CONSTITUTIONAL LITIGATION UNDER § 1983

THIRD EDITION

2018 Supplement

Mark R. Brown
Newton D. Baker/Baker & Hostetler Professor of Law
Capital University Law School

Kit Kinports
Professor of Law & Polisher Family Distinguished Faculty Scholar
Pennsylvania State University, The Dickinson School of Law

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Table of Contents

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, 135 S. Ct. 1225 (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").

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

See also Kingsley v. Hendrickson, 135 S. Ct. 2466 (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 end of first paragraph in Note 2 on page 56:

In *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (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 Justices in dissent. She argued that "[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.

Chapter 2. Official Immunities

B. Qualified Immunity

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").

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

Cf. 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*, 135 S. Ct. 348 (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*, 135 S. Ct. 348 (2014) (per curiam)). For the argument that recent 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*, 134 S. Ct. 2056 (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 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*, 134 S. Ct. 2369 (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.'"

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 CAL. 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 *Hernandez 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 the 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 Amendments 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." On remand, a majority of the en banc Fifth Circuit observed that "this is not a garden variety excessive force case," and the court concluded that "[t]he transnational aspect of the facts presents a 'new context' under *Bivens*, and numerous 'special factors' counsel against federal courts' interference with the Executive and Legislative branches of the federal government." *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) (en banc).

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

See also Plumhoff v. Rickard, 134 S. Ct. 2012 (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[ied] 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").

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*, 135 S. Ct. 530 (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 to 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*, 135 S. Ct. 346 (2014), 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 after the third paragraph of Note 8 following *Safford Unified School District #1 v. Redding* on page 121:

See also Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (distinguishing *Johnson v. Jones* and allowing appeal of denial of summary judgment in 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, 134 S. Ct. 1861 (2014) (per curiam) (reversing grant of qualified immunity in 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:

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, but the case was ultimately affirmed by an equally divided vote. The Court did rule, however, 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. *See Franchise Tax Board v. Hyatt*, 136 S. Ct. 1277 (2016).

Chapter 4. Local Liability

A. Congressional Intent

Add the following to 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, a supervisory official can be held liable 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 *any* prison official who, 'acting with deliberate indifference, expose[s] a prisoner to a sufficiently substantial risk of serious damage to his future health,' violates the Eighth Amendment") (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). *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'").

In summarily reversing the Third Circuit's opinion in *Barkes* on other grounds, the Supreme Court pointed out that the court of appeals found that the plaintiffs "had alleged a cognizable theory of supervisory liability," but the Supreme Court refused to "express [a] view" on that question. *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam).

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).

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 § 1983for 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 6. Remedies Under § 1983

A. Compensatory Damages

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.

Add to the end of Note 3 on page 315:

The Supreme Court in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the Supreme Court once again granted review to address "whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under § 1983." As in *Reichle v. Howards*, 566 U.S. 658 (2012), however, it avoided the precise question, ruling instead that where a

plaintiff is arrested pursuant to an official city policy (as the plaintiff in *Lozman* alleged), the plaintiff "need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City."

In *Bartlett v. Nieves*, 712 Fed. Appx. 613 (9th Cir. 2017), the Ninth Circuit ruled that Hartman v. Moore does not extend to retaliatory arrest claims under the First Amendment. The Supreme Court granted review to address the following question: "Does probable cause likewise defeat a First Amendment retaliatory-arrest claim under § 1983?" *Nieves v. Bartlett*, __ S. Ct. __ (June 28, 2018).

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.

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,* 134 S. Ct. 2334 (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/).

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*, 135 S. Ct. 2443 (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.'"

[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 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 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

[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*, 135 S. Ct. 1124 (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

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

[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."

> 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."

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."

[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.*, 135 S. Ct. 1293 (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."

Add the following to the end of Note 3 on page 514:

The Supreme Court in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), which (per Kagan, J.) ruled that the Fourth Amendment embraces malicious prosecution claims as well as false arrest claims, broached these many questions without deciding them. It instead remanded to the Seventh Circuit to address in the first instance precisely when a Fourth Amendment malicious prosecution claim accrues. Justice Kagan offered the following comments to help guide the Seventh Circuit:

> In defining the contours and prerequisites of a § 1983claim, including its rule of accrual, courts are to look first to the common law of torts. Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving "more as a source of inspired examples than of prefabricated components." In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue.
>
> With these precepts as backdrop, Manuel and the City offer competing views about what accrual rule should govern a § 1983 suit challenging post-legal-process pretrial detention. According to [the plaintiff and the United States as amicus curiae], that Fourth Amendment claim accrues only upon the dismissal of criminal charges—here, on May 4, 2011, less than two years before he brought his suit. Relying on this Court's caselaw, Manuel analogizes his claim to the common-law tort of malicious prosecution. An element of that tort is the "termination of the ... proceeding in favor of the accused"; and accordingly, the statute of limitations does not start to run until that termination takes place. [Citing Wallace and Heck.] [The plaintiff and the United States] argue[] that following the same rule in suits like his will avoid "conflicting resolutions" in § 1983 litigation and criminal proceedings by "preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution." In support of Manuel's position, all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a "favorable termination" element and so pegged the statute of limitations to the dismissal of the criminal case. [The remaining two Circuits have yet to address the issue.] That means in the great majority of Circuits, Manuel's claim would be timely.

The City, however, contends that any such Fourth Amendment claim accrues (and the limitations period starts to run) on the date of the initiation of legal process. According to the City, the most analogous tort to Manuel's constitutional claim is not malicious prosecution but false arrest, which accrues when legal process commences. And even if malicious prosecution were the better comparison, the City continues, a court should decline to adopt that tort's favorable-termination element and associated accrual rule in adjudicating a § 1983 claim involving pretrial detention. That element, the City argues, "make[s] little sense" in this context because "the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures." We leave consideration of this dispute to the Court of Appeals.

Chapter 9. Attorney's Fees

A. Prevailing Party

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 Hough Gravel Co. v. Central Pension Fund*, 134 S. Ct. 773 (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.