seeking to forge a compromise on the bill. See Catie Edmondson & Nicholas Fandos, *Congress, Buoyed by the Floyd Verdict, Resurrects Its Bid to Overhaul Policing*, N.Y. TIMES, Apr. 22, 2021, at A15.

Court-watchers wondered whether the Supreme Court was poised to reconsider the qualified immunity doctrine when the Court relisted nine cert petitions challenging the defense for about a month starting in May of 2020. See John Elwood, *Relist Watch: Looking for the Living Among the Dead*, SCOTUSBLOG (May 27, 2020, 11:29 AM), <https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead/>. Towards the end of the Term, the Court denied cert in all nine cases over Justice Thomas’ lone dissent. Justice Thomas, citing his opinion in *Ziglar v. Abbasi* (discussed *infra*), would have granted review on the grounds that qualified immunity “appears to stray from the statutory text.” *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

Add the following at the end of the first paragraph of Note 6 following *Harlow v. Fitzgerald* on page 99:

See also Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019) (pointing out that the Court’s redefinition of qualified immunity in *Harlow v. Fitzgerald* came in a *Bivens* suit filed against federal officials that was based on “separation-of-powers concerns” and arguing that, “other than an intuitive belief that the law should treat state and federal officials the same way, ... no particular legal principle appears to offer sufficient support for applying the *Harlow* standard to § 1983 suits on ... federalism grounds”).

Add the following at the end of Note 6 following *Harlow v. Fitzgerald* on page 100:

But cf. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9-10 (2017) (reporting that .6% of the 1183 § 1983 suits filed against law enforcement officials in five federal district courts in 2011 and 2012 were dismissed at the motion to dismiss stage on qualified immunity grounds and 2.6% were dismissed on summary judgment on qualified immunity grounds, and concluding that “qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end”); Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 NW. U. L. REV. 1101, 1105-07 (2020) (concluding, based on the same

sample of 1183 § 1983 suits and attorney interviews, that the qualified immunity defense delays and increases the costs of § 1983 litigation, but does not screen out insubstantial § 1983 claims by discouraging plaintiffs' attorneys from bringing such claims).

Recent empirical scholarship has also documented how often damages are paid by individual government employees in successful constitutional tort suits. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 565-66 (2020) (studying 171 successful *Bivens* suits brought against Federal Bureau of Prisons employees between 2007 and 2017, and reporting that payments by individual employees were made in only 4.7% of the cases and accounted for only .32% of the money awarded to plaintiffs); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912-13 (2014) (finding that state and local governments paid 99.98% of the damages awarded to plaintiffs in § 1983 suits alleging police misconduct between 2006 and 2011).

Add the following at the end of the third paragraph of Note 8 following *Harlow v. Fitzgerald* on page 101:

See also Ted Sampsell-Jones & Jenna Yauch, *Measuring Pearson in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011) (finding, after examining the 190 federal appellate court opinions published in 2009 and 2010 that cited *Pearson*, that “courts continued to follow the *Saucier* sequence most of the time, although they exercised their *Pearson* discretion in a substantial minority [approximately 31%] of cases”); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 38 (2015) (reporting similar findings in a study of 844 published and unpublished federal appellate cases decided between 2009 and 2012, but noting that “the finding of constitutional violations (when granting qualified immunity) – the pure *Saucier* development of constitutional law – has decreased,” and therefore “[t]he data ... provide at least some support for the post-*Pearson* constitutional stagnation theory”).

Add the following at the end of the fourth paragraph of Note 2 following *Safford Unified School District #1 v. Redding* on page 110:

In *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam), the Court repeated the equivocal caveat made in *Reichle v. Howards* and summarily reversed the Third Circuit's denial of qualified immunity on the grounds that the lower court “cited only a single [Third Circuit] case” that was distinguishable on its facts and was “even more perplexing in comparison to” contrary rulings made by other courts. *See also* *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (“We have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity. We express no view on that question here.”); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (“Assuming for the sake of argument that a right can be ‘clearly established’ by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue.”); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) (“But even if ‘a controlling circuit precedent could constitute clearly established federal law in these circumstances,’ it does not do so here.”) (quoting *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam)). For the argument that Supreme

Court opinions like these have covertly broadened the qualified immunity defense, see Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016).

Add the following after the fifth paragraph of Note 2 following *Safford Unified School District #1 v. Redding* on page 110:

In *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam), the Court granted qualified immunity to a police officer who made a warrantless entry in pursuit of someone the officer believed had committed a jailable misdemeanor offense. The Court noted that “federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.” The Court distinguished both its ruling in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and “the most relevant” Ninth Circuit opinion on the grounds that neither case involved hot pursuit. In addition, because *United States v. Santana*, 427 U.S. 38 (1976), approved of a warrantless entry in hot pursuit without “expressly limit[ing]” the holding to felony cases, the Court characterized the two pertinent Supreme Court precedents as “equivocal on the lawfulness of [the officer’s] entry.” Citing two California Court of Appeal decisions, the Court also thought it significant that the officer’s actions were “lawful according to courts in the jurisdiction where he acted.” Finally, the Court considered its holding “bolstered” by two federal district court opinions in California that “granted qualified immunity precisely because the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established.”

In *Wood v. Moss*, 572 U.S. 744 (2014), a unanimous Supreme Court extended qualified immunity to two Secret Service agents who moved a group of protestors standing in front of an inn where then-President George W. Bush was dining while allowing a group of the President’s supporters to remain in the area. In response to the plaintiffs’ First Amendment claim of viewpoint discrimination, Justice Ginsburg’s majority opinion found no court decision that “would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation ‘to ensure that groups with different viewpoints are at comparable locations at all times.’” The Court also reasoned that the protestors had a “direct line of sight to the outdoor patio where the President stopped to dine” and therefore “posed a potential security risk to the President, while the supporters, because of their location, did not.”

In *Lane v. Franks*, 573 U.S. 228 (2014), a unanimous Supreme Court held that the First Amendment protects public employees who provide “truthful sworn testimony, compelled by subpoena, outside the course of [their] ordinary job responsibilities.” Nevertheless, Justice Sotomayor’s majority opinion dismissed Lane’s wrongful termination suit on qualified immunity grounds, reasoning that the law “did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection.” In support of this finding, the Court cited precedent from the defendant’s jurisdiction (the Eleventh Circuit) that restricted First Amendment protection to speech that was “made primarily in the employee’s role as citizen,” rather than “primarily in the role of employee,” and therefore denied constitutional protection to a deputy sheriff who testified in a civil wrongful death suit only because he was subpoenaed. Justice Sotomayor distinguished

two other Eleventh Circuit cases that had found public employees protected if they testified on matters of public concern on the ground that Lane, like the deputy sheriff, had testified because of a subpoena. “At best,” the Court observed, “Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity.” Finally, the Court dismissed contrary decisions from other courts of appeals as “in direct conflict with Eleventh Circuit precedent.”

In *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), the Court quoted *Ashcroft v. al-Kidd*’s reference to a “‘robust consensus of cases of persuasive authority,’” but did so in a way that suggested – contrary to *al-Kidd* – that whether such a consensus suffices to overcome a claim of qualified immunity might be an open question. Writing for the six Justices who took a position on qualified immunity, Justice Alito’s majority opinion in *Sheehan* described qualified immunity as an “exacting standard” and then said: “Finally, to the extent that a ‘robust consensus of cases of persuasive authority’ could itself clearly establish the federal right respondent alleges, no such consensus exists here.” In a subsequent per curiam opinion, the Court repeated *Sheehan*’s equivocal statement. See *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam) (“And ‘to the extent that a “robust consensus of cases of persuasive authority”’ in the Courts of Appeals ‘could itself clearly establish the federal right respondent alleges,’ the weight of that authority at the time of *Barkes*’s death suggested that such a right did not exist.”).

In reversing the denial of qualified immunity in *Sheehan*, the Court also concluded that testimony from the plaintiff’s expert claiming that the defendant police officers were not following their training for handling mentally ill suspects did not “matter for purposes of qualified immunity.” “Even if an officer acts contrary to her training,” the Court noted, “that does not itself negate qualified immunity where it would otherwise be warranted.” Quoting the Ninth Circuit’s opinion in *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002), the Court in *Sheehan* went on to say: “[r]ather, so long as ‘a reasonable officer could have believed that his conduct was justified,’ a plaintiff cannot ‘avoi[d] summary judgment by simply producing an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.” Cf. *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021) (reversing district court decision that denied qualified immunity because officers “actually knew from their training” that a constitutional right existed, and reasoning that qualified immunity is “judged by an objective standard and, therefore, what the officer defendants subjectively understood or believed the law to be was irrelevant”).

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court, by a vote of four-to-two, granted qualified immunity to federal officials who were sued under § 1985(3) for conspiring to violate the equal protection rights of several persons detained in the wake of 9/11 by subjecting them to harsh conditions of confinement because of their race, religion, ethnicity, and national origin. Justice Kennedy’s majority opinion offered two reasons for concluding that “reasonable officials in petitioners’ positions would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.” First, in light of the intracorporate-conspiracy doctrine, “the fact that the [lower] courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well

established.” Second, given the importance of fostering “open discussion among federal officers ... so that they can reach consensus on the policies a department of the Federal Government should pursue,” and the concern that allowing “those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals ... would ... chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies,” the issue whether or not “officials employed by the same governmental department ... conspire when they speak to one another and work together in their official capacities” is “sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions.”

Justice Thomas, concurring in part and concurring in the judgment in *Abbasi*, wrote separately to express his “growing concern” with the qualified immunity doctrine and to suggest that the Court “reconsider our qualified immunity jurisprudence.” Citing William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018), Justice Thomas noted that the Court has “not attempted to locate [the *Harlow*] standard in the common law as it existed in 1871,... and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.” Justice Thomas warned that, “[u]ntil we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.” Justices Breyer and Ginsburg dissented, agreeing with the Second Circuit that the officials were not entitled to qualified immunity on the § 1985(3) claim.

In *Hernández v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam), the Court vacated and remanded a case involving the fatal shooting of a fifteen-year-old Mexican national, asking the lower court to reconsider the availability of a *Bivens* claim under the Court’s week-old decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The teenager and some friends had been running back and forth across a culvert of the Rio Grande River on the border between the United States and Mexico, but he was on Mexican soil when he was shot by a U.S. Border Patrol agent from the American side of the border. The suit filed by his parents claimed that the agent violated their son’s Fourth and Fifth Amendment rights by using deadly force against an unarmed person who presented no threat. Although the Justices declined to reach the merits of the constitutional claims, they held, quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam), that the agent was not entitled to qualified immunity on the Fifth Amendment claim because “qualified immunity analysis ... is limited to ‘the facts that were knowable to the defendant officers’ at the time they engaged in the conduct in question” and it was “undisputed ... that Hernández’s nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting.” Justice Thomas dissented on the grounds that *Bivens* is not available in a case “involv[ing] cross-border conduct.” In a separate dissent, Justice Breyer, joined by Justice Ginsburg, would have remanded on the *Bivens* and qualified immunity issues, but concluded that the Fourth Amendment applied to the case because “the entire culvert [has] sufficient involvement with, and connection to, the United States to subject the culvert to Fourth Amendment protections.” When the case returned to the Supreme Court three years later, the Justices, in a five-to-four decision, held that a *Bivens* suit could not be based on a cross-border shooting. See *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (discussed in Chapter 1.E., *supra*).

In *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), the Court concluded that police officers had probable cause to arrest a group of partygoers for unlawful entry despite the plaintiffs' claim that they thought the person who invited them to the party had permission to do so. The Court went on to hold, in an opinion written by Justice Thomas, that even if the officers lacked probable cause to arrest, they were entitled to qualified immunity because they “‘reasonably but mistakenly conclude[d] that probable cause [wa]s present.’” Justice Thomas explained that “neither the panel majority nor the partygoers have identified a single precedent – much less a controlling case or robust consensus of cases – finding a Fourth Amendment violation ‘under similar circumstances,’” and “it should go without saying that this is not an ‘obvious case’ where ‘a body of relevant case law’ is not needed.”

Add the following at the end of the third paragraph of Note 3 following *Safford Unified School District #1 v. Redding* on page 112:

See also Taylor v. Riojas, 140 S. Ct. 52 (2020) (per curiam) (quoting *Hope* in concluding that no reasonable prison official could believe it was constitutional to house a prisoner for six days in two “shockingly unsanitary cells”; one of the cells was “covered, nearly floor to ceiling, in “‘massive amounts” of feces,” and the other was a “frigidly cold cell” in which the plaintiff was “left to sleep naked in sewage”).

Add the following at the end of the third paragraph of Note 4 following *Safford Unified School District #1 v. Redding* on page 114:

See also Plumhoff v. Rickard, 572 U.S. 765 (2014) (holding that police officers were entitled to qualified immunity in an excessive force case the Court described as not “meaningfully distinguish[able]” from *Brosseau*, and reasoning that no case “decided between 1999 and 2004 ... clearly established the unconstitutionality of using lethal force to end a high-speed car chase”); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam) (observing, in granting qualified immunity in another excessive force case, that “cases involving car chases reveal the hazy legal backdrop against which [the officer] acted” there, and rejecting the argument that he violated clearly established law by firing at a fleeing vehicle before waiting to see whether spike strips would succeed in stopping the car, noting that the Court had never “den[ie]d qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alternative over another”); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) (noting, in reversing denial of qualified immunity to an officer who shot and killed an armed occupant of a house without first giving a warning, that the court below “failed to identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment,” and concluding that “[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed”); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam) (reversing denial of qualified immunity to an officer who shot the plaintiff, who was standing outside holding a large kitchen knife, in order to protect a bystander (the plaintiff’s roommate, who later told the police she did not believe she was in danger), noting that “[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment”); *City of Escondido v.*

Emmons, 139 S. Ct. 500 (2019) (per curiam) (reversing denial of qualified immunity on the ground that the court of appeals “defined the clearly established right at a high level of generality” instead of “ask[ing] whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances” after he had been arrested for resisting a police officer). *See generally* Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (reporting, based on a study of California law enforcement training materials, that officers are instructed on “the general principles” of Supreme Court opinions like *Graham v. Connor* and then are told “to apply those principles in the widely varying circumstances that come their way,” but are not informed of the circuit court opinions that could clearly establish the law); Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (reporting that, since 2005, federal appellate courts have increasingly granted qualified immunity in excessive force cases, even in those involving unarmed civilians). *But cf. Lombardo v. City of St. Louis*, 141 S. Ct. – (2021) (per curiam) (reversing grant of summary judgment to police officers in fatal excessive force case, without reaching either the merits of the excessive force claim or the defendants’ entitlement to qualified immunity, on the grounds that the lower court may have considered “the use of a prone restraint ... *per se* constitutional so long as an individual appears to resist officers’ efforts to subdue him” – without considering other relevant circumstances, such as the fact that the individual was already in handcuffs and leg shackles when he was moved to the prone position and was kept in that position for 15 minutes – and reasoning that “[s]uch a *per se* rule would contravene the careful, context-specific analysis required by this Court’s excessive force precedent”). *But see Estate of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020) (denying qualified immunity to five officers who fired 22 shots at Wayne Jones, a homeless Black man who was stopped for walking on the street rather than the sidewalk, because a jury could reasonably conclude that Jones, who had been tased four times, was “both secured and incapacitated in the final moments before his death,” and, referencing the deaths of Michael Brown in Ferguson and George Floyd in Minneapolis, admonishing that police must act “with respect for the dignity and worth of black lives”; concluding, “[t]his has to stop”).

Add the following at the end of Note 4 following *Safford Unified School District #1 v. Redding* on page 114:

In *Heien v. North Carolina*, 574 U.S. 54 (2014), the Court determined that the reasonable suspicion required by the Fourth Amendment to justify a stop can be based on a police officer’s erroneous but reasonable interpretation of state law – in that case, the belief that North Carolina required a vehicle to have two functioning brake lights. In response to the argument that the Court’s holding would permit “a sloppy study of the laws” on the part of law enforcement officials, Chief Justice Roberts’ opinion for the majority remarked that “[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes – whether of fact or of law – must be objectively reasonable.” The Chief Justice went on to say that this Fourth Amendment “inquiry is not as forgiving” as the one used in “the distinct context” of qualified immunity. The Court provided no further explanation for this comparison, and it is therefore unclear whether it was based on the differences between qualified immunity and the merits of a Fourth Amendment claim outlined in *Anderson v. Creighton* and *Saucier v. Katz* or something else. Justice Kagan,

joined by Justice Ginsburg, wrote a concurring opinion in *Heien*, agreeing with the majority that the Fourth Amendment’s definition of a reasonable mistake is “more demanding” than the qualified immunity inquiry and explaining that the former requires a law that is “genuinely ambiguous,” “‘so doubtful in construction’ that a reasonable judge could agree with the officer’s view.” For criticism of the Court’s ruling in *Heien*, see Kit Kinports, *Heien’s Mistake of Law*, 68 ALA. L. REV. 121 (2016).

Add the following at the end of Note 5 following *Safford Unified School District #1 v. Redding* on page 116:

The Court in a per curiam reversal of the Fifth Circuit in *Johnson v. City of Shelby*, 574 U.S. 10 (2014) (per curiam), did not impose a heightened pleading requirement on plaintiff-police officers who challenged their discharges under the Federal Constitution but failed to cite § 1983: “no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim.” “Federal pleading rules call for ‘a short and plain statement of the claim showing that the pleader is entitled to relief’; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.”

Add the following at the end of the fourth paragraph of Note 6 following *Safford Unified School District #1 v. Redding* on page 118:

See also Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2086 (2018) (reporting results of a three-year study of all district court trials in federal civil rights cases, and finding that, where juries were instructed on qualified immunity or asked to resolve disputed issues of fact relevant to qualified immunity, the trial judge failed to instruct jurors on the burden of proof in almost 60% of cases and, in the 40% of cases where a burden-of-proof instruction was given, imposed the burden on the plaintiff almost three-quarters of the time).

Add the following at the end of the fifth paragraph of Note 6 following *Safford Unified School District #1 v. Redding* on page 119:

See also Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2068 (2018) (reporting results of a three-year study of all district court trials in federal civil rights cases, and finding that in the vast majority of cases in which qualified immunity was raised (more than 85%), juries received no instructions on qualified immunity and, where no instruction was given, “plaintiffs’ win rate nearly tripled in cases that went to verdict”).

Add the following at the end of the third paragraph of Note 8 following *Safford Unified School District #1 v. Redding* on page 121:

See also *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (distinguishing *Johnson v. Jones* and allowing appeal of the denial of summary judgment in an excessive force case on the ground that the defendants’ contentions that their use of force was not excessive under the Fourth Amendment and, in any event, did not violate clearly established law “raise legal issues ... quite

different from any purely factual issues that the trial court might confront if the case were tried” and “requiring appellate courts to decide such issues is not an undue burden”).

Add the following at the end of Note 8 following *Safford Unified School District #1 v. Redding* on page 122:

See also Tolan v. Cotton, 572 U.S. 650 (2014) (per curiam) (reversing grant of qualified immunity in an excessive force case on the grounds that the lower court “failed to view the evidence at summary judgment in the light most favorable to” the plaintiff “[b]y failing to credit evidence that contradicted some of its key factual conclusions” on issues such as whether the plaintiff’s mother was “calm” or “agitated,” what position the plaintiff was in when he was shot, and whether he was “shouting” and “verbally threatening” the defendant police officer).

Chapter 3. Sovereign Immunity

C. Waiver and Abrogation

Add the following at the end of Note 2 following *Quern v. Jordan* on page 169:

Cf. Lightfoot v. Cendant Mortgage Co., 137 S. Ct. 553 (2017) (holding that statutory language authorizing Fannie Mae “to sue and be sued ... in any court of competent jurisdiction, State or Federal,” did not give the federal courts original jurisdiction in every case involving Fannie Mae; given the statute’s reference to a “court of competent jurisdiction,” “Fannie Mae’s sue-and-be-sued clause is most naturally read” to authorize suit only in a “state or federal court already endowed with subject-matter jurisdiction over the suit”).

Add the following at the end of Note 6 following *Quern v. Jordan* on page 174:

In *Franchise Tax Board v. Hyatt*, 136 S. Ct. 1277 (2016), the Supreme Court agreed to consider whether decisions like *Alden v. Maine* undermined the Court’s previous holding in *Nevada v. Hall*, 440 U.S. 410 (1979), that sovereign immunity does not protect a state from being sued in the courts of another state. Although the Justices were equally divided on that issue, the Court did decide that a state sued in another state’s courts is entitled to the same immunities that would be available to the forum state under its laws – in that case, a statutory cap on compensatory damages.

When the case returned to the Supreme Court three years later, the Court voted to overturn *Nevada v. Hall* by a vote of five-to-four. Holding that states are immune from private suits brought in another state’s courts even though “no constitutional provision explicitly grants that immunity,” Justice Thomas’ opinion for the majority quoted *Alden v. Maine*’s observation that “‘the Constitution was understood ... to preserve the States’ traditional immunity from private suits’” and concluded that “[i]nterstate sovereign immunity is ... integral to the structure of the Constitution.” *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 724 (1999)).

Chapter 4. Local Liability

A. Congressional Intent

Add the following at the end of Note 7 on page 194:

The impact of the Supreme Court's decision in *Ashcroft v. Iqbal* on supervisory liability in § 1983 cases continues to bedevil the lower courts. The Fifth Circuit, like the Seventh Circuit, interprets *Iqbal* broadly. See *Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011) (rejecting the claim that one of the defendant police officers “fail[ed] to supervise the other officers on the scene” because, after *Iqbal*, “[b]eyond [a supervisor’s] own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy” and there was “no evidence” in this case that the supervisor “established any sort of policy during this one incident”).

But other courts continue to take the view that § 1983 liability can be imposed on supervisors who act with the state of mind necessary to prove the particular constitutional violation alleged by the plaintiff. See *Turkmen v. Hasty*, 789 F.3d 218, 250 (2d Cir. 2015) (refusing to dismiss claims filed by Arab and Muslim plaintiffs who were detained in New York following the 9/11 attacks and alleged that high-ranking federal and local officials violated, inter alia, the plaintiffs’ substantive due process and equal protection rights by continuing to detain them despite being aware of the lack of evidence linking them to terrorism, and relying on the Ninth Circuit’s opinion in *Starr v. Baca* in noting that “*Iqbal* does not preclude ... claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference”), *rev’d on other grounds sub nom. Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (assuming “for purposes of this case” that deliberate indifference was the “correct” standard for evaluating whether the warden of the detention facility violated the Fifth Amendment by allowing the guards to abuse the plaintiffs); *Barkes v. First Correctional Medical, Inc.*, 766 F.3d 307, 320 (3d Cir. 2014) (holding that, at least for Eighth Amendment claims, liability can be imposed on a supervisory official who, “by virtue of his or her own deliberate indifference to known deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur, and ... such an injury does occur,” and reasoning that any other approach “would immunize from liability prison officials who were deliberately indifferent to a substantial risk that inmates’ serious medical conditions were being mistreated” and thereby “would subvert the Supreme Court’s command” that the Eighth Amendment is violated whenever “any prison official..., ‘acting with deliberate indifference, expose[s] a prisoner to a sufficiently substantial risk of serious damage to his future health’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)), *rev’d on other grounds sub nom. Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (pointing out that the court of appeals found that the plaintiffs “had alleged a cognizable theory of supervisory liability,” but refusing to “express [a] view” on that question). Cf. *Morales v. Chadbourne*, 793 F.3d 208, 221 (1st Cir. 2015) (noting in a Fourth Amendment case that the necessary “‘affirmative link between the behavior of a subordinate and the action or inaction of his supervisor’” can be demonstrated by showing that the supervisor was “‘a primary violator or direct participant in the rights-violating incident,’ or that ‘a responsible official supervises, trains

or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation”).

D. Innocent Agents

Add to Note 3 on page 249:

Staub has been applied to Title VII actions and ADEA suits against governmental employers. *See, e.g., Morris v. McCarthy*, 825 F.3d 658 (D.C. Cir. 2016) (holding that the federal EPA could be held liable for racial discrimination notwithstanding the presence of an innocent agent: "the supervisor's biased recommendation may still influence the ultimate decision if the final decisionmaker 'takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.'"); *Vogel v. Pittsburgh Public School District*, 40 F. Supp.3d 592 (W.D. Pa. 2014).

Add to Note 4 on page 249:

Several Circuits have "held or assumed that cat's paw liability would be available under § 1983," *Kregler v. City of New York*, 987 F. Supp.2d 357 (S.D.N.Y. 2013), both before and after the Supreme Court's holding in *Staub*. *See, e.g., Campion, Barrow & Assocs., Inc. v. City of Springfield, Ill.*, 559 F.3d 765 (7th Cir. 2009) (stating that "evidence could support a finding that X (the [City] Council) relied on Y's (the Mayor's or [an alderman's]) intent, making it permissible to base municipal liability on Y's discriminatory animus."); *Arendale v. City of Memphis*, 519 F.3d 587 (6th Cir. 2008) ("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability."). Courts in these Circuits have also sometimes concluded or assumed that a cat's paw theory of liability, like that discussed in *Staub*, could result in municipal liability under § 1983. *See, e.g., Polion v. City of Greensboro*, 26 F. Supp.3d 1197 (S.D. Ala. 2014) (assuming a municipality could be held liable under § 1983 for act of innocent agent in employment context). *See also Brnovich v. Democratic National Committee*, ___ U.S. ___ (2021) ("A 'cat's paw' is a 'dupe' who is 'used by another to accomplish his purposes.' A plaintiff in a 'cat's paw' case typically seeks to hold the plaintiff's employer liable for 'the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision.' The 'cat's paw' theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents.").

Add new Note on page 250:

8. Is *Heller* Consistent with Subsequent Supreme Court Cases? In *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the Court potentially undermined its holding in *Heller*. There, the plaintiff (Lozman) was arrested by a police officer at the direction of city officials for disrupting a public meeting. Even though the arresting officer was innocent of wrongdoing under § 1983, having probable cause and not having acted with discriminatory animus, the Supreme Court

ruled that the City could still be liable under § 1983 for its own "premeditated plan to intimidate [Lozman] in retaliation for his" speech. Justice Kennedy's explanation did not mention *Heller*, nor did it explain exactly how a municipality might be held liable for the act of its innocent agent. Could an explanation rest in the final authority analysis? Assuming the final authority analysis is used to support municipal liability, after all, a high ranking individual would be responsible. This could satisfy both a cat's paw theory and the Court's conclusion in *Heller*. Can the same be said of liability based on formal policies (like that in *Monell*) or liability premised on the deliberate indifference standard (recognized in *Harris*)? Do either necessarily implicate a single responsible individual? In *Heller*, remember, the plaintiff argued that the City's own regulations supported its liability.

Chapter 5. The Relationship Between State and Federal Law in Section 1983 Litigation

A. Section 1988(a), Statutes of Limitations, and Survivorship Rules

Add the following at the end of Note 5 on page 270:

See also McDonough v. Smith, 139 S. Ct. 2149 (2019) (analogizing to *Heck v. Humphrey* and holding that a plaintiff's § 1983 claim alleging that fabricated evidence was used against him in a criminal proceeding accrued when those proceedings terminated in his favor – i.e., when he was acquitted after his second trial – and not when he first became aware that tainted evidence had been introduced against him).

Chapter 6. Remedies Under § 1983

A. Compensatory Damages

Add to end of Note 1 on page 307:

Are nominal damages required for past constitutional violations when only nominal damages requested? Or are they only proper when compensatory damages are also demanded? In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), two students at a small state college challenged college policies limiting student speech under § 1983 and the First Amendment. They sought declaratory and injunctive relief as well as nominal damages from school officials, but not compensatory damages. While the case was pending, the college revised the policies and one of the students graduated. The District Court and the Eleventh Circuit agreed the case was rendered moot; their "claim for nominal damages cannot save their otherwise moot constitutional challenge to the Prior Policies."

In an opinion by Justice Thomas, the Supreme Court reversed, holding that a stand-alone claim for nominal damages was proper and that the plaintiff need not also or prove compensatory damages. Further, the availability of nominal damages, like compensatory damages, satisfied Article III's standing requirements, in particular redressability, and prevented the case from being rendered moot (*see* Chapter 6.C.[1][c], *infra*). Justice Thomas explained:

Early courts required the plaintiff to prove actual monetary damages in every case: “[I]njuria & damnum [injury and damage] are the two grounds for the having [of] all actions, and without these, no action lieth.” Later courts, however, reasoned that *every* legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress. The latter approach was followed both before and after ratification of the Constitution.

Admittedly, the rule allowing nominal damages for a violation of any legal right, though “decisively settled,” was not universally followed—as is true for most common-law doctrines. And some courts only followed the rule in part, recognizing the availability of nominal damages but holding that the improper denial of nominal damages could be harmless error. Yet, even among these courts, many adopted the rule in full whenever a person proved that there was a violation of an “important right.” Nonetheless, the prevailing rule, “well established” at common law, was “that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.”

That this rule developed at common law is unsurprising in the light of the noneconomic rights that individuals had at that time. A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation. By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.

Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.

The argument that a claim for compensatory damages is a prerequisite for an award of nominal damages also rests on the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff. That contention is not without some support. But this view is against the weight of the history discussed above, and we have already expressly rejected it. Despite being small, nominal damages are certainly concrete. The dissent says that “an award of nominal damages does not change [a plaintiff’s] status or condition at all.” But we have already held that a person who is awarded nominal damages receives “relief on the merits of his claim” and “may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages.” Because nominal damages are in fact damages paid to the plaintiff, they “affect the behavior of the defendant towards the plaintiff” and thus independently provide redress. True, a single dollar often cannot

provide full redress, but the ability “to effectuate a partial remedy” satisfies the redressability requirement.

Applying this principle here is straightforward. For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because “every violation [of a right] imports damage,” *Webb*, 29 F.Cas. at 509, nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.

See also New York State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (Alito, J., dissenting) (where the majority ruled the case moot because of a change in the challenged law the dissent complained that “[a]t a minimum, if petitioners succeeded on their challenge to the travel restrictions, they would be eligible for nominal damages. When a plaintiff's constitutional rights have been violated, nominal damages may be awarded without proof of any additional injury.”).

Add to end of Note 3 on page 309:

The Supreme Court in *Comcast Corp. v. National Association of African American Owned Media*, 140 S. Ct. 1009 (2020), unanimously ruled that the plaintiff has the burden in a § 1981 case to prove that race is a but-for cause of its injury as opposed to merely playing “some role” as held by the Ninth Circuit.

Add new Note 4 on page 309:

4. Damages Caused By Fourth Amendment Violations. In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), police officers entered a shack used as a dwelling without a search warrant and without announcing the presence. When one of the occupants brandished a weapon he and his co-occupant were shot multiple times by the police officers. The Ninth Circuit concluded that while the officers were entitled to qualified immunity for their violation of the knock-and-announce rule, they were responsible for provoking the occupants' threatening response and therefore were liable for the shooting regardless of whether they (the officers) otherwise used excessive force. The Supreme Court, per Justice Alito, unanimously (Gorsuch, J., not participating) ruled that although the Ninth Circuit's provocation rule conflicted with established excessive force jurisprudence, the officers might still be held responsible for the shooting if it were proximately caused by the unlawful warrantless entry:

Proper analysis of this proximate cause question required consideration of the “foreseeability or the scope of the risk created by the predicate conduct,” and required the court to conclude that there was “some direct relation between the injury asserted and the injurious conduct alleged.” Unfortunately, the Court of Appeals' proximate cause analysis appears to have been tainted by the same errors that cause us to reject the provocation rule. The court reasoned that when officers make a “startling entry” by “barg [ing] into” a home “unannounced,” it is reasonably foreseeable that violence may result.

But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset.

Replace Note 3 on pages 314-15 with the following case:

NIEVES v. BARTLETT
Supreme Court of the United States
139 S. Ct. 1715 (2019)

[The plaintiff (Bartlett) sued (seeking damages) two police officers under § 1983 and the First Amendment for a disorderly conduct arrest he claimed was premised on his refusal to speak with one of the arresting officers. After the arrest, one of the officers allegedly said to Bartlett that he “bet you wish you would have talked to me now.” The State eventually dropped the charge against Bartlett. The District Court granted summary judgment to the officers, holding that probable cause defeated the First Amendment claim. The Ninth Circuit reversed.]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

“[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions” for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256, (2006). If an official takes adverse action against someone based on that forbidden motive, and “non-retaliatory grounds are in fact insufficient to provoke the adverse consequences,” the injured person may generally seek relief by bringing a First Amendment claim. [See, e.g., *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977).]

To prevail on such a claim, a plaintiff must establish a “causal connection” between the government defendant's “retaliatory animus” and the plaintiff's “subsequent injury.” It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a “but-for” cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.

For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context “have simply taken the evidence of the motive and the discharge as

sufficient for a circumstantial demonstration that the one caused the other,” shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases.

In *Hartman*, for example, we addressed retaliatory prosecution cases, where “proving the link between the defendant’s retaliatory animus and the plaintiff’s injury ... ‘is usually more complex than it is in other retaliation cases.’ ” Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity. Thus, even when an officer’s animus is clear, it does not necessarily show that the officer “induced the action of a prosecutor who would not have pressed charges otherwise.”

To account for this “problem of causation” in retaliatory prosecution claims, *Hartman* adopted the requirement that plaintiffs plead and prove the absence of probable cause for the underlying criminal charge. As *Hartman* explained, that showing provides a “distinct body of highly valuable circumstantial evidence” that is “apt to prove or disprove” whether retaliatory animus actually caused the injury.

As a general matter, we agree [that this same principle applies to arrests]. [R]etaliatory arrest claims face some of the same challenges we identified in *Hartman*: Like retaliatory prosecution cases, “retaliatory arrest cases also present a tenuous causal connection between the defendant’s alleged animus and the plaintiff’s injury.” The causal inquiry is complex because protected speech is often a “wholly legitimate consideration” for officers when deciding whether to make an arrest. Officers frequently must make “split-second judgments” when deciding whether to arrest, and the content and manner of a suspect’s speech may convey vital information—for example, if he is “ready to cooperate” or rather “present[s] a continuing threat.”

In addition, “[l]ike retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case.” And because probable cause speaks to the objective reasonableness of an arrest, its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer’s animus caused the arrest, whereas the presence of probable cause will suggest the opposite.

To be sure, ... the two claims give rise to complex causal inquiries for somewhat different reasons. Unlike retaliatory prosecution cases, retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors (although this case did). But regardless of the source of the causal complexity, the ultimate problem remains the same. For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer’s malice or the plaintiff’s potentially criminal conduct. Because of the “close relationship” between the two claims, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.

Adopting *Hartman's* no-probable-cause rule in this closely related context addresses those familiar concerns. Absent such a showing, a retaliatory arrest claim fails. But if the plaintiff establishes the absence of probable cause, “then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.”

Our conclusion is confirmed by the common law approach to similar tort claims. When defining the contours of a claim under § 1983, we look to “common-law principles that were well settled at the time of its enactment.”

As the parties acknowledge, when § 1983 was enacted in 1871, there was no common law tort for retaliatory arrest based on protected speech. We therefore turn to the common law torts that provide the “closest analogy” to retaliatory arrest claims. *Heck v. Humphrey*, 512 U.S. 477, 484, (1994) [see main text, *infra*, at 493]. The parties dispute whether the better analog is false imprisonment or malicious prosecution. At common law, false imprisonment arose from a “detention without legal process,” whereas malicious prosecution was marked “by *wrongful institution* of legal process.” *Wallace v. Kato*, 549 U.S. 384, 389–390 (2007) [see main text, *infra*, at 507]. Here, both claims suggest the same result: The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.

Malicious prosecution required the plaintiff to show that the criminal charge against him “was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice.” It has long been “settled law” that malicious prosecution requires proving “the want of probable cause.”

For claims of false imprisonment, the presence of probable cause was generally a complete defense for peace officers. In such cases, arresting officers were protected from liability if the arrest was “privileged.” At common law, peace officers were privileged to make warrantless arrests based on probable cause of the commission of a felony or certain misdemeanors.

Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose “a risk that some police officers may exploit the arrest power as a means of suppressing speech.”

When § 1983 was adopted, officers were generally privileged to make warrantless arrests for misdemeanors only in limited circumstances. Today, however, “statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests” in a much wider range of situations—often whenever officers have probable cause for “even a very minor criminal offense.”

For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman's* rule would come at the expense of *Hartman's* logic.

For those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. That showing addresses *Hartman's* causal concern by helping to establish that “non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences.” And like a probable cause analysis, it provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are “irrelevant” at this stage. After making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause.

In light of the foregoing, Bartlett's retaliation claim cannot survive summary judgment. As an initial matter, the record contains insufficient evidence of retaliation on the [officers]. The *only* evidence of retaliatory animus identified by the Ninth Circuit was Bartlett's affidavit stating that Sergeant Nieves said “bet you wish you would have talked to me now.” In any event, Bartlett's claim against both officers cannot succeed because they had probable cause to arrest him.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I do not agree that “a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” That qualification has no basis in either the common law or our First Amendment precedents.

JUSTICE GORSUCH, concurring in part and dissenting in part.

The common law tort of false arrest translates more or less into a *Fourth* Amendment claim. That's because our precedent considers a warrantless arrest unsupported by probable cause—the sort that gave rise to a false arrest claim at common law—to be an unreasonable seizure in violation of the Fourth Amendment. But the *First* Amendment operates independently of the Fourth and provides different protections. It seeks not to ensure lawful authority to arrest but to protect the freedom of speech.

Everyone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause. Following our lead, the courts of appeals have recognized that § 1983 plaintiffs alleging racially selective arrests in violation of

the Fourteenth Amendment don't have to show a lack of probable cause, even though they might have to show a lack of probable cause to establish a violation of the Fourth Amendment.

I can think of no sound reason why the same shouldn't hold true here. Like a Fourteenth Amendment selective arrest claim, a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause. We thus have no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.

JUSTICE GINSBURG, concurring in the judgment in part and dissenting in part.

Arrest authority, as several decisions indicate, can be abused to disrupt the exercise of First Amendment speech and press rights. *See, e.g., Lacey v. Maricopa County*, 693 F. 3d 896, 907–910 (9th Cir. 2012) (en banc) (newspaper publishers alleged they were arrested in nighttime raid after publishing story on law enforcement's investigation of the newspaper); *Roper v. New York*, 2017 WL 2483813, *1 (S.D.N.Y., June 7, 2017) (photographers documenting Black Lives Matter protest alleged they were arrested for standing in street and failing to use crosswalk; sidewalks and crosswalks were blocked by police); *Morse v. San Francisco Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, *1–*7 (N.D. Cal., Feb. 11, 2014) (only journalist arrested at protest was journalist critical of Bay Area Rapid Transit Police). Given the array of laws proscribing, *e.g.*, breach of the peace, disorderly conduct, obstructing public ways, failure to comply with a peace officer's instruction, and loitering, police may justify an arrest as based on probable cause when the arrest was in fact prompted by a retaliatory motive. If failure to show lack of probable cause defeats an action under 42 U.S.C. § 1983, only entirely baseless arrests will be checked. I remain of the view that the Court's decision in *Mt. Healthy* strikes the right balance.

JUSTICE SOTOMAYOR, dissenting.

Prevailing First Amendment standards have long governed retaliatory arrest cases in the Ninth Circuit, and experience there suggests that trials in these cases are rare—the parties point to only a handful of cases that have reached trial in more than a decade. Even accepting that, every so often, a police officer who made a legitimate arrest might have to explain that arrest to a jury, that is insufficient reason to curtail the First Amendment. No legal standard bats a thousand, and district courts already possess helpful tools to minimize the burdens of litigation in cases alleging constitutionally improper motives. In addition, the burden of a (presumably indemnified) officer facing trial pales in comparison to the importance of guarding core First Amendment activity against the clear potential for abuse that accompanies the arrest power.

What exactly the Court means by “objective evidence,” “otherwise similarly situated,” and “the same sort of protected speech” is far from clear. I hope that courts approach this new standard commonsensically. It is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass, for example, if statistics or common sense confirm that jaywalking arrests are extremely rare. Otherwise, there

will be little daylight between the comparison-based standard the Court adopts and the absolute bar it ostensibly rejects.

Add new Note 6 on page 316:

6. Retaliatory Arrest Pursuant to Official Policy. In *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the plaintiff (Lozman) was arrested with probable cause for disrupting a public meeting. Even though the arresting officer assumedly possessed probable cause and acted in good faith, Lozman claimed that the City itself had him arrested based on his speech. The Supreme Court, per Justice Kennedy, ruled that where the plaintiff alleged that the municipality's "premeditated plan [was] to intimidate [the plaintiff] in retaliation for his" speech, the limitations found in *Hartman v. Moore*, 547 U.S. 250 (2006), did not apply. Justice Kennedy explained:

The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

In addition, Lozman's allegations, if proved, alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases. The causation problem in arrest cases is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it is difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the City. So in a case like this one it is unlikely that the connection between the alleged animus and injury will be "weakened ... by [an official's] legitimate consideration of speech." This unique class of retaliatory arrest claims, moreover, will require objective evidence of a policy motivated by retaliation to survive summary judgment.

See also Tanzin v. Tanvir, 141 S. Ct. 486 (2020) ("There is no doubt that damages claims have always been available under § 1983 for clearly established violations of the First Amendment.").

C. Prospective Relief Against State and Local Officials

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

Add to end of Note 1 on page 340:

The Supreme Court in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), unanimously ruled (per Justice Thomas) that political activists who were accused of making false political statements and brought before a state investigatory agency for violating Ohio's "false statements" law, only to have the charges later withdrawn, had standing to challenge the law's future application. In so holding, the Court made direct reference to *Clapper*'s footnote 5 (*see* page 338 of the main text): "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." The Court continued:

One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."

First, [the challengers] have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." Next, [their] intended future conduct is "arguably ... proscribed by [the] statute" they wish to challenge. The Ohio false statement law sweeps broadly, and covers the subject matter of [the challengers'] intended speech. Finally, the threat of future enforcement of the false statement statute is substantial. Most obviously, there is a history of past enforcement here. We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not "chimerical." *Cf. Clapper*, 568 U.S., at —.

The credibility of that threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency. Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents. And [the challengers], who intend to criticize candidates for political office, are easy targets.

Finally, Commission proceedings are not a rare occurrence. [T]he prospect of future enforcement is far from "imaginary or speculative." We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review. The burdens that Commission proceedings can impose on electoral speech are of particular concern here.

Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.

[Ohio] contend[s] that “prudential ripeness” factors confirm that the claims at issue are nonjusticiable. But we have already concluded that [the challengers] have alleged a sufficient Article III injury. To the extent [Ohio] would have us deem [the] claims nonjusticiable “on grounds that are ‘prudential,’ rather than constitutional,” “[t]hat request is in some tension with our recent reaffirmation of the principle that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’ “

In any event, we need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the “fitness” and “hardship” factors are easily satisfied here. First, [the] challenge to the Ohio false statement statute presents an issue that is “purely legal, and will not be clarified by further factual development.” And denying prompt judicial review would impose a substantial hardship on [the challengers], forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.

See also Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (“an injury in fact must be both concrete *and* particularized”). Does this mean that *Clapper*’s “certainly impending” standard is merely an alternative way of establishing standing? Is a “substantial risk” sufficient? *See* Marty Lederman, Susan B. Anthony List, *Clapper footnote 5, and the state of Article III standing doctrine*, SCOTUSblog, (June 17, 2014) (<http://www.scotusblog.com/2014/06/commentary-susan-b-anthony-list-clapper-footnote-5-and-the-state-of-article-iii-standing-doctrine/>). Or must the harm distinctly be “imminent”?

In *Carney v. Adams*, 141 S. Ct. 493 (2020), the Court vacated on standing grounds a Third Circuit decision that had invalidated a Delaware law restricting judicial appointments to members of the two major parties. The plaintiff, a then- politically unaffiliated lawyer, had been a registered Democrat his whole life, a number of judicial openings had materialized for which he “would have been eligible” had he applied while a Democrat, “he did not apply for any of them,” he only became unaffiliated eight days before filing suit to challenge the Delaware law, and then only because he read a law review article stating the law was likely unconstitutional. *Id.* In this “highly fact-specific case,” the Court stated, the plaintiff lacked standing to challenge the law. The Court was careful to point out that generally a plaintiff’s showing “that he is likely to apply ... in the reasonably foreseeable” future (but for the challenged law) and is otherwise “‘able and ready’ to perform” is sufficient to establish standing under Article III. But under the unique facts of the case at hand, the Court concluded that “in the context set forth by the evidence, [the plaintiff] has not shown that he was ‘able and ready’ to apply in the imminent future.” Does this mean that “imminent” means the same thing as “reasonably foreseeable”?

In *Trump v. New York*, 141 S. Ct. 530 (2020), the Court dismissed on standing grounds a challenge to President Trump's memorandum directing the Secretary of Commerce "to the maximum extent feasible and consistent with the discretion delegated to the executive branch" to prepare a Census report that excluded aliens from the count. The Court concluded that "[a]t present, this case is riddled with contingencies and speculation that impede judicial review." Given the "guesswork," and contingencies involving "both legal and practical constraints, ... any prediction about future injury just that—a prediction." "Any prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time," the Court observed, and insufficient to support Article III standing. Justices Breyer, Sotomayor and Kagan dissented.

In *California v. Texas*, ___ U.S. ___ (2021), the Court dismissed on standing grounds Texas's (and several other States'), as well as individual plaintiffs', challenges to the Affordable Care Act's "minimum essential insurance" provision was unconstitutional, with the result that all of the Affordable Care Act necessarily collapsed. Because Congress had previously repealed the tax penalty (the mandate) attached to the minimum essential insurance requirement, however, the Court found that neither the States nor the individuals possessed Article III standing. "With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply. Because of this, there is no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance." As for Texas and the other States, they "have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs." In sum, without a penalty, there was no way to causally connect the purchase of insurance with the Affordable Care Act.

Add new Note 6 on page 341:

6. Policies Authorizing Challenged Action. The Court has often stated that it disfavors facial challenges to laws. A law, the Court has noted, must be unconstitutional in all of its applications to be subjected to a facial challenge. The result is that plaintiffs are generally forced to file "as-applied" challenges, which then gives rise to the problems described in *Clapper*. In *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), the Court may have relaxed this demanding standard for facial challenges and thereby made it less difficult to establish the requisite threatened injury. *Patel* involved a Fourth Amendment challenge to a city ordinance that authorized warrantless and suspicion-less administrative searches of hotel guest registries. In a 5 to 4 opinion authored by Justice Sotomayor, the Court concluded that a facial challenge brought by group of motel operators, who had been subjected to the law in the past, was proper:

A facial challenge is an attack on a statute itself as opposed to a particular application. While such challenges are "the most difficult ... to mount successfully," the Court has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution. Instead, the Court has allowed such challenges to proceed under a diverse array of constitutional provisions.

She continued: "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant."

Justice Scalia dissented, arguing in part that facial challenges are generally improper: "Although we have at times described our holdings as invalidating a law, it is always the application of a law, rather than the law itself, that is before us." Justice Alito separately dissented, likewise arguing that a facial challenge was improper: "Before entering a judgment with such serious safety and federalism implications, the Court must conclude that every application of this law is unconstitutional—*i.e.*, that 'no set of circumstances exists under which the [law] would be valid.'"

[a] Prudential Limitations

Add the following to the end of the last paragraph on page 342:

The Court in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), ruled that unlike Article III challenges, prudential third-party standing challenges may be waived by a party's concession.

[b] Intervenors' Standing

Add the following to footnote 34 on page 352:

See also Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that laws banning same-sex marriage and prohibiting its recognition violate the Fourteenth Amendment).

Add the following to the end of Note 1 on page 354:

See also Wittman v. Personhuballah, 136 S. Ct. 1732 (2016) (holding that individual members of Congress did not have standing to challenge re-districting plan).

[c] Mootness

Add the following to the end of Note 1 on page 359:

In a series of so-called "shadow docket" rulings (that is, emergency rulings before certiorari without full briefing), the Supreme Court has recently concluded in the COVID-19 context that changes to State rules and orders do not necessarily moot constitutional challenges. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam order) ("It is clear that this matter is not moot."); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) ("even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. ... [S]o long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions."); *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch,

J.), ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner.").

Add new Note 1.a. on page 359:

1.a. Claims for Nominal Damages. Can a claim for nominal damages avoid mootness where the challenged law or policy has been repealed? *See New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (case rendered moot where local law barring transportation of guns was changed to allow the challenged conduct). In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), two students at a small state college challenged college policies limiting student speech under § 1983 and the First Amendment. They sought declaratory and injunctive relief as well as nominal damages from school officials, but not compensatory damages. While the case was pending, the college revised the policies and one of the students graduated. The District Court and the Eleventh Circuit agreed the case was rendered moot; their "claim for nominal damages cannot save their otherwise moot constitutional challenge to the Prior Policies." The Supreme Court, in an opinion by Justice Thomas, reversed, holding that where nominal damages may be recovered, see Chapter 6.A., *supra*, the repeal of a challenged law or policy does not moot the case. Like claims to compensatory damages, which plainly keep cases alive, "nominal damages are redress."

Note that nominal damages are not automatic. They still cannot, for example, be sought from States or their officials in official-capacity actions because of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (discussed in Chapter 3.C., *supra*) and its extension of sovereign immunity principles to section 1983, and when sought from officials in their personal capacities would appear to still be subject to qualified immunity (discussed in Chapter 2.B. *supra*) notwithstanding the Court's holding in *Uzuegbunam*. But see James Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L.REV. 1601 (2011) (arguing that qualified immunity should not apply to claims for nominal damages).

Add the following to the end of Note 2 on page 359:

The Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), ruled that "in accord with Rule 68 ... an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists" under Article III.

Add the following Note on page 359:

4. Addition of Nominal Damages Claim. Can a claim for nominal damages save a case that has otherwise been rendered moot by a change in the challenged policies? In *Uzuegbunam v. Preczewski*, 781 Fed. Appx. 824 (11th Cir. 2019), *cert. granted*, No. 19-968 (U.S., July 9, 2020), two students at a small state college challenged college policies limiting student speech under § 1983 and the First Amendment. They sought declaratory and injunctive relief as well as nominal

damages, but not compensatory damages. While the case was pending, the college revised the policies and one of the students graduated. The District Court and the Eleventh Circuit agreed the case was rendered moot; their "claim for nominal damages cannot save their otherwise moot constitutional challenge to the Prior Policies." The Supreme Court granted review to address "Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right."

Add the following to the end of Note 7 on page 369:

New York State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) ("in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").

Add to the end of Note 8 on page 370:

See also Azar v. Garza, 138 S. Ct. 1790 (2018) (vacating a lower court injunction allowing a detained pregnant minor (Garza) to seek an abortion where "Garza and her lawyers ... took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected" before the government sought certiorari and a stay from the Supreme Court).

[2] Statutory Limits on Prospective Relief

[a] Prison Litigation Reform Act

Add to the end of Note 2 on page 386:

See also Lomax v. Ortiz-Marquez, 140 S. Ct. 1721 (2020) (holding that Prison Litigation Reform Act's three-strikes provision that bans in forma pauperis (IFP) status after three dismissals in federal court includes dismissals without prejudice).

[b] The Tax Injunction Act

Add the following to the end of Note 1 on page 393:

The Court in *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015), unanimously ruled, per Justice Thomas, that the Tax Injunction Act does not restrict a prospective action challenging a state law that requires internet retailers to report tax-related information to purchasers and government officials. Justice Thomas reasoned that the requirement did not "restrain" the assessment of any tax. Justice Ginsburg concurred, but emphasized the reporting requirement fell on the seller, who was not responsible for paying the tax: " A different question would be

posed ... by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector, *e.g.*, an employer or an in-state retailer ..."

Chapter 7. Federal Abstention in Favor of State Proceedings

A. Avoiding Constitutional Issues

Add the following to the end of Note 9 on page 403:

In *McKesson v. Doe*, 141 S. Ct. 48 (2020), the plaintiff, a police officer, brought a diversity action under Louisiana tort law based on injuries he suffered during a protest organized by the defendant. The defense in part relied on the First Amendment, and the District Court dismissed the action. The Fifth Circuit reversed, concluding that under Louisiana law the defendant could plausibly be held liable for negligence and that the First Amendment did not protect the defendant. The Supreme Court vacated and remanded for further proceedings following the certification of the Louisiana-law negligence question to the Louisiana Supreme Court: "We think that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place." Observing that "[f]ederal courts have only rarely resorted to state certification procedures," the Court advised that here "[t]wo aspects of this case, taken together, persuade us that the Court of Appeals should have certified First, the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts. ... Second, certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical." The Court added that it "express[ed] no opinion on the propriety of the Fifth Circuit certifying or resolving on its own any other issues of state law that the parties may raise on remand."

B. Deference to Pending State Proceedings

Replace Note 4 on page 423:

4. "Coercive" Versus "Remedial" Proceedings. The Court in *Dayton Christian Schools* in note 3 distinguished its prior holding in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which had ruled that § 1983 generally does not require exhaustion of administrative remedies: "Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial." Most federal courts, relying on this language, have refused to invoke *Younger* abstention (and its effective "exhaustion of administrative remedies" requirement) where state administrative proceedings are "remedial" rather than "coercive."

The Supreme Court in *Sprint Communications v. Jacobs*, 571 U.S. 69 (2013), unanimously lent its support to this distinction, though it chose to avoid the literal language used

in *Dayton Christian Schools*.¹ The substantive question there revolved around which of two communications companies (Sprint and Windstream) should be responsible for Iowa's intrastate access charge. Sprint filed an action (which is later tried to withdraw) before Iowa's Utilities Review Board (IUB) arguing that Windstream should bear the cost. After the Board ruled against it, Sprint both sought review in state court and filed an original action in federal court challenging the Board's jurisdiction. The Eighth Circuit affirmed the District Court's abstention under *Younger*.

The Supreme Court, per Justice Ginsburg, reversed, stating that "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." "Circumstances fitting the *Younger* doctrine ... are 'exceptional'; they include [1] 'state criminal prosecutions,' [2] 'civil enforcement proceedings,' and [3] 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions'." After finding that the IUB action clearly did not fall into the first or third category, Justice Ginsburg turned to the second:

Our decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings "akin to a criminal prosecution" in "important respects." Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act. In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action.

The IUB proceeding does not resemble the state enforcement actions this Court has found appropriate for *Younger* abstention. It is not "akin to a criminal prosecution." Nor was it initiated by "the State in its sovereign capacity." A private corporation, Sprint, initiated the action. No state authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint.

The IUB's adjudicative authority ... was invoked to settle a civil dispute between two private parties, not to sanction Sprint for commission of a wrongful act. Although Sprint withdrew its complaint, administrative efficiency, not misconduct by Sprint, prompted the IUB to answer the underlying federal question.

Add to the end of the first paragraph in Note 3 on page 429:

The Supreme Court in *Sprint Communications v. Jacobs*, 561 U.S. 69 (2013), stated that it "assume[d] without deciding, as the Court did in *NOPSI*, that an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger* purposes."

¹ Justice Ginsburg noted that although the Court had "referenced" the "'coercive' rather than 'remedial'" distinction in *Dayton Christian Schools*, and lower courts tended to use the language, she did "not find the inquiry necessary or inevitably helpful, given the susceptibility of the designations to manipulation."

Chapter 8. Prior and Parallel State Proceedings

A. Preclusion

Add new Note on page 447:

5a. Raising Challenges That Could Have Been Joined in A Prior Action. In *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court invalidated two Texas restrictions on abortion rights. In the course of doing so, the Court (per Justice Breyer) rejected the state's claim that a prior unsuccessful facial federal challenge to one aspect of the law by some of the same plaintiffs precluded their subsequent renewal of their challenge:

The doctrine of claim preclusion ... prohibits “successive litigation of the very same claim” by the same parties. [The plaintiffs'] postenforcement as-applied challenge is not “the very same claim” as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. ... The Restatement adds that, where “important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.”

We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable.

When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference.

Justice Breyer also rejected the state's claim that the plaintiffs were required to join all of their challenges to all of the Texas abortion law's requirements in that first proceeding:

This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as “separate claims,” even when they are part of one overarching “[g]overnment regulatory scheme.” That approach makes sense. ... Such a rule would encourage a kitchen-sink approach to any litigation

challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.²

Add new Note on page 448:

6a. Using Collateral Estoppel Offensively Against Government. Can collateral estoppel be offensively asserted in § 1983 suits against states and their local governments? In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court ruled as a matter of federal law that collateral estoppel cannot be used offensively against the federal government and its agencies. Thus, a federal governmental loss in one federal court cannot be used in another federal court by a new party to bind the federal government. Among other things, this allows different Circuits to reach different conclusions about the legality of federal programs and facilitates Supreme Court review.

What about states and their local subdivisions? Does the same logic apply? Of course, state law itself might require mutuality of estoppel or otherwise limit its use. But what if state law otherwise allows it? Or what if the first judgment is rendered by a federal court? As a matter of federal law, can collateral estoppel be used offensively against states and local governments in subsequent federal proceedings?

The Circuits are presently split. The Sixth and Ninth Circuits have concluded that federal law does not prohibit the offensive use of collateral estoppel to support a state-court judgment. See *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998); *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004). Thus, a state's or local government's loss in a state-court proceeding can result in issue preclusion in a subsequent federal proceeding brought by a plaintiff who was not involved in the initial state-court proceeding. The Eleventh Circuit, meanwhile, has ruled to the contrary. See *Demaree v. Fulton County School District*, 515 Fed. Appx. 859 (11th Cir. 2013) (holding that the question is a federal one and that federal law prohibits the use of non-mutual collateral estoppel against states and local governments).

² Justice Breyer also observed that under Federal Rule of Civil Procedure 54(c), a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Consequently, the plaintiffs' request for “such other and further relief as the Court may deem just, proper, and equitable.” supported invalidating Texas's law “across the board.” “Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims.”

[2] Takings Claims in Federal Court

Replace *San Remo Hotel v. City and County of San Francisco* with the following principal case on pages 454-58:

KNICK V. TOWNSHIP OF SCOTT
Supreme Court of the United States
139 S. Ct. 2162 (2019)

[Scott, Pennsylvania passed an ordinance requiring that “[a]ll cemeteries ... be kept open and accessible to the general public during daylight hours.” A local landowner, Knick, whose 90-acre rural property has a small family graveyard, was notified that she was violating the ordinance because she would not allow the public to access the graveyard in accordance with the ordinance. Knick sought declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property. However, Knick did not bring an inverse condemnation action under state law seeking compensation. Scott then stayed enforcement of its ordinance, which the state court ruled defeated Knick’s claim to equitable relief. Knick then filed an action in Federal District Court under § 1983 and the Takings Clause of the Fifth Amendment. The District Court dismissed her claim under *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), and the Third Circuit affirmed.]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), we held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law.

The *Williamson County* Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a “ripe” federal takings claim in federal court. But as we later held in *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U. S. 323 (2005), a state court’s resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

The *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment. The Civil Rights Act of 1871, after all, guarantees “a federal forum for claims of unconstitutional treatment at the hands of state officials,” and the settled rule is that “exhaustion of state remedies ‘is *not* a prerequisite to an action under [42 U. S. C.] § 1983.’ ” But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.

In *Williamson County*, a property developer brought a takings claim under § 1983 against a zoning board that had rejected the developer's proposal for a new subdivision. *Williamson County* held that the developer's Fifth Amendment claim was not "ripe" for two reasons. First, the developer still had an opportunity to seek a variance from the appeals board, so any taking was therefore not yet final. Knick does not question the validity of this finality requirement, which is not at issue here.

The second holding of *Williamson County* is that the developer had no federal takings claim because he had not sought compensation "through the procedures the State ha[d] provided for doing so." That is the holding Knick asks us to overrule.

The unanticipated consequences of this ruling were not clear until 20 years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. The complaint made clear that the plaintiffs sought relief only under the takings clause of the State Constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held that the full faith and credit statute, 28 U. S. C. § 1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.

[We hold that] [c]ontrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.

We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. The Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution" or any federal law or contract for damages "in cases not sounding in tort." 28 U. S. C. § 1491(a)(1). We have held that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United*

States v. Causby, 328 U. S. 256, 267 (1946). And we have explained that “the act of taking” is the “event which gives rise to the claim for compensation.” *United States v. Dow*, 357 U. S. 17, 22 (1958).

[T]he same reasoning applies to takings by the States. The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner’s federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right. And that is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under § 1983.

Just two years after *Williamson County*, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987), the Court returned to the understanding that the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it. Relying heavily on *Jacobs* and other Fifth Amendment precedents neglected by *Williamson County*, *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that “government action that works a taking of property rights necessarily implicates the ‘constitutional obligation to pay just compensation.’ ”

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. The “general rule” is that plaintiffs may bring constitutional claims under § 1983 “without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.” This is as true for takings claims as for any other claim grounded in the Bill of Rights.

Williamson County drew that understanding of the Clause from *Ruckelshaus v. Monsanto Co.*, [467 U.S. 986 (1984),] a decision from the prior Term. *Monsanto* did not involve a takings claim for just compensation. The plaintiff there sought to enjoin a federal statute because it effected a taking, even though the statute set up a special arbitration procedure for obtaining compensation, and the plaintiff could bring a takings claim pursuant to the Tucker Act if arbitration did not yield sufficient compensation. The Court rejected the plaintiff’s claim because “[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the

sovereign subsequent to the taking.” *Id.*, at 1016 (footnote omitted). That much is consistent with our precedent: Equitable relief was not available because monetary relief was under the Tucker Act.

Other than *Monsanto*, the principal case to which *Williamson County* looked was *Parratt v. Taylor*, 451 U. S. 527 (1981). Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation. Indeed, it was not a takings case at all. *Parratt* held that a prisoner deprived of \$23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. But the analogy from the due process context to the takings context is strained. It is not even possible for a State to provide pre-deprivation due process for the unauthorized act of a single employee. That is quite different from the taking of property *by the government* through physical invasion or a regulation that destroys a property’s productive use.

Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government’s action effecting a taking.

We conclude that a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time. That does not as a practical matter mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting [through equitable relief] will ordinarily not be appropriate. But because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise.

Williamson County was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence.

Because of its shaky foundations, the state-litigation requirement [it created] has been a rule in search of a justification for over 30 years. We eventually abandoned the view that the requirement is an element of a takings claim and recast it as a “prudential” ripeness rule. See *Horne v. Department of Agriculture*, 569 U. S. 513, 525–526 (2013). No party defends that approach here. Respondents have taken a new tack, adopting a § 1983–specific theory at which *Williamson County* did not even hint. The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*.

The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under § 1983. But, as we held in *San Remo*, the state court’s resolution of the plaintiff’s inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a

federal forum that § 1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.

Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court. Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed.

The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government.

JUSTICE THOMAS, concurring.

[A]s the Court correctly explains, the United States’ concerns about injunctions may be misplaced. Injunctive relief is not available when an adequate remedy exists at law. And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory “program.”

Still, “[w]hen the government repudiates [its] duty” to pay just compensation, its actions “are not only unconstitutional” but may be “tortious as well.” *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 717 (1999) (plurality opinion). I do not understand the Court’s opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.

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

Williamson County was rooted in an understanding of the Fifth Amendment’s Takings Clause stretching back to the late 1800s. On that view, a government could take property so long as it provided a reliable mechanism to pay just compensation, even if the payment came after the fact. No longer. The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation—no matter how good its commitment to pay. That conclusion has no basis in the Takings Clause. Its consequence is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts. And it transgresses all usual principles of *stare decisis*. I respectfully dissent.

[T]he Takings Clause is different because it does not prohibit takings; to the contrary, it permits them provided the government gives just compensation. So when the government “takes and pays,” it is not violating the Constitution at all. Put another way, a Takings Clause violation has two necessary elements. First, the government must take the property. Second, it must deny the property owner just compensation. If the government has not done both, no constitutional

violation has happened. All this is well-trod ground. Even the majority (despite its faulty analogy) does not contest it.

Similarly well-settled—until the majority’s opinion today—was the answer to a follow-on question: At what point has the government denied a property owner just compensation, so as to complete a Fifth Amendment violation? For over a hundred years, this Court held that advance or contemporaneous payment was not required, so long as the government had established reliable procedures for an owner to later obtain just compensation (including interest for any time elapsed).

Williamson County followed from those decisions as night the day. Consistent with the century’s worth of precedent I have recounted above, the Court found that no Fifth Amendment violation had yet occurred. ... So the property owner’s claim was “not yet ripe”: The owner could not “claim a violation of the [Takings] Clause until it [had] used the procedure and been denied.”

So contrary to the majority’s portrayal, *Williamson County* did not result from some inexplicable confusion about “how the Takings Clause works.” Far from it. *Williamson County* built on a long line of decisions addressing the elements of a Takings Clause violation.

[T]he majority lays claim to another line of decisions—involving the Tucker Act—but with no greater success. The Tucker Act waives the Federal Government’s sovereign immunity and grants the Court of Federal Claims jurisdiction over suits seeking compensation for takings. See 28 U. S. C. § 1491(a)(1). According to the majority, this Court’s cases establish that such an action “is a claim for a violation of the Fifth Amendment”—that is, for a constitutional offense that has already happened because of the absence of advance payment. But again, the precedents say the opposite. The Tucker Act is the Federal Government’s equivalent of a State’s inverse condemnation procedure, by which a property owner can obtain just compensation. The former, no less than the latter, *forestalls* any constitutional violation by ensuring that an owner gets full and fair payment for a taking.

The majority’s overruling of *Williamson County* will have two damaging consequences. It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism.

To begin with, today’s decision means that government regulators will often have no way to avoid violating the Constitution. There are a “nearly infinite variety of ways” for regulations to “affect property interests.” And under modern takings law, there is “no magic formula” to determine “whether a given government interference with property is a taking.” For that reason, a government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take someone’s property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use regulation (and what government doesn’t?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.

Still more important, the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts—where *Williamson County* put them. The regulation of land use, this Court has stated, is “perhaps the quintessential state activity.” And a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues.

State courts are—or at any rate, are supposed to be—the “ultimate expositors of state law.” The corollary is that federal courts should refrain whenever possible from deciding novel or difficult state-law questions. That stance, as this Court has long understood, respects the “rightful independence of the state governments,” “avoid[s] needless friction with state policies,” and promotes “harmonious relation[s] between state and federal authority.” *Railroad Comm’n of Tex. v. Pullman Co.* (1941) [discussed at page 395 in Chapter in Chapter 7, *supra*]. For that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges’ hands. We may as well not have bothered. Today’s decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism.

[I]n highlighting the preclusion concern, the majority only adds to the case for respecting *stare decisis*—because that issue can always be addressed by Congress. When “correction can be had by legislation,” Justice Brandeis once stated, the Court should let stand even “error[s] on] matter[s] of serious concern.” Here, Congress can reverse the *San Remo* preclusion rule any time it wants [by amending the federal Full Faith and Credit law], and thus give property owners an opportunity—*after* a state-court proceeding—to litigate in federal court.

Replace Notes 2 and 3 with the following Notes on pages 459-60:

2. Injunctive Relief in Takings Cases? One of the Court's primary concerns with overruling *Williamson County* was the potential avalanche of federal cases in federal court could result. The majority felt that the limited availability of declaratory and injunctive relief ameliorated this concern. After all, every State, except Ohio, provides a tort of inverse condemnation, meaning that damages are available and the irreparable harm needed for equitable relief would be missing. The result is that although the Court's holding in *Knick* creates immediate claims for money damages under the Takings Clause, those damage claims already existed under state-law inverse condemnation theories anyway.

3. Shifting Takings Claims to Federal District Courts. The dissent worries that the majority's holding will shift an enormous number of Takings claims for damages from local to federal courts. Is this concern justified? Are federal courts more efficient than local courts? Are federal judges more property-oriented than local judges? Will plaintiffs be eager to proceed to federal court? What about claims against States and their agencies, which are protected by constitutional sovereign immunity? See Chapter 3.A., *supra*. The Court states, after all, that it is speaking only to claims against local regulatory authorities.

4. Using Section 1983 With Takings Claims. Perhaps the most significant result following from the majority's holding in *Knick* is that § 1983 can now be used to prosecute Takings claims, at least those Takings claims against municipal defendants. *Knick* makes clear that a Takings

claim is ripe upon the interference with property; there is no need to first proceed under state law to seek compensation. Along with the availability of § 1983 comes federal attorney-fee shifting under 42 U.S.C. § 1988(b), discussed in Chapter 9, *infra*. Because of *Williamson County* and *San Remo Hotel*, § 1983 and federal fee-shifting was effectively removed from the Takings calculus. Now, whether the Takings claim for damages is pressed in federal or local court, attorney-fee shifting would appear to be available.

5. Exhaustion of Administrative Remedies? *Williamson County* also established that in the context of an uncompensated takings challenge to local zoning requirements a Fifth Amendment challenger must first "ripen" its claims by exhausting its administrative remedies, something that commonly requires seeking a variance. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (noting that the "central question in resolving the ripeness issue ... is whether petitioner obtained a final decision from the Council determining the permitted use for the land"); *Urban Developers LLC v. City of Jackson*, 468 F.3d 281 (5th Cir. 2006) (observing that landowner must use available state procedures for seeking permit or variance). Does *Knick* change override this requirement, too?

In *Pakdel v. City and County of San Francisco*, __ U.S. __ (2021), the Court, in a unanimous per curiam opinion, ruled it does. There, owners were denied the permit needed to convert their tenancy-in-common apartment into a condominium. Rather than pursue available administrative remedies, they brought suit under the Takings Clause and 42 U.S.C. § 1983 in federal court. The Ninth Circuit ruled that their claim was not ripe under *Williamson County* because they had failed to timely pursue their available administrative remedies. The Supreme Court disagreed:

When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a "final" decision.. After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation. In the decision below, however, the Ninth Circuit required petitioners to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but *also* that they had complied with the agency's administrative procedures for seeking relief. Because the latter requirement is at odds with "the settled rule ... that exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. § 1983," *Knick*, we vacate and remand.

The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question ... about how the 'regulations at issue apply to the particular land in question.'" In this case, there is no question about the city's position: Petitioners must "execute the lifetime lease" or face an "enforcement action." And there is no question that the government's "definitive position on the issue [has] inflict[ed] an actual, concrete injury" of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government.

The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually "been

injured by the Government's action” and is not prematurely suing over a hypothetical harm. Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government “regulation has gone ‘too far,’” the court must first “kno[w] how far the regulation goes.” Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution.

The Ninth Circuit's contrary approach—that a conclusive decision is not “final” unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits. ... That guarantee includes “the settled rule” that “exhaustion of state remedies is *not* a prerequisite to an action under ... § 1983.”

The Ninth Circuit's demand that a plaintiff seek “an exemption through the prescribed [state] procedures,” plainly requires exhaustion. In fact, this rule mirrors our administrative-exhaustion doctrine, which “provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” As we have often explained, this doctrine requires “*proper* exhaustion”—that is, “compliance with an agency's deadlines and other critical procedural rules.” Otherwise, parties who would “prefer to proceed directly to federal court” might fail to raise their grievances in a timely fashion and thus deprive “the agency [of] a fair and full opportunity to adjudicate their claims.” Or, in the words of the Ninth Circuit below, parties might “make an end run ... by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant.”

Whatever policy virtues this doctrine might have, administrative “exhaustion of state remedies” is not a prerequisite for a takings claim when the government has reached a conclusive position. To be sure, we have indicated that a plaintiff’s failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision. *See, e.g., Williamson County* (“The Commission's refusal to approve the preliminary plat ... leaves open the possibility that [the plaintiff] may develop the subdivision according to the plat after obtaining the variances”). But, contrary to the Ninth Circuit's view, administrative missteps do not defeat ripeness once the government has adopted its final position. It may very well be ...that misconduct during the administrative process is relevant to “evaluating the *merits* of the ... clai[m]” or the measure of damages. For the limited purpose of ripeness, however, ordinary finality is sufficient.

[3] Adjudicative Decisions by State Agencies

Add the following to the end of Note 4 on page 465:

The Court in an opinion by Justice Alito in *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015), ruled that the federal Trademark Trial and Appeal Board's findings in a trademark matter are entitled to preclusive effect. The fact that its procedures differed from those used in federal court did not counsel otherwise: “Procedural differences, by themselves ...

do not defeat issue preclusion. ... Nor is there reason to think that the state agency in *Elliott* used procedures identical to those in federal court Rather than focusing on whether procedural differences exist—they often will—the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair." Justice Thomas, joined by Justice Scalia, dissented, arguing that administrative preclusion should be disfavored.

Add the following to footnote 32 on page 483:

See also Artis v. District of Columbia, 138 S. Ct. 594 (2018) (holding that 28 U.S.C. 1367(d) "stops the clock" on state statutes of limitations during the pendency of federal proceedings and for an additional 30 days following the dismissal of those federal proceedings).

B. Habeas Corpus and § 1983

[2] Damages

Add the following to the end of the first paragraph of Note 3 on page 500:

The Supreme Court in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), ruled (per Kagan, J.), that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case." Consequently, so-called "malicious prosecution" claims may be brought under the Fourth Amendment. Justice Kagan explained:

The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause. If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.

Justice Kagan elaborated using "the facts alleged in this case. Police officers initially arrested Manuel without probable cause, based solely on his possession of pills that had field tested negative for an illegal substance. So ... Manuel could bring a claim for wrongful arrest under the Fourth Amendment. And the same is true ... as to a claim for wrongful detention—because Manuel's subsequent weeks in custody were *also* unsupported by probable cause, and so *also* constitutionally unreasonable. No evidence of Manuel's criminality had come to light in between the roadside arrest and the County Court proceeding initiating legal process; ... And that means Manuel's ensuing pretrial detention, no less than his original arrest, violated his Fourth Amendment rights."

The Supreme Court in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), which is excerpted, *infra*, ruled that a Due Process challenge to the fabrication and use of evidence in a criminal indictment and prosecution may proceed as a malicious prosecution claim, at least where the § 1983 plaintiff experiences a deprivation through incarceration or some other "restrictions on his ability to travel and other restraints not shared by the public generally." It noted, however, that (as in *Manuel*) it was not deciding whether a "distinct constitutional malicious prosecution claim" exists, and was not addressing the contours of malicious prosecution claims under the Fourth Amendment. The scope of malicious prosecution claims under the Fourth Amendment therefore remains open.

Replace Notes 3 and 4 on page 514 with the following principal case and related Notes:

McDONOUGH v. SMITH
Supreme Court of the United States
139 S. Ct. 2149 (2019)

[McDonough was the commissioner of a county elections board who was investigated and prosecuted for forging ballots by Smith. Smith allegedly fabricated evidence during the investigation and used it to win a grand jury indictment. McDonough was acquitted. McDonough then sued Smith under § 1983 and the Fourteenth Amendment for fabricating the evidence. The District Court dismissed the case under New York's three-year statute of limitations, ruling that McDonough's claim accrued when he learned the evidence was false and had been used against him. The Second Circuit agreed.]

JUSTICE SOTOMAYOR delivered the opinion for the Court.

The statute of limitations for a fabricated-evidence claim like McDonough's does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor. This conclusion follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment.

An accrual analysis begins with identifying “ ‘the specific constitutional right’ ” alleged to have been infringed. Though McDonough's complaint does not ground his fabricated-evidence claim in a particular constitutional provision, the Second Circuit treated his claim as arising under the Due Process Clause. McDonough's claim, this theory goes, seeks to vindicate a “ ‘right not to be deprived of liberty as a result of the fabrication of evidence by a government officer.’ ” We assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.³

³ [n.2] In accepting the Court of Appeals' treatment of McDonough's claim as one sounding in denial of due process, we express no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. § 1983 action. Moreover, because the Second Circuit understood McDonough's due process claim to allege a deprivation of liberty, we have no occasion to

[T]his Court often decides accrual questions by referring to the common-law principles governing analogous torts. These “principles are meant to guide rather than to control the definition of § 1983 claims,” such that the common law serves “ ‘more as a source of inspired examples than of prefabricated components.’ ” [M]alicious prosecution is the most analogous common-law tort here.

Common-law malicious prosecution requires showing, in part, that a defendant instigated a criminal proceeding with improper purpose and without probable cause. The essentials of McDonough’s claim are similar: His claim requires him to show that the criminal proceedings against him—and consequent deprivations of his liberty⁴—were caused by Smith’s malfeasance in fabricating evidence. At bottom, both claims challenge the integrity of criminal prosecutions undertaken “pursuant to legal process.”⁵

We follow the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. As *Heck* explains, malicious prosecution’s favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation. These concerns track “similar concerns for finality and consistency” that have motivated this Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983. Because a civil claim such as McDonough’s, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule.

This case differs from *Heck* because the plaintiff in *Heck* had been convicted, while McDonough was acquitted. Although some claims do fall outside *Heck*’s ambit when a conviction is merely “anticipated,” *Wallace*, however, McDonough’s claims are not of that kind. [H]is claims challenge the validity of the criminal proceedings against him in essentially the

consider the proper handling of a fabricated-evidence claim founded on an allegation that the use of fabricated evidence was so egregious as to shock the conscience, or caused harms exclusively to “interests other than the interest in freedom from physical restraint.” Accordingly, we do not address what the accrual rule would be for a claim rooted in other types of harm independent of a liberty deprivation, as no such claim is before us.

⁴ [n.4] McDonough’s distinct constitutional malicious prosecution claim ... is not before us. This Court has not defined the elements of such a § 1983 claim, see *Manuel v. Joliet*, 580 U. S. — (2017), and this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim. Similarly, while noting that only McDonough’s malicious prosecution claim was barred on absolute-immunity grounds below, we make no statement on whether or how the doctrine of absolute immunity would apply to McDonough’s fabricated-evidence claim. Any further consideration of that question is properly addressed by the Second Circuit on remand, subject to ordinary principles of waiver and forfeiture.

⁵ [n.5] Smith urges the Court to steer away from the comparison to malicious prosecution, noting that the Second Circuit treats malicious prosecution claims and fabricated-evidence claims as distinct. But two constitutional claims may differ yet still both resemble malicious prosecution more than any other common-law tort; comparing constitutional and common-law torts is not a one-to-one matching exercise.

same manner as the plaintiff in *Heck* challenged the validity of his conviction. And the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions. The principles and reasoning of *Heck* thus point toward a corollary result here: There is not “a complete and present cause of action,” to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in the defendant’s favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.

The soundness of this conclusion is reinforced by the consequences that would follow from the Second Circuit’s approach, which would impose a ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them. Such a rule would create practical problems in jurisdictions where prosecutions regularly last nearly as long as—or even longer than—the relevant civil limitations period. A significant number of criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them. The first option is obviously undesirable, but from a criminal defendant’s perspective the latter course, too, is fraught with peril: He risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context. Moreover, as noted above, the parallel civil litigation that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy.

Smith suggests that stays and ad hoc abstention are sufficient to avoid the problems of two-track litigation. Such workarounds are indeed available when claims falling outside *Heck*’s scope nevertheless are initiated while a state criminal proceeding is pending, see *Wallace*; *Heck*, but Smith’s solution is poorly suited to the type of claim at issue here. When, as here, a plaintiff’s claim “necessarily” questions the validity of a state proceeding, there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases. The accrual rule we adopt today, by contrast, respects the autonomy of state courts and avoids these costs to litigants and federal courts.

In deferring rather than inviting such suits, we adhere to familiar principles. The proper approach in our federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor.

Smith’s counterarguments do not sway the result. First, Smith argues that *Heck* is irrelevant to McDonough’s claim, relying on this Court’s opinion in *Wallace*. The Court [there] rejected the plaintiff’s reliance on *Heck*, stating that the *Heck* rule comes “into play only when there exists ‘a conviction or sentence that has *not* been ... invalidated,’ that is to say, an ‘outstanding criminal judgment.’ ” The Court thus declined to adopt the plaintiff’s theory “that an action which would impugn *an anticipated future conviction* cannot be brought until that

conviction occurs and is set aside,” because doing so in the context of an action for false arrest would require courts and litigants “to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict—all this at a time when it can hardly be known what evidence the prosecution has in its possession.”

Wallace did not displace the principles in *Heck* that resolve this case. A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences. That feature made the claim analogous to common-law false imprisonment. By contrast, a claim like *McDonough*’s centers on evidence used to secure an indictment and at a criminal trial, so it does not require “speculat[ion] about whether a prosecution will be brought.” It directly challenges—and thus necessarily threatens to impugn—the prosecution itself.

Second, Smith notes (1) that a fabricated-evidence claim in the Second Circuit (unlike a malicious prosecution claim) can exist even if there is probable cause and (2) that *McDonough* was acquitted. In other words, *McDonough* theoretically could have been prosecuted without the fabricated evidence, and he was not convicted even with it. Because a violation thus could exist no matter its effect on the outcome, Smith reasons, “the date on which that outcome occurred is irrelevant.”

Smith is correct in one sense. One could imagine a fabricated-evidence claim that does not allege that the violation’s consequence was a liberty deprivation occasioned by the criminal proceedings themselves. To be sure, the argument for adopting a favorable-termination requirement would be weaker in that context. That is not, however, the nature of *McDonough*’s claim.

As already explained, *McDonough*’s claim remains most analogous to a claim of common-law malicious prosecution, even if the two are not identical. *Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction, and that rationale extends to an ongoing prosecution as well: The alternative would impermissibly risk parallel litigation and conflicting judgments. If the date of the favorable termination was relevant in *Heck*, it is relevant here.

It does not change the result, meanwhile, that *McDonough* suffered harm prior to his acquittal. The Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. To the contrary, the injury caused by a classic malicious prosecution likewise first occurs as soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date.

Third and finally, Smith argues that the advantages of his rule outweigh its disadvantages as a matter of policy. In his view, the Second Circuit’s approach would provide more predictable guidance, while the favorable-termination approach fosters perverse incentives for prosecutors (who may become reluctant to offer favorable resolutions) and risks foreclosing meritorious

claims (for example, where an outcome is not clearly “favorable”). These arguments are unconvincing. We agree that clear accrual rules are valuable but fail to see how assessing when proceedings terminated favorably will be, on balance, more burdensome than assessing when a criminal defendant “learned that the evidence was false and was used against him” and deprived him of liberty as a result. And while the risk of foreclosing certain claims and the potential incentive effects that Smith identifies could be valid considerations in other contexts,⁶ they do not overcome the greater danger that plaintiffs will be deterred under Smith’s theory from suing for redress of egregious misconduct, nor do they override the guidance of the common law and precedent.

JUSTICE THOMAS, with whom JUSTICE KAGAN and JUSTICE GORSUCH join, dissenting.

We granted certiorari to decide when “the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run.” McDonough, however, declined to take a definitive position on the “threshold inquiry in a [42 U.S.C.] § 1983 suit”: “identify[ing] the specific constitutional right’ at issue.” [B]ecause the constitutional basis for McDonough’s claim is unclear, we are unable to confirm that he has a constitutional claim at all.

Further complicating this case, McDonough raised a malicious-prosecution claim alongside his fabrication-of-evidence claim. The District Court dismissed that claim on grounds of absolute immunity. McDonough has not fully explained the difference between that claim and his fabrication claim, which he insists is both analogous to the common-law tort of malicious prosecution and distinct from his dismissed malicious-prosecution claim.

The better course would be to dismiss this case as improvidently granted and await a case in which the threshold question of the basis of a “fabrication-of-evidence” claim is cleanly presented. Moreover, even if the Second Circuit were correct that McDonough asserts a violation of the Due Process Clause, it would be preferable for the Court to determine the claim’s elements before deciding its statute of limitations.

NOTES

1. Is *Wallace* Limited to Arrest? The majority in *McDonough* asserts that *Wallace* is distinguishable as a false arrest case. False arrest, the *McDonough* Court stated, “has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences.” A constitutional challenge that goes beyond an arrest “without legal process” and “directly challenges—and thus necessarily threatens to impugn—the prosecution itself,” like that in *McDonough*, presents a different problem and produces a different result. Does this mean that *Wallace* and its early

⁶ [n.10] Because McDonough’s acquittal was unquestionably a favorable termination, we have no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused. To the extent Smith argues that the law in this area should take account of prosecutors’ broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped, those arguments more properly bear on the question whether a given resolution should be understood as favorable or not. Such considerations might call for a context-specific and more capacious understanding of what constitutes “favorable” termination for purposes of a § 1983 false-evidence claim, but that is not the question before us.

accrual logic is effectively limited to challenges that seek only damages for unconstitutional arrests that occur "without legal process"? Can plaintiffs avoid *Wallace* by claiming that arrests and seizures were subject to legal process but still violated the Fourth Amendment? *See, e.g., Thompson v. Clark*, 794 Fed. Appx. 140 (2d Cir. 2020), *cert. granted*, No. 20-659 (U.S., March 8, 2021) (challenging warrantless home entry and arrest as "unreasonable seizure pursuant to legal process") (discussed in the next Note). For insight into so-called "false arrest" claims under § 1983 and the procedural problems they create, see Terressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C.L. REV. 379 (2021).

2. Favorable Termination. *Heck v. Humphrey* holds that where a damage claim "would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ..., or called into question by a federal court's issuance of a writ of habeas corpus." According to *Wallace v. Kato*, meanwhile, "the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has not been ... invalidated, that is to say, an outstanding criminal judgment." This does not include "an action which would impugn an anticipated future conviction" *Id.* *McDonough v. Smith* then adds that a claim subject to *Heck* cannot be brought "under § 1983 prior to favorable termination of [] prosecution"

Obviously, an acquittal, reversal on direct appeal, expunction, successful habeas petition and the like constitute "favorable terminations" under *Heck*. The plaintiff in *McDonough*, for example, was acquitted, while the plaintiff in *Wallace* had his conviction reversed on appeal. But what constitutional challenges under § 1983 that follow simple dismissals of criminal proceedings? Does a dismissal of criminal charges constitute a "favorable termination" within the meaning of *Heck*?

The Supreme Court in *Thompson v. Clark*, 794 Fed. Appx. 140 (2d Cir. 2020), *cert. granted*, No. 20-659 (U.S., March 8, 2021), granted review to decide "[w]hether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," or that the proceeding "ended in a manner that affirmatively indicates his innocence." The Second Circuit in that case ruled that a dismissal of criminal charges for resisting arrest following a warrantless home entry by police was not sufficient to constitute a "favorable termination," and consequently that the § 1983 claim challenging the warrantless entry and arrest under the Fourth Amendment remained barred by *Heck v. Humphrey*.

Chapter 9. Attorney's Fees

A. Prevailing Party

Add the following to the end of Note 6 on page 524:

Compare Justice Kavanaugh's ruling in *Thole v. U.S. Bank NA*, 140 S. Ct. 1615 (2020) ("If Thole and Smith were to *win* this lawsuit, they would still receive the exact same monthly benefits that

they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit. To be sure, their attorneys have a stake in the lawsuit, but an “interest in attorney’s fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.”), with Justice Alito’s dissent in *New York State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (Alito, J., dissenting) (“On the other hand, dismissing the case as moot means that petitioners are stuck with the attorney’s fees they incurred in challenging a rule that the City ultimately abandoned—and which it now admits was not needed for public safety. That is so because “[a] defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.” Section 1988 attorney’s fees are an important component of civil rights enforcement. The prospect of an award of attorney’s fees ensures that “private attorneys general” can enforce the civil rights laws through civil litigation, even if they ‘cannot afford legal counsel.’”).

Add the following new Note 8 on page 524:

8. Attorney’s Fees and Finality for Appeal. The Supreme Court has long held that a pending motion for attorney’s fees is collateral to the merits of a case and therefore does not render a judgment anything less than final for purposes of appeal. Consequently, a losing party must perfect its appeal within the required time period notwithstanding a pending motion for attorney’s fees. The Supreme Court reiterated this point in *Ray Haluch Gravel Co. v. Central Pension Fund*, 571 U.S. 177 (2014), where it also elaborated on the Federal Rules of Civil Procedure supporting this result:

Rule 58(e) ... provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. Rule 58(e) further provides that if a timely motion for attorney’s fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4 (a)(4). This delays the running of the time to file an appeal until the entry of the order disposing of the fee motion. Rule 4(a)(4)(A)(iii).

Add the following to the end of Note 1 on page 532:

In *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017), the Court (in a unanimous opinion by Justice Kagan) analogized fee-shifting based on bad-faith conduct to the analysis applied in *Fox*. In so doing, Justice Kagan elaborated on the approach applied in *Fox*:

In *Fox*, a prevailing defendant sought reimbursement under a fee-shifting statute for legal expenses incurred in defending against several frivolous claims. The trial court granted fees for all legal work relating to those claims—regardless of whether the same work would have been done (for example, the same depositions taken) to contest the *non*-frivolous claims in the suit. We made clear that was wrong. When a “defendant would have incurred [an] expense in any event[,] he has suffered no incremental harm from the frivolous claim,” and so the court lacks a basis for shifting the expense. ... This but-for

causation standard generally demands that a district court assess and allocate specific litigation expenses—yet still allows it to exercise discretion and judgment. The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued. But as we stressed in *Fox*, trial courts undertaking that task “need not, and indeed should not, become green-eyeshade accountants” (or whatever the contemporary equivalent is). “The essential goal” in shifting fees is “to do rough justice, not to achieve auditing perfection.” Accordingly, a district court “may take into account [its] overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.” *Ibid*. The court may decide, for example, that all (or a set percentage) of a particular category of expenses—say, for expert discovery—were incurred solely because of a litigant's bad-faith conduct. And such judgments, in light of the trial court's “superior understanding of the litigation,” are entitled to substantial deference on appeal.

Add the following new Note 4 on page 533:

4. Dismissals Based on Lack of Jurisdiction. Must a defendant win a decision “on the merits” in order to prevail and be entitled to fees? Or might it be sufficient that the court has merely dismissed the plaintiff's complaint based on some jurisdictional defect? In *CRST Van Expedited v. Equal Employment Opportunities Commission*, 136 S. Ct. 1642 (2016), the Court (per Justice Kennedy) ruled that even dismissals that are not technically “on the merits” may support defendants' rights to attorneys' fees:

There is no indication that Congress intended that defendants should be eligible to recover attorney's fees only when courts dispose of claims on the merits. The congressional policy regarding the exercise of district court discretion in the ultimate decision whether to award fees does not distinguish between merits-based and non-merits-based judgments. ... The Court, therefore, has interpreted the statute to allow prevailing defendants to recover whenever the plaintiff's “claim was frivolous, unreasonable, or groundless.” It would make little sense if Congress' policy of “sparing defendants from the costs of *frivolous* litigation,” depended on the distinction between merits-based and non-merits-based frivolity.

A plaintiff's claim may be frivolous, unreasonable, or groundless if the claim is barred by state sovereign immunity, or is moot. In cases like these, significant attorney time and expenditure may have gone into contesting the claim. Congress could not have intended to bar defendants from obtaining attorney's fees in these cases on the basis that, although the litigation was resolved in their favor, they were nonetheless not prevailing parties.

Having abandoned its defense of the Court of Appeals' reasoning, the Commission now urges this Court to hold that a defendant must obtain a preclusive judgment in order to prevail. The Court declines to decide this issue, however.

Add the following new Note 5 on page 533:

5. Does § 1988(b) Limit State Courts? Does 42 U.S.C. § 1988(b)'s restriction on awarding attorney's fees to successful defendants to frivolous claims apply in state courts? In *James v. City of Boise*, 136 S. Ct. 685 (2016), the Idaho Supreme Court concluded that it could award attorney's fees to a city that had successfully defended a federal suit regardless of whether the plaintiff's federal claim was frivolous. The Supreme Court summarily reversed: "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.' The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise."

C. Limits Under the Prison Litigation Reform Act

Add the following as the principal reading on page 549:

MURPHY v. SMITH
Supreme Court of the United States
138 S. Ct. 784 (2018)

JUSTICE GORSUCH delivered the opinion of the Court.

This is a case about how much prevailing prisoners must pay their lawyers. When a prisoner wins a civil rights suit and the district court awards fees to the prisoner's attorney, a federal statute says that "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2). Whatever else you might make of this, the first sentence pretty clearly tells us that the prisoner has to pay some part of the attorney's fee award before financial responsibility shifts to the defendant. But how much is enough? Does the first sentence allow the district court discretion to take *any* amount it wishes from the plaintiff's judgment to pay the attorney, from 25% down to a penny? Or does the first sentence instead mean that the court must pay the attorney's entire fee award from the plaintiff's judgment until it reaches the 25% cap and only then turn to the defendant?

The facts of our case illustrate the problem we face. After a jury trial, the district court entered judgment for Charles Murphy in the amount of \$307,733.82 against two of his prison guards, Officer Robert Smith and Lieutenant Gregory Fulk. The court also awarded Mr. Murphy's attorney \$108,446.54 in fees. So far, so good. But then came the question who should pay what portion of the fee award. The defendants argued that, under the statute's terms, the court had to take 25% (or about \$77,000) from Mr. Murphy's judgment before taxing them for the balance of the fee award. The court, however, refused that request. Instead, it ordered that Mr. Murphy "shall pay 10% of [his] judgment" (or about \$31,000) toward the fee award, with

the defendants responsible for the rest. ... [D]id the district court have latitude to apply 10% (or some other discretionary amount) of the plaintiff's judgment to his attorney's fee award instead of 25%?

As always, we start with the specific statutory language in dispute. That language (again) says “a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded.” § 1997e(d)(2). And we think this much tells us a few things. First, the word “shall” usually creates a mandate, not a liberty, so the verb phrase “shall be applied” tells us that the district court has some nondiscretionary duty to perform. Second, immediately following the verb we find an infinitival phrase (“to satisfy the amount of attorney's fees awarded”) that specifies the purpose or aim of the verb's non-discretionary duty. Third, we know that when you purposefully seek or aim “to satisfy” an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full. Together, then, these three clues suggest that the court (1) *must* apply judgment funds toward the fee award (2) with the *purpose* of (3) *fully discharging* the fee award. And to meet *that* duty, a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap. If Congress had wished to afford the judge more discretion in this area, it could have easily substituted “may” for “shall.” And if Congress had wished to prescribe a different purpose for the judge to pursue, it could have easily replaced the infinitival phrase “to satisfy ...” with “to reduce ...” or “against....” But Congress didn't choose those other words.

Mr. Murphy's reply does more to hurt than help his cause. Consider, he says, college math credits that the college prospectus says shall be “applied to satisfy” a chemistry degree. No one, the argument goes, would understand that phrase to suggest a single math course will fully discharge all chemistry degree requirements. We quite agree, but that is beside the point. In Mr. Murphy's example, as in our statute, the word “satisfy” does not suggest some hidden empirical judgment about *how often* a math class will satisfy a chemistry degree. Instead it serves to tell the college registrar *what purpose* he must pursue when handed the student's transcript: the registrar must, without discretion, apply those credits toward the satisfaction or discharge of the student's credit obligations. No doubt a college student needing three credits to graduate who took a three-credit math course would be bewildered to learn the registrar thought he had discretion to count only two of those credits toward her degree. So too here. It doesn't matter how many fee awards will be fully satisfied from a judgment without breaking the 25% cap, or whether any particular fee award could be. The statute's point is to instruct the judge about the purpose he must pursue—to discharge the fee award using judgment funds to the extent possible, subject to the 25% cap.

Retreating now, Mr. Murphy contends that whatever the verb and the infinitival phrase mean, the subject of the sentence—“a *portion* of the judgment (not to exceed 25 percent)” —necessarily suggests wide judicial discretion. This language, he observes, anticipates a *range* of amounts (some “portion” up to 25%) that can be taken from his judgment. And the existence of the range, Mr. Murphy contends, necessarily means that the district court must enjoy discretion to pick *any* “portion” so long as it doesn't exceed the 25% cap.

But that does not logically follow. Under *either* side's reading of the statute the portion of fees taken from the plaintiff's judgment will vary over a range—whether because of the district court's discretionary choice (as Mr. Murphy contends), or because of the variance in the size of fee awards themselves, which sometimes will be less than 25% of the judgment (as Officer Smith and Lieutenant Fulk suggest). If the police have two suspects in a robbery committed with a red getaway car, the fact that one suspect drives a red sedan proves nothing if the other does too. The fact that the statute contemplates a range of possible “portion[s]” to be paid out of the judgment, thus, just doesn't help identify which of the two proposed interpretations we should adopt for both bear that feature.

Nor does the word “portion” necessarily denote unfettered discretion. If someone told you to follow a written recipe but double the portion of sugar, you would know precisely how much sugar to put in—twice whatever's on the page. And Congress has certainly used the word “portion” in just that way. ... So the question is how has Congress used the word “portion” in this statute? And as we have explained, the text persuades us that, subject to the 25% cap, the size of the relevant “portion” here is fixed by reference to the size of the attorney's fee award, not left to a district court's unguided choice.

Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties' positions. Section 1988(b) confers discretion on district courts in unambiguous terms: “[T]he court, in its *discretion*, *may* allow the prevailing party ... a *reasonable* attorney's fee as part of the costs” against the defendant. (Emphasis added.) Meanwhile, § 1997e(d) expressly qualifies the usual operation of § 1988(b) in prisoner cases.

The surrounding statutory structure of § 1997e(d) reinforces this conclusion. Like paragraph (2), the other provisions of § 1997e(d) *also* limit the district court's pre-existing discretion under § 1988(b). These provisions limit the fees that would otherwise be available under § 1988 to cover only certain kinds of lawyerly tasks, see §§ 1997e(d)(1)(A) and (B)(ii); they require proportionality between fee awards and the relief ordered, see § 1997e(d)(1)(B)(i); and they restrict the hourly rate of the prisoner's lawyer, see § 1997e(d)(3). All this suggests a statute that seeks to restrain, rather than replicate, the discretion found in § 1988(b).

Notably, too, the discretion Mr. Murphy would have us introduce into § 1997e doesn't even sit easily with our precedent under § 1988. Our cases interpreting § 1988 establish “[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a ‘reasonable’ fee.” To be sure, before the lodestar became “the guiding light of our fee shifting jurisprudence,” many lower courts used one of your classic 12-factor balancing tests. Ultimately, though, this Court rejected undue reliance on the 12-factor test because it “gave very little actual guidance to district courts [,] ... placed unlimited discretion in trial judges[,] and produced disparate results.”

At the end of the day, what may have begun as a close race turns out to have a clear winner. Now with a view of the full field of textual, contextual, and precedential evidence, we think the interpretation the court of appeals adopted prevails. In cases governed by § 1997e(d),

we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.

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

The text of § 1997e(d)(2)—“a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant”—and its statutory context make clear that the provision permits district courts to exercise discretion in choosing the portion of a prisoner-plaintiff's monetary judgment that must be applied toward an attorney's fee award, so long as that portion is not greater than 25 percent.

The crux of the majority's reasoning is its definition of the infinitive “to satisfy.” The majority contends that “when you purposefully seek or aim ‘to satisfy’ an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full.”

But the phrase “to satisfy” as it is used in § 1997e(d)(2) does not bear the weight the majority places on it. Its neighboring text and the realities of prisoner-civil-rights litigation rebut the conclusion that “to satisfy” compels a district court always to maximize the amount of the prisoner-plaintiff's judgment to be contributed to the fee award, and instead indicate that the only work “to satisfy” does in the statute is to direct a district court to contribute some amount of the judgment toward payment of the fee award.

Beginning with the neighboring text, it may well be that, standing alone, “to satisfy” is often used to mean “to completely fulfill an obligation.” But the statutory provision here does not simply say “to satisfy”; it says “applied to satisfy.” As a matter of everyday usage, the phrase “applied to satisfy” often means “applied toward the satisfaction of,” rather than “applied in complete fulfillment of.” Thus, whereas an action undertaken “to satisfy” an obligation might, as the majority suggests, naturally be understood as an effort to discharge the obligation in full, a contribution that is “applied to satisfy” an obligation need not be intended to discharge the obligation in full.

Take a few examples: A consumer makes a payment on her credit card, which her agreement with the card company provides shall be “applied to satisfy” her debt. A student enrolls in a particular type of math class, the credits from which her university registrar earlier announced shall be “applied to satisfy” the requirements of a physics degree. And a law firm associate contributes hours to a *pro bono* matter that her firm has provided may be “applied to satisfy” the firm's overall billable-hours requirement. In each case, pursuant to the relevant agreement, the payment, credits, and hours are applied toward the satisfaction of a larger obligation, but the inference is not that the consumer, student, or associate had to contribute or even necessarily did contribute the maximum possible credit card payment, classroom credits, or hours toward the fulfillment of those obligations. The consumer may have chosen to make the minimum credit card payment because she preferred to allocate her other funds elsewhere; the student may have chosen the four-credit version of the math course over the six-credit one because the former had a better instructor; and the associate may have been judicious about the

hours she dedicated to the *pro bono* matter because she knew her firm more highly valued paid over *pro bono* work. So, too, here. Section 1997e(d)(2), like the credit card agreement, university registrar announcement, and law firm policy, sets out the relevant rule—“a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy” the fee award—and the district court, like the consumer, student, and law firm associate, decides how much of the judgment to apply.

As a practical matter, moreover, a district court will almost never be able to discharge fully a fee award from 25 percent of a prisoner-plaintiff's judgment. In the vast majority of prisoner-civil-rights cases, the attorney's fee award exceeds the monetary judgment awarded to the prevailing prisoner-plaintiff. In fiscal year 2012, for instance, the median damages award in a prisoner-civil-rights action litigated to victory (*i.e.*, not settled or decided against the prisoner) was a mere \$4,185. Therefore, in 2012, the maximum amount (25 percent) of the median judgment that could be applied toward an attorney's fee award was \$1,046.25. The PLRA caps the hourly rate that may be awarded to a prisoner-plaintiff's attorney at 150 percent of the rate for court-appointed counsel under 18 U.S.C. § 3006A, which in 2012 was \$125. Thus, a prisoner's attorney was entitled to up to \$187.50 per hour worked. Even if a district court were to apply an hourly rate of just \$100, well below the cap, unless the attorney put in fewer than 10.5 hours in the ordinary case—a virtually unimaginable scenario—25 percent of the judgment will not come close to discharging fully the attorney's fee award.

Given the very small judgment awards in successfully litigated prisoner-civil-rights cases, it is hard to believe, as the majority contends, that Congress used “applied to satisfy” to command an effort by district courts to “discharge ... in full,” when in most cases, full discharge will never be possible. Rather, taking into account both the realities of prisoner-civil-rights litigation and the most natural reading of “applied to satisfy,” the more logical inference is that § 1997e(d)(2) simply requires that a portion of the prevailing prisoner-plaintiff's judgment be applied toward the satisfaction of the attorney's fee award. It does not, however, demand that the district court always order the prisoner-plaintiff to pay the maximum possible portion of the judgment (up to 25 percent) needed to discharge fully the fee award.