The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs

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Melissa L. Koehn*

Fifteen percent of the decisions issued by the Supreme Court during its 1996–97 Term centered around section 1983. Section 1983 provides civil rights plaintiffs with a procedural mechanism for vindicating their federally protected rights, including those enshrined in the Constitution. The Court’s decisions from its 1996–97 Term reflect a continuation of the alarming trend that has permeated section 1983 for the last two decades—a movement to decrease the scope of section 1983, regardless of the impact on constitutional rights. The Supreme Court appears to be creating a hierarchy both of constitutional rights and of plaintiffs: free speech and takings claims are favored at the top of the heap, while prisoner civil rights actions and suits against police officers are disfavored at the bottom of the heap. In this Article, Professor Koehn explores the section 1983 decisions from the 1996–97 Term and concludes that they raise a troubling concern that, whether intentionally or unintentionally, the Supreme Court is creating a system in which prisoners, Indians, and persons suing police departments are not entitled to full constitutional protection.

Introduction

America isn’t easy. America is advanced citizenship. You’ve gotta want it bad, because it’s gonna put up a fight. It’s gonna say, You want free speech? Let’s see you acknowledge a man whose words make your blood boil, who’s standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours.

You want to claim this land is a land of the free? Then the symbol of your country cannot just be a flag. The symbol also has to be one of its citizens exercising his right to burn that flag in protest.

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Now show me that. Defend that. Celebrate that in your classrooms. Then you can stand up and sing about the land of the free.¹

The author of these words has clearly captured the theory behind the Bill of Rights—that our constitutional protections exist not just for those in the majority or for those espousing popular opinions. Constitutional protections also shield the minority from attack by those in the majority. They extend protections our society has deemed fundamental to all citizens, not just to those whose views are in vogue at any given moment. The Supreme Court seems to have forgotten that fundamental purpose of the Bill of Rights.

During the October 1996 Term, the Supreme Court handed down 81 opinions. Ten of those were section 1983² cases, and two others were directly related to section 1983.³ These cases reflect a continuation of the alarming trend that has permeated section 1983 decisions for the last two decades—a movement to decrease the scope of section 1983, regardless of the impact on constitutional rights.⁴ The Supreme Court appears to be creating a

¹ The American President (Castle Rock Entertainment et al. 1995). This speech is given near the end of the movie by Michael Douglas' character, the President of the United States.
² 42 U.S.C. § 1983 (1994). This statute provides a procedural mechanism for bringing a civil action to vindicate deprivations of federally-protected rights.
³ These two cases are United States v. Lanier, 520 U.S. 259 (1997), and Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997). Lanier was a criminal action under 18 U.S.C. § 242, the criminal analogue of section 1983. See Lanier, 520 U.S. at 271-72 (discussing similarity of civil and criminal liability under sections 1983 and 242). Section 242 makes it a crime to "willfully subject[ ] any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ." Lanier, 520 U.S. at 264 n.3 (quoting 18 U.S.C. § 242). Coeur d'Alene Tribe was an Eleventh Amendment case in which the Court held that the Ex parte Young exception did not apply to a suit brought by a federal Indian tribe that sought to quiet title to specific lands. See Coeur d'Alene Tribe, 117 S. Ct. at 2043. Accordingly, the federal courts were barred from hearing the case. For a discussion regarding the relationship of the Eleventh Amendment and Ex parte Young to section 1983 cases, see infra Part II.A.
⁴ This trend has been recognized and commented on by many scholars, as well as members of the Supreme Court. See Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. REV. 1 (1985). Blackmun acknowledges the reduction in the scope of section 1983:

In certain instances, the Court appears inclined to cut back on § 1983 in any way it can, short of ignoring the language of the statute or existing rulings. The common theme of some of the recent decisions seems to me to be that § 1983 should be construed to minimize federal judicial intervention in state affairs whenever possible, regardless of the impact on the ability of federal courts to protect constitutional rights.
hierarchy both of constitutional rights and of plaintiffs: free speech and takings claims are favored at the top of the heap, while prisoner civil rights actions and suits against police officers are disfavored at the bottom of the heap.

Obviously, the Court cannot, and does not, simply announce, "Plaintiff, we don't like you; therefore, you lose." Rather, the Court has created the hierarchy by manipulating the procedural barriers that must be overcome before the courts can reach the merits of plaintiffs' claims. Plaintiffs raising free speech claims or takings claims generally confront relatively low procedural barriers. Plaintiffs who are prisoners or who sue police officers generally confront an amazing thicket of procedural snarls which often prevent federal courts from hearing the merits of their claims.

I do not contend that section 1983 cases are the only area in which the Supreme Court has manipulated the law—it is common knowledge that the justices occasionally play fast and loose with rules of law. Instead, this Article is an effort to start the process of questioning whether the Supreme Court has systematically manipulated section 1983 law to create a subclass of citizens who are not entitled to full constitutional protection. If so, recognition of that manipulation is the first step toward correcting it.

Id. at 23-24; see also Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 STAN. L. REV. 51 (1989). Beermann has also recognized this "hostile" trend:

Commentators have long attacked the Court's method of construing § 1983, charging the Court with [a variety of motives]. To these allegations I would add the charge that some justices are outright hostile to § 1983 and to § 1983 plaintiffs, and veil their hostility only thinly beneath the most rudimentary, unelaborated "policy arguments."


5. See discussion infra Part III.
6. See infra notes 366-73 and accompanying text.
7. See discussion infra Part II.
8. Anyone who has ever studied Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is aware of this fact.
9. I do not challenge the Court's prior holdings that many constitutional rights do not operate at full force for people who are incarcerated. See Hudson v. Palmer, 468 U.S. 517, 526 (1984) (holding that a prisoner has no Fourth Amendment protection against unreasonable searches); see also Jones v. Metzger, 456 F.2d 854, 855 (6th Cir. 1972) (stating that some of a prisoner's constitutional rights may be impinged for security or rehabilitative purposes); cf. Price v. Johnston, 334 U.S. 286, 299-92 (1948) (expressing that, while the writ
Part I of this Article takes a brief look at section 1983 and its basic requirements with the goal of laying the foundation for understanding the Court's section 1983 jurisprudence and how the Court has begun the manipulation process. Part II continues this examination by focusing on four areas that have provided the source of many procedural rules: the Eleventh Amendment, qualified immunity, municipal liability, and the overlap between section 1983 and habeas corpus. All four of these areas were before the Court during the 1996–97 Term. After looking briefly at the historical development of the law in each of these four areas, Part II will examine how the Court's opinions from the 1996–97 Term contributed to the development of these procedural barriers. Finally, Part III will contrast decisions where the Court has raised the procedural barriers with decisions where the Court has gone out of its way to collapse those barriers and reach the merits of the case. Part III concludes by attempting to discern what is motivating the Court's analysis.

I. A Brief Look at the Background of Section 1983

Section 1983 provides a procedural mechanism for vindicating federally-protected rights. The statute declares:

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

This statute has changed little since it was first enacted in 1871 as part of the post-Civil War Reconstruction efforts. By the plain language of the statute, a plaintiff (who must be either a U.S. citizen or a person within the jurisdiction of the United States) must

of habeas corpus has played a major role in lifting restraints on personal liberty, district courts are not required to grant habeas corpus petitions in cases of numerous and successive filings by individual prisoners that are deemed to be an abuse of the system). The Court often seems determined, however, to obstruct prisoners' efforts to enforce even the limited constitutional rights they do enjoy.

11. Id.
prove that the defendant is (1) a person (2) who deprived plaintiff of a federally-protected right (3) while acting under color of state law. Although the statute seems straightforward and relatively simple, it actually contains a great deal of ambiguity, at least as interpreted by the Supreme Court. These ambiguities include:

- Who is a “person”? Does the word include only natural persons, or does it also refer to agencies and other corporate entities?
- What is a “federally protected right”? Can a plaintiff sue under any provision of the Constitution or any portion of any federal statute?
- What does it mean to act “under color of state law”?
- What is the relevant standard of proof? Who bears the burden of proof?
- Are defendants protected by any form of immunity?

Part II will examine some of these ambiguities and how the Court has dealt with them.

The key thing to remember is that section 1983 is a procedural mechanism. In and of itself, it conveys no substantive rights. As part of their suits, section 1983 plaintiffs must plead and prove a violation of a federally-protected right. This “federally-protected right” can be either a constitutional or statutory right, but this Article focuses solely on constitutionally-protected rights.

12. See id.
14. Certain federal statutes can serve as the basis of a section 1983 action. See infra note 18 and accompanying text.
15. For an overview of how the Supreme Court has interpreted the “under color of state law” requirement, see JOSEPH G. COOK & JOHN G. SOBIESKI, JR., CIVIL RIGHTS ACTIONS ¶ 7.10 (1998).
16. The relevant burden of proof varies depending on the specific issue in question. See id. chs. 2, 3, 7, & 14.
17. Most defendants are covered by some form of immunity. See id. ¶ 2.06-2.11; see also infra Part II.B.
18. A plaintiff using section 1983 to enforce a federal statutory right must prove many of the same basic elements as a plaintiff using section 1983 to vindicate a constitutional right, but the details of the litigation can differ. For example, not all statutes can be the subject of a section 1983 action, even if they do create individual rights. Indeed, the Court recently addressed this precise issue in Blessing v. Freestone, 520 U.S. 329 (1997). In Blessing, the Court reiterated that a plaintiff seeking to use section 1983 to enforce a federal statutory right must prove that: (1) “Congress must have intended that the provision in question
At first glance, section 1983 seems sweeping and its purpose clear—the statute is both a remedial measure and a preemptive warning to states. Section 1983 is designed to provide an individual with a means to enforce constitutionally-protected rights and to provide states and state employees with a deterrent against violating those rights. Congress knew that federal resources were limited and the federal government could not monitor the actions of every state and local government employee, so section 1983 gives the “man on the street” the ability to enforce his or her own constitutional rights in court.

To further enable persons seeking to protect federal rights to bring actions, Congress enacted 42 U.S.C. § 1988 in 1976. Section 1988 allows certain “prevailing parties” (including those who filed suit under section 1983) to recover attorneys’ fees as part of their costs. The phrase “prevailing party” has become a term of art. The intent, obviously, is to encourage attorneys to pursue civil rights cases and to make it easier for indigents to find attorneys to enforce and defend their rights. Section 1988 reinforces the seriousness of Congress’ intent to protect the constitutional rights of all persons within the borders of the United States. Congress did not want a subclass of poor citizens to develop. The Constitution protects all citizens, not just those with enough money to fight in court. Section 1988 is a means to achieve that goal.

In addition, the Supreme Court has repeatedly declared that remedial statutes should be interpreted liberally in order to fulfill Congress’ intent. The Court has even declared that section 1983

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20. Section 1983 suits can be filed in state or federal courts: state courts because they are courts of general jurisdiction, see id. § 3.3, at 199, and federal courts because the suits present a federal question. See id. § 8.1, at 422.

21. Section 1988 provides, in relevant part: “In any action or proceeding to enforce a provision of section[] ... 1983 ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988(b) (1994).

22. The details of this area of section 1983 jurisprudence are beyond the scope of this Article, but for a look at the Court’s most recent pronouncements in this area, see Farmer v. Hobby, 506 U.S. 103, 109–12 (1992).

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is just such a remedial statute. Given the "prevailing party" doctrine and the remedial nature of section 1983, one would think, then, that the Court would interpret section 1983 broadly because it was designed to enforce our most precious and fundamental rights. One would be wrong, at least in cases where the plaintiff is a prisoner or an Indian, or the plaintiff is suing a police officer. As the next Part of this Article discusses, rather than interpret section 1983 broadly, the Supreme Court has created instead an array of procedural hurdles designed to prevent courts from reaching the merits of many section 1983 actions.

II. THE COURT’S SECTION 1983 DECISIONS FROM THE 1996–97 TERM

Twelve of the Supreme Court’s eighty-one opinions in its 1996–97 Term, a staggering fifteen percent of the Court’s docket, were either cases filed under section 1983 or cases raising related issues. In part, section 1983’s dominance of the Court’s 1996–97 docket can be explained by the fact that section 1983 is a procedural shell. The statute can be used in a variety of cases in a variety of ways. Indeed, during the 1996–97 Term, the Court used section 1983 cases to, among other things:

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24. See Gomez v. Toledo, 446 U.S. 635, 639 (1980) (“As remedial legislation, § 1983 is to be construed generously to further its primary purpose.”).

25. In many respects, these holdings reflect popular sentiment against these groups. Indeed, public feeling against both prisoner civil rights actions and habeas corpus petitions has run so high in recent years that Congress has turned its attention to limiting the scope of both types of litigation. See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; cf. Nadine Strossen, The Current Assault on Constitutional Rights and Liberties: Origins and Approaches, 99 W. VA. L. Rev. 769 (1997) (discussing politically-motivated attacks on constitutional rights). The Supreme Court must be sensitive to public opinion. See generally Robert G. McCloskey, The American Supreme Court (2d ed. 1994). The Court is also supposed to protect against the tyranny of majority. Such protection is one of the primary reasons for insulating the Court from political pressures by providing federal judges with life tenure and protection against salary decreases. See U.S. Const. art. III; The Federalist No. 51 (James Madison).

Hold that the President is not immune from civil damages for actions occurring outside his official duties; 27

Refine and restructure the “custom or policy” requirement for municipal liability; 28

Continue foreshadowing a serious restriction upon, or even the elimination of, the Ex parte Young doctrine; 29 and

Determine that private prison guards are not protected by qualified immunity. 30

Section 1983’s breadth is part of its strength, but it also operates as a weakness. Because Congress wrote the statute with such generality, the Court has been free, if not required, to fill in the details. The Court has used this power to “discover” (read: create) numerous procedural hurdles buried in section 1983, hurdles that must be overcome before the federal courts can reach the merits of the suit (i.e., the allegation that a constitutional right has been violated). This section discusses some of the more important procedural barriers. My purpose is not to provide an exhaustive account of the procedural barriers under section 1983 or even to provide a thorough discussion of any one barrier. Instead, I provide a sampling of the types of procedural barriers created by the Supreme Court and discuss how the Court’s decisions from the October 1996 Term have continued the erection of those barriers.

A. Eleventh Amendment

The Eleventh Amendment has the distinction of being the first constitutional amendment enacted to overturn a Supreme Court decision. 31 In 1793, in Chisholm v. Georgia, 32 the Supreme Court held that the executors of a South Carolina estate could bring an

27. See Jones, 117 S. Ct. at 1651.
28. See McMillian, 117 S. Ct. at 1736–38; Brown, 520 U.S. at 405–11.
30. See Richardson, 117 S. Ct. at 2107–08.
31. In the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court established itself as the official and final arbiter of the meaning of the Constitution. See id. at 146–47. Consequently, the Court’s pronouncements regarding the meaning of the Constitution can be altered in only two ways—either by a subsequent decision of the Court itself or by a constitutional amendment.
32. 2 U.S. (2 Dall.) 419 (1793).
action in the Supreme Court to collect a debt owed to the estate by the State of Georgia. The Court's decision created an uproar\textsuperscript{33} and in 1798, just five years after the Court issued its decision, the Eleventh Amendment became part of the Constitution.

The Eleventh Amendment simply states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."\textsuperscript{34}

The Supreme Court's interpretation of the Eleventh Amendment, however, has been anything but simple. The Court's interpretation often has little to do with the Eleventh Amendment's literal language. For example, in \textit{Hans v. Louisiana},\textsuperscript{35} the Court completely ignored the actual language of the amendment and extended its prohibition to include suits filed against a state by one of its own citizens.\textsuperscript{36}

The Eleventh Amendment has played a major role in the interpretation of section 1983. Many section 1983 suits are directed at states, state agencies, and/or state employees.\textsuperscript{37} The Supreme Court's interpretation of the Eleventh Amendment would seem to deprive federal courts of jurisdiction over such suits. After all, they are "suit[s] in law" that have been "commenced... against one of the United States."\textsuperscript{38} The balance of section 1983 actions are brought against municipalities and their employees.\textsuperscript{39} If the courts deemed that these defendants should be treated like the state, because they are subdivisions of the state, it would be conceivable to interpret the Eleventh Amendment as also barring federal courts from hearing these actions.

Obviously, because a wealth of section 1983 actions are pursued in federal courts, the Supreme Court has not used the Eleventh Amendment to deprive federal courts of jurisdiction in all section 1983 suits. Instead, the Supreme Court has drawn a series of distinctions that allow certain section 1983 actions to be heard by federal courts. Through one such distinction, the Court has differentiated between states and municipalities.\textsuperscript{40} As a result,

\begin{footnotesize}
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\item 33. \textit{See Chemerinsky, supra note 19, § 7.2, at 378–74.}
\item 34. U.S. Const. amend. XI.
\item 35. 134 U.S. 1 (1890).
\item 36. \textit{See id. at 21.}
\item 37. \textit{See Chemerinsky, supra note 19, § 8.1, at 422.}
\item 38. U.S. Const. amend. XI.
\item 39. \textit{See Chemerinsky, supra note 19, § 8.1, at 422.}
\item 40. \textit{See generally Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (distinguishing between states and municipalities for purposes of section 1983 and holding that municipalities are subject to suit under that statute). Monell overruled the Court's}
\end{itemize}
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municipalities, subject to certain restrictions discussed below, are amenable to suit under section 1983 without regard to the Eleventh Amendment.

The question that remains is how to treat states, as well as their agencies and employees. Two lines of decisions have provided the answer to this question. The first line of cases draws a distinction between states and state agencies on the one hand and state employees on the other. In these cases, the Court has declared that section 1983 actions cannot be filed against states and state agencies, whether in state or federal court. The Eleventh Amendment does not bar all suits against states. Instead, it simply withholds federal court jurisdiction for such cases; the Amendment does not, however, prevent these cases from being filed in state courts. This distinction, then, between states and state employees does not rely on the Eleventh Amendment. Rather, in a series of cases culminating in Will v. Michigan Department of State Police, the Supreme Court held that states and state agencies are not "persons" for purposes of section 1983. Therefore, states and state agencies can never be sued under section 1983, regardless of whether the suit is filed in federal or state court.

The Court reiterated this conclusion during the 1996–97 Term in Arizonans for Official English v. Arizona. Arizonans for Official English arose out of a 1988 Arizona ballot initiative establishing English as the official language of the state. Two days after the initiative passed, a state employee filed suit under section 1983, alleging that the initiative violated the U.S. Constitution. After a flurry of pretrial motions, only one defendant remained in the litigation—Arizona’s Governor Mofford, who was sued in her official capacity. The district court eventually ruled that the initiative was


41. See infra Part II.C.

42. See John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 51 (1998) (analyzing "the Eleventh Amendment and section 1983 as an integral package of liability rules for constitutional violations" and arguing that "[t]he real role of the Eleventh Amendment is not to bar redress for constitutional violations by states but to force plaintiffs to resort to section 1983").

43. See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 & n.10 (1989).

44. U.S. CONST. amend XI.


46. See id. at 71. Recall the discussion above indicating that one element of a section 1983 suit is that the defendant be a "person." See supra note 13.


48. See id. at 49.

49. See id. at 49–50.

50. See id. at 53.
unconstitutional, but it denied plaintiff’s request for an injunction, finding that she had not “established an enforcement threat sufficient to warrant [such] relief.”

After Governor Mofford announced her intention not to appeal, a number of individuals and organizations sought to intervene in the litigation. As the case moved around the legal system, both the district court and the Ninth Circuit issued opinions concerning the various motions to intervene and on a variety of justiciability issues. One of the primary justiciability issues centered around the fact that the plaintiff had subsequently resigned her position with the state. Nevertheless, the courts eventually ruled that the plaintiff still had standing to sue and after another trip to the district court, she was awarded nominal damages.

When the case eventually found its way into the Supreme Court, the Court focused on the justiciability issues. It initially expressed doubt about the intervenors’ standing, but the Court deferred final decision on the issue, preferring instead to focus on the original plaintiff. In an opinion clearly meant to chastise the Ninth Circuit for losing sight of basic principles, the Supreme Court reiterated that a state is not a “person” capable of being sued under section 1983. The only defendant before the court was Arizona’s governor, appearing in her official capacity. An official capacity suit against a state officer is the same as a suit against the state itself. Consequently, the Ninth Circuit’s assertion that the state had waived its Eleventh Amendment immunity from suit

51. Id. at 55.
52. See id. 55–56.
53. See id. at 57–59.
54. See id. at 59–60.
55. See id. at 60–63.
56. See id. at 65–67.
57. The Supreme Court’s unanimous opinion contained some rather blunt language. For example: “Thus, the claim for relief the Ninth Circuit found sufficient to overcome mootness was nonexistent.” Id. at 69;

While we do not rule on the propriety of the Ninth Circuit’s exclusion of the State as a party, we note this lapse in that court’s accounting for its decision: The Ninth Circuit did not explain how it arrived at the conclusion that an intervenor the court had designated a nonparty could be subject, nevertheless, to an obligation to pay damages.

Id. at 70; “In advancing cooperation between Yniguez and the Attorney General regarding the request for and agreement to pay nominal damages, the Ninth Circuit did not home in on the federal courts’ lack of authority to act in friendly or feigned proceedings.” Id. at 71; “Both lower federal courts in this case refused to invite the aid of the Arizona Supreme Court. . . . A more cautious approach was in order.” Id. at 76–77.
58. See id. at 69.
59. See id. at 69 n.24.
was unavailing, as such an assertion did not permit the award of nominal damages against a state.\textsuperscript{60} Rather than an Eleventh Amendment immunity problem, the problem was a definitional one under the language of section 1983.\textsuperscript{61}

States and state agencies cannot be sued under section 1983. The question remains, however, whether state employees can be sued under that statute. In a second line of decisions, the Supreme Court has made a series of distinctions: (1) whether a state employee is sued in her official or personal capacity,\textsuperscript{62} and (2) whether the remedy sought is prospective or retroactive.\textsuperscript{63} Starting with \textit{Ex parte Young},\textsuperscript{64} and continuing through a number of other cases,\textsuperscript{65} the Supreme Court addressed the question of a state employee's capacity by differentiating between prospective and retroactive remedies. Prospective remedies, such as injunctions, may be sought against a state employee in both her official and personal capacities.\textsuperscript{66} Retroactive remedies, specifically damages, may be pursued only through a personal capacity suit.\textsuperscript{67} The distinction between a state employee's personal and official capacities has become known as the "\textit{Ex parte Young} doctrine," after the case that originated it.\textsuperscript{68}

This long entrenched doctrine has suffered a number of hits in recent Supreme Court Terms, first in \textit{Seminole Tribe of Florida v. Florida}\textsuperscript{69} and most recently in \textit{Idaho v. Coeur d'Alene Tribe}.\textsuperscript{70} \textit{Seminole Tribe} was a suit filed by the Seminole Indian tribe against the State of Florida and its governor under the Indian Gaming Regulatory

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\item \textsuperscript{60} See id. at 69.
\item \textsuperscript{61} See id.
\item \textsuperscript{62} The anomaly of allowing a suit to proceed against a state employee in her personal capacity while at the same time requiring that she act under color of state law has previously been discussed. See \textit{Cook & Sobieski, supra} note 15, at \$ 2.01[B].
\item \textsuperscript{63} The primary case, of course, is \textit{Edelman v. Jordan}, 415 U.S. 651 (1974), which held that the Eleventh Amendment bars the retroactive payment of benefits. Also instructive are \textit{Quern v. Jordan}, 440 U.S. 332 (1979), holding that the explanatory notice advising applicants that state administrative procedures exist for determining eligibility for past benefits constitutes permissible prospective relief rather than retroactive award, and \textit{Milliken v. Bradley}, 433 U.S. 267 (1977), holding that the district court was authorized to provide prospective relief despite the fact that such relief requires state expenditures.
\item \textsuperscript{66} See, e.g., \textit{Hafer}, 502 U.S. at 25–26; \textit{Will}, 491 U.S. at 71; \textit{Edelman}, 415 U.S. at 677.
\item \textsuperscript{67} See, e.g., \textit{Hafer}, 502 U.S. at 25–26; \textit{Will}, 491 U.S. at 71; \textit{Edelman}, 415 U.S. at 677.
\item \textsuperscript{68} See \textit{Chemerinsky, supra} note 19, \$ 7.5.1, at 390–94; \textit{Cook & Sobieski, supra} note 15, \$ 2.01[B].
\item \textsuperscript{69} 517 U.S. 44 (1996).
\item \textsuperscript{70} 117 S. Ct. 2028 (1997).
\end{itemize}
The Supreme Court disallowed the suit, finding first that Congress has no power to abrogate a state’s Eleventh Amendment immunity for legislation enacted pursuant to Congress’ Article I powers. The Court held that the *Ex parte Young* doctrine could not be used to allow suit against Florida’s governor because it would allow plaintiffs to circumvent the remedial scheme Congress had established in the statute at issue.

This was a new restriction on the *Ex parte Young* doctrine. It was a modest restriction, however, and it impacts only suits seeking to vindicate federal statutory rights. The Court’s decision in *Coeur d’Alene Tribe*, though, threatens to restrict significantly the *Ex parte Young* doctrine in the context of section 1983 actions which seek to enforce constitutional rights.

The *Coeur d’Alene Tribe* litigation began when the Coeur d’Alene Indian Tribe and several of its members filed suit in federal court to quiet title to the beds and banks of all navigable watercourses and waters within the original boundaries of the Coeur d’Alene Reservation. The suit named as defendants the State of Idaho, various Idaho state agencies, and a number of state officials sued in their individual capacity. The primary issue before the Supreme Court concerned whether the Eleventh Amendment barred the litigation. In a fractured 5-4 decision, the Court held that the

73. *See id. at 73–74. The Court explained its holding: “[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.” *Id.* at 74. Continuing, the Court stated:

[T]he fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter . . . . We hold that *Ex parte Young* is inapplicable to [the Tribe’s] suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction.

*Id.* at 75–76. For more on *Seminole Tribe* and *Ex parte Young*, see Thomas, *supra* note 64, at 1085–92, 1104–08.


76. *See id.*
77. *See id.* at 2031–32.
Eleventh Amendment prohibited federal courts from hearing the litigation, and thus to proceed, the Tribe would have to bring its suit in state court. 78

Two notable elements emerge from Coeur d'Alene Tribe, one from the explicit premise of the majority and one from an implicit distinction between state and tribal government. First, all five justices in the majority reviewed the history of the Eleventh Amendment and Ex parte Young and agreed that:

To interpret [Ex parte] Young to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. 79

After this agreement, however, the judges split into two camps.

The first camp consisted of Justice Kennedy, who wrote the primary opinion, joined by Chief Justice Rehnquist. Indeed, the primary opinion's heart garnered only the votes of these two members of the Court. 80 Justice Kennedy and Chief Justice Rehnquist argued for sweeping changes in the Ex parte Young doctrine. Specifically, they reiterated that states are bound by the Constitution and contended that state courts are perfectly competent forums to adjudicate suits seeking to vindicate federal rights. 81

This is especially true when "the parties invoke federal principles to challenge state administrative action." 82 In these cases, "the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials." 83 Justice Kennedy and Chief Justice Rehnquist recognized that precedent suggests that the Eleventh Amendment is not a bar to a suit seeking prospective relief from individual state officers. 84 They suggested, however, that precedent

78. See id. at 2043.
79. Id. at 2034.
80. As my colleague on the CLE panel, Louis Bullock, noted, Coeur d'Alene Tribe is certainly an interesting example of the Chief Justice's use of power to designate the author of an opinion. By choosing Justice Kennedy to write the primary opinion, the Chief Justice elevated an opinion garnering only two votes to be the primary decision.
82. Id. at 2037–38.
83. Id. at 2038.
84. See id.
had gone too far, and the Court should look to the context of each suit to see whether the provision of a federal forum is really necessary.85

The other three members of the majority wrote separately. While they, too, were concerned with an over-expansive use of the *Ex parte Young* doctrine, they urged more modest changes than the sweeping changes sought by Kennedy and Rehnquist. The three concurring justices advocated keeping the basic *Ex parte Young* rule that permits an exception to the Eleventh Amendment whenever a plaintiff names a state official, alleges an ongoing violation of federal law, and clearly seeks prospective relief.86 They agreed with Justice Kennedy and Chief Justice Rehnquist that the current suit could not go forward, but they reached that conclusion by arguing that the Coeur d'Alene Tribe's suit did not fit the standard rule.87 According to the concurring justices, the suit did not fit *Ex parte Young*'s confines because of the nature of the suit.88 Specifically, the Tribe was seeking to divest a state of all regulatory power over submerged lands.89 As Justice Souter pointed out in his dissent, however, this distinction was not reasonable; it ignored the fact that the Tribe's claim was based on an ongoing violation of federal law and the Tribe did not seek any retroactive relief.90 In fact, the Tribe had carefully circumscribed its complaint to seek only prospective relief.91 Arguments about the "nature" of the suit come very close to eradicating the formalist distinctions created by the Court in *Ex parte Young* itself.

Few lawyers, judges, or scholars seriously contend that *Ex parte Young* is not a formalist exercise in line-drawing.92 It is, however, an exercise that has been part of American jurisprudence for a long time and one that is relatively easy to apply. For a suit to proceed, the plaintiff need only jump through the correct mechanical hoops, making sure to list in the complaint whether the defendants are sued in their individual and/or official capacities.93

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85. See id. at 2038-40.
86. See id. at 2046-47 (O'Connor J., concurring).
87. See id. at 2043-45 (O'Connor J., concurring).
88. See id. (O'Connor J., concurring).
89. See id. at 2032.
90. See id.
91. See id.
92. See CHEMERINSKY, supra note 19, § 7.5.1, at 392 ("Many have criticized the [Ex parte] Young decision as creating a fictional distinction between the state and its officers."); see also Thomas, supra note 64, at 1078-79 (admitting that *Ex parte Young* is a fiction, but arguing that it is a necessary fiction).
93. See COOK & SOBIESKI, supra note 15, ¶ 2.01[B].
test is clear, and lower federal courts have little or no trouble applying it.\textsuperscript{94}

The same cannot be said of the new tests. First, a court faced with a section 1983 suit must determine whether the suit is brought to vindicate constitutional or statutory rights. If the suit seeks to enforce statutory rights, then the court must determine whether allowing the suit to proceed would interfere with the remedial scheme established by Congress. This is not much more than what was already required before \textit{Seminole Tribe}. Currently, before allowing a section 1983 suit to proceed based on a federal statutory right, a court must determine whether Congress either expressly or impliedly foreclosed section 1983 as a remedy. The courts will find foreclosure by implication if the statute contains a comprehensive enforcement scheme that is incompatible with individual enforcement under section 1983.

After \textit{Coeur d'Alene Tribe}, though, lower courts must now perform an additional analytical step: they must also determine whether it “simply cannot be said that the suit is not a suit against the State.”\textsuperscript{95} In other words, courts must look at the nature of the suit and the relief sought and ask themselves whether this is intrinsically a suit against the state itself.\textsuperscript{96} Yet there is no meaningful way to determine whether a suit is basically “a suit against the State,” because all suits invoking \textit{Ex parte Young} are suits against the state itself. In reality, the Court in \textit{Ex parte Young} did not draw a line between suits against a state and suits which are not against a state. Instead, the Court drew a line that declared that suits against states can proceed in federal court despite the Eleventh Amendment. The line was clear and easy to follow under \textit{Ex parte Young}, as courts needed to ask only three questions:

- Did plaintiff name a state official rather than the state itself in the complaint?\textsuperscript{97};
- Does plaintiff allege an ongoing violation of a federal right?\textsuperscript{98}; and
- Does plaintiff seek only prospective relief?\textsuperscript{99}

If these conditions were met, the suit could proceed. In \textit{Coeur d'Alene Tribe}, however, the Court directs lower courts to add an im-

\textsuperscript{94} See id.
\textsuperscript{95} \textit{Coeur d'Alene Tribe}, 117 S. Ct. at 2047 (O'Connor J., concurring).
\textsuperscript{96} See id.
\textsuperscript{97} See CHEMERINSKY, supra note 19, § 7.5.2.
\textsuperscript{98} See id.
\textsuperscript{99} See id.
possible fourth question: Is this a suit against the state itself? Because the Court provides no meaningful guidelines for lower courts to use in trying to answer that question, the question is impossible to answer. Consequently, litigants and courts will have to spend a good deal of time and money arguing over the "nature" and "essence" of many *Ex parte Young* suits.

These arguments can lead to only one of two results: abandon either *Coeur d'Alene Tribe* or *Ex parte Young*. The two decisions cannot exist side by side in any logical, reasoned manner. The fundamental premises of the decisions are completely incompatible. *Ex parte Young* rests on the concept that a state cannot vest its officers with the authority to engage in unconstitutional conduct. This premise makes it possible for federal courts to ensure that states comply with the U.S. Constitution. *Coeur d'Alene Tribe*, however, surrenders the authority of the federal courts to enforce federal law, leaving that task (at least for the case at bar) to the state courts. Unless *Coeur d'Alene Tribe* is limited to its admittedly unique facts, it has the real potential to wreak havoc on the previously clear boundaries of the *Ex parte Young* doctrine.

The second element that emerges regarding the Court's Eleventh Amendment jurisprudence is an insidious element of racism. In *Coeur d'Alene Tribe*, Justice Kennedy and Chief Justice Rehnquist recognized that a federal forum can play an important role in mediating structural disputes between federal and state interests. The primary opinion failed to recognize, however, that these same structural concerns exist in disputes involving tribal and state interests. Indeed, as Justice Souter recognized in his dissenting opinion, state courts have been historically hostile to the claims of tribes and tribal members.

It is hard to escape the fact that the two recent decisions reinvigorating the Eleventh Amendment have come in decisions involving Indian tribes. On one hand, it could be argued that this is simple coincidence: these cases arrived before the Court at just the right time (or the wrong time, depending on your perspective). The Court was primed and ready to reinvigorate the

100. See id. § 7.5.1, at 393.
101. See id.
102. For further criticism of *Coeur d'Alene Tribe*, see Thomas, supra note 64, at 1108–15. Thomas further states: "The doctrine of *Ex parte Young* must survive in order to enable individuals to assert their federal rights, and the *Edelman v. Jordan* decision reflects the proper approach to that doctrine." Id. at 1100–01.
103. See *Coeur d'Alene Tribe*, 117 S. Ct. at 2037.
104. See id. at 2036–38.
105. See id. at 2056 n.11 (Souter, J., dissenting).
106. See id. at 2028; *Seminole Tribe*, 517 U.S. at 44.
Eleventh Amendment, and *Seminole Tribe* and *Coeur d'Alene Tribe* provided two handy fact situations to allow the Court to continue this process.  

On the other hand, a more insidious explanation also can be offered. Rarely in the past two decades has the Court passed up an opportunity to erode tribal sovereignty. *Seminole Tribe* and *Coeur d'Alene Tribe* allowed the Court to "kill" two birds with one stone, simultaneously reducing tribal sovereignty and decreasing federal court jurisdiction over a vast array of section 1983 cases. Although *Coeur d'Alene Tribe* was not itself a section 1983 action, the reasoning of the majority easily transfers to suits brought under that statute. As Justice Souter stated in his dissenting opinion, the principal distinction drawn by the majority is that the tribe's suit pierces the barrier between a state official's actions and action by the state itself, as the remedy sought must essentially come from the state, not the individual state officer. This distinction falls of its own weight, as "an officer suit implicating title is no more or less the 'functional equivalent' of an action against the government than any other [Ex parte] Young suit. . . . and if the Court's reasoning were good in a title case it would be good in any [Ex parte] Young case."  

The theme, then, that emerges from the Court's Eleventh Amendment cases from the October 1996 Term is one of empowering and/or protecting states. *Arizonans for Official English* reaffirmed that states and state agencies cannot be defendants in a
section 1983 action.\textsuperscript{112} \textit{Coeur d'Alene Tribe} suggests that it also will be harder to sue states through the back door by naming state employees in their official capacities as defendants.\textsuperscript{113} Although these restrictions do not affect damages actions brought against state employees in their individual capacities, plaintiffs in such suits still face the issue of the defendant's qualified immunity, which is discussed in the next section.

\textbf{B. Qualified Immunity}

As the previous section makes clear, state employees are a primary target of section 1983 suits. Once such a suit has been filed, the question arises whether the employee defendant is protected by any form of immunity. This question, of course, also arises when municipal employees are sued. This section focuses on state and municipal employees sued in their individual capacities by a plaintiff who is seeking damages.\textsuperscript{114}

Section 1983 itself does not address explicitly the issue of immunity for any defendant.\textsuperscript{115} In resolving the issue of whether employee defendants are immune in section 1983 suits, the Supreme Court could have held that, since section 1983 is meant to be a remedial statute and does not explicitly provide for any immunity, no such immunity exists. The Court did not, however, choose to take this path. Instead, the Court has interpreted section 1983 to include all the relevant common law immunities that existed in 1871 when the statute was enacted.\textsuperscript{116}

It is not my intent to debate the wisdom or accuracy of this decision.\textsuperscript{117} Instead, I will explore the effect this decision has had on section 1983 litigation. Although the Court has extended absolute immunity to judicial and legislative actions,\textsuperscript{118} it is not those decisions

\textsuperscript{112} See supra text accompanying notes 47–61.

\textsuperscript{113} See supra text accompanying notes 75–101.

\textsuperscript{114} See supra Part II.A (discussing suits against states and official capacity suits against state employees); infra Part II.C (discussing issues of official capacity suits against municipal employees and suits against municipalities themselves).

\textsuperscript{115} See supra note 17.

\textsuperscript{116} See CHEMERINSKY, supra note 19, § 8.6.1, at 459–60.

\textsuperscript{117} This issue has been explored by other commentators. See, e.g., Richard A. Matasar, \textit{Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis}, 40 ARK. L. REV. 741 (1987).

\textsuperscript{118} See CHEMERINSKY, supra note 19, § 8.6.2, at 463. The type of liability which applies, absolute or qualified, is dependent on the character of the defendant's challenged action—whether it was judicial, legislative, or executive. The Supreme Court reiterated this principle in \textit{Clinton v. Jones}, 117 S. Ct. 1636, 1644 (1997).
which provide the most trouble for lower courts. The culprit there has been the doctrine of qualified immunity.

The Court has extended qualified immunity to most executive branch officials. Qualified immunity applies when these officials are sued for damages, and its roots trace back to the 1967 case of *Pierson v. Ray.* The current formulation of qualified immunity, however, is much more favorable to defendants than the one initially put forth in *Pierson.* The key cases establishing this new test are *Harlow v. Fitzgerald* and *Anderson v. Creighton.* Under *Harlow* and *Anderson,* a defendant in a damages action is shielded by qualified immunity unless his actions violated a clearly established law of which a reasonable person would have known.

The Supreme Court issued two qualified immunity decisions in its 1996–97 Term: one analyzing qualified immunity's procedural aspects, and another addressing whether it can be extended to private prison guards. *Johnson v. Fankell* represents the third time in three years that the Court has elaborated on the proce-

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119. 386 U.S. 547 (1967). In *Pierson,* the court held that the defense of good faith and probable cause was available to police officers in a section 1983 claim. See id. at 557.
120. See, e.g., Nahmod, Section 1983 Cases, supra note 4. Nahmod states:

> Whatever the explanation, in the real world of § 1983 litigation qualified immunity has become a remarkably potent defense for defendants. This is not only the result of pro-defendant doctrinal changes in the elements of the qualified immunity test, but also because the procedural ground rules have been changed for the benefit of § 1983 defendants. . . . As a structural matter, these changes in the substantive and procedural doctrines privilege the § 1983 defendant's narrative and marginalize the counter-narrative of the plaintiff, thereby directing the qualified immunity decision-maker—the judge—to empathize more with the defendant than with the injured plaintiff.

*Id.* at 820–21 (citations omitted).
121. 457 U.S. 800 (1982). In *Harlow,* the Court held "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.
122. 483 U.S. 635 (1987). In *Anderson,* the Court held that no exception to the general rule of qualified immunity exists for warrantless searches of third parties' homes. See *id.* at 646.
124. See *Johnson v. Fankell,* 117 S. Ct. 1800, 1807 (1997) (holding that a state does not have to provide for an interlocutory appeal of a denial of qualified immunity).
125. See *Richardson v. McKnight,* 117 S. Ct. 2100, 2108 (1997) (holding that qualified immunity cannot be extended to private prison guards).
dural aspects of qualified immunity. Each of these three cases grew out of the Court’s 1985 decision in *Mitchell v. Forsyth.* In *Mitchell,* the Court held that a district court order rejecting a section 1983 defendant’s qualified immunity defense is an immediately appealable “final decision.” Eleven years later, in *Behrens v. Pelletier,* the Court declared that the *Mitchell* rule applied to each rejection of qualified immunity, allowing section 1983 defendants to bring interlocutory appeals from both denials of motions to dismiss and denials of motions for summary judgment. Thus, a section 1983 defendant may be able to interrupt the pretrial process with two separate interlocutory appeals on the issue of qualified immunity.

*Mitchell, Behrens,* and *Johnson v. Jones* were all cases litigated entirely in the federal court system. In contrast, *Fankell* made its way through the Idaho state courts and came to the Supreme Court through a writ of certiorari to the Idaho Supreme Court. Indeed, this difference supplied the issue in dispute in *Fankell:* does the *Mitchell* rule apply in state courts?

The case began when Kristine Fankell was fired from her position as a liquor store clerk. She sued her employers, the Idaho Liquor Dispensary, alleging that they had deprived her of property without due process of law. Defendants raised the issue of qualified immunity, claiming that “they reasonably believed that [Fankell] was a probationary employee who had no property interest in her job.” The trial court denied the motion for summary

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129. See id. at 525; see also *Behrens,* 516 U.S. at 311 (interpreting 28 U.S.C. § 1291, the general federal appellate jurisdiction statute).
131. See id. at 307. *Jones* distinguished a limited set of circumstances when such interlocutory appeals are not available. The *Jones* rule applies when the record in a particular case demonstrates a genuine issue of material fact as to whether the defendant’s conduct amounted to a clear violation of the Constitution. See *Jones,* 515 U.S. at 313. For a further discussion about the relationship between *Behrens* and *Jones,* see Schwartz, *Section 1983 Litigation,* supra note 74, at 320–22.
133. See *Behrens,* 516 U.S. at 302 (stating that respondent brought suit in federal court); *Jones,* 515 U.S. at 307–08 (stating that Jones initiated the action in federal district court prior to appealing to the Seventh Circuit Court of Appeals); *Mitchell,* 472 U.S. at 515 (stating that Forsythe filed suit in the United States Eastern District of Pennsylvania).
134. See *Fankell,* 117 S. Ct. at 1802.
135. See id.
136. See id.
137. See id.
138. Id.
judgment, and defendants attempted to appeal to the Idaho Supreme Court. That court refused to hear the appeal, holding that the trial court’s order was not immediately appealable. Defendants petitioned for a writ of certiorari to the Supreme Court, arguing that the right to an immediate appeal is a federal right and that Idaho must allow such an appeal in a section 1983 case, even if the state’s procedures normally would not permit such an interlocutory appeal. The Supreme Court granted certiorari and agreed to hear the case.

At first blush, defendants’ argument seems very appealing. The Supreme Court has clearly been concerned over the past two decades with the burdens that section 1983 litigation has placed on state and local employees. It was this concern that led the Court to restructure the qualified immunity tests in Harlow and Anderson. This concern also motivated the Court to permit interlocutory appeals from denials of qualified immunity. Indeed, in Fankell, the Court rearticulated the philosophy behind these decisions:

This “qualified immunity” defense is valuable to officials asserting it for two reasons. First, if it is found applicable at any stage of the proceedings, it determines the outcome of the litigation by shielding the official from damages liability. Second, when the complaint fails to allege a violation of clearly established law or when discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation, it provides the defendant with an

139. See id.
140. See id.
141. See id. at 1802–04.
142. See id. at 1803.
144. See Anderson, 483 U.S. at 640 (defining qualified immunity as applying when “a reasonable official would understand that what he is doing violates” a constitutional right); Harlow, 457 U.S. at 818 (concluding that qualified immunity attaches as long as conduct does not violate “clearly established . . . rights of which a reasonable person would have known”).
145. See Behrens, 516 U.S. at 308.
immunity from the burdens of trial as well as a defense to liability.\textsuperscript{146}

A wrongful denial of qualified immunity at the pretrial stage could erroneously subject defendants to the litigation burdens that the Court is concerned with avoiding. Thus, allowing an interlocutory appeal of a trial court's decision to reject qualified immunity gives defendants an opportunity to protect themselves from the wrongful impositions of these burdens. Of course, time and expense is still involved in an appeal, but generally it will be far less costly than the burdens of an actual trial.

These same burdens fall upon defendants regardless of whether the suit is litigated in a state or a federal forum. Accordingly, the Idaho state defendants could meaningfully argue that they should be entitled to the same interlocutory appeal that they would have received in federal court. The Supreme Court, however, rejected that argument and refused to require states to ignore their own neutral procedural rules by providing these interlocutory appeals.\textsuperscript{147}

Two, and possibly three, factors motivated the Court's decision. The first factor is the Court's recurring theme of protecting state sovereignty:

Petitioners' argument for pre-emption is bottomed on their claims that the Idaho rules are interfering with their federal rights. While it is true that the defense has its source in a federal statute (§1983), the ultimate purpose of qualified immunity is to protect the state and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.\textsuperscript{148}

In other words, the Court developed the qualified immunity test and its attendant procedures to protect state and local employees, both from the litigation costs involved in section 1983 actions and from interference by the federal government into realms of state decisionmaking.\textsuperscript{149} If states do not choose to extend

\textsuperscript{146} Fankell, 117 S. Ct. at 1803.
\textsuperscript{147} See id. at 1805-06.
\textsuperscript{148} Id. at 1805.
\textsuperscript{149} See id.
the same protection to their employees in state court, then the federal government will not interfere. In a way, the same philosophy that led to the interlocutory appeals in federal court allows state courts to disallow them. This is the idea that states should retain a sphere of autonomy free from federal interference.

A second potential motivating factor does not appear explicitly in the opinion, but may have been in the Justices' minds as they cast their votes. Federal law does provide a mechanism, removal, through which the defendants in Fankell could have received their interlocutory appeal. A long-standing feature of federal procedure has been the ability of defendants to remove cases involving federal questions from state to federal court. In addition, there are special removal statutes for civil rights cases, reinforcing defendants' ability to have a federal court hear the case. Defendants arguably gave up their right to an interlocutory appeal on the qualified immunity issue when they failed to remove the case to federal court. Although the Fankell defendants could not have known definitively that they were making this choice, they must have considered that it was a possibility. Future section 1983 defendants are now on notice that they must choose between remaining in state court and maintaining the ability to pursue an interlocutory appeal should they lose a pretrial motion on qualified immunity grounds.

Beyond the two factors of protecting state sovereignty and relying on removal as a mechanism to ensure the right to an interlocutory appeal, a third factor might also have been present. Fankell did not fit the stereotypical mold of the frivolous section 1983 plaintiff because she was not a state prisoner nor was she suing a police department. Rather, she was a state employee essentially suing for wrongful termination. The fact that she did not fit that stereotypical mold may have made it easier for the Court to reach the decision it did, a decision that avoids imposing upon her the delay and expense of an interlocutory appeal. The Court probably would have reached the same decision regardless of her status, in light of the fact that its decision was ultimately a protection of state sovereignty, but it is interesting to note that a potentially close call went for the plaintiff in this case.

150. Justice Stevens wrote the Fankell opinion for a unanimous Court. See id. at 1802.
153. Of course, this presupposes that the state does not allow such appeals—if a state does allow interlocutory appeals in these circumstances, no choice need be made.
154. See Fankell, 117 S. Ct. at 1802.
In some ways, however, the Court's second qualified immunity decision during the 1996–97 Term undercuts that theory. In *Richardson v. McKnight*, the Supreme Court held that qualified immunity is not available to private prison guards. *Richardson* was a stereotypical prisoner case in which Ronnie Lee McKnight, a state prisoner, claimed that two prison guards injured him when they used unduly tight restraints. The critical difference, however, between a traditional prisoner suit and the case at hand was that Tennessee, following a growing trend, had privatized the management of some of its prisons, and McKnight was housed in one of those private facilities. Thus, the guards who allegedly injured him were employees of a private firm, rather than Tennessee state employees.

The plain language of section 1983 requires that a defendant act "under color of state law" before being held liable under the statute. Thus, defendants generally will be state or municipal employees, or perhaps even municipalities themselves. Occasionally, however, a private party can be so connected with the state that he becomes subject to the strictures of section 1983. In its 1992 decision *Wyatt v. Cole*, the Supreme Court addressed whether private parties in this situation are entitled to the protections of qualified immunity. Although *Wyatt* did not answer the question presented in *Richardson*, it did provide the framework for

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156. See id. at 2108. As with several other opinions discussed in this Article, *Richardson* was a 5-4 decision. See id. One major difference, however, exists between this 5-4 decision and the others: in *Richardson*, Justice O'Connor voted with the four justices usually in the minority—Stevens, Souter, Breyer, and Ginsburg—rather than with the block consisting of Rehnquist, Scalia, Kennedy, and Thomas, thus putting the conservatives in the minority for this one case. See id. at 2102.
157. See id.
158. See id. at 2104.
159. See id.
160. See id.
161. See supra notes 11–12, 15 and accompanying text.
162. For a discussion of municipal liability, see discussion infra Part II.C.
165. *Wyatt* raised the question of whether a private individual sued for his role in seizing property pursuant to a writ of replevin could claim governmental immunity. The Supreme Court held that he could not, but left open the question of whether he could raise a good faith defense. See *Wyatt*, 504 U.S. at 169. For analyses of the Court's decision in *Wyatt*, see Scott C. Arakaki & Robert E. Badger, Jr., Note, Wyatt v. Cole and Qualified Immunity for Private Parties in Section 1983 Suits, 69 NOTRE DAME L. REV. 735 (1994), and David Lagos, Note, Damned If You Do... The Supreme Court Denies Qualified Immunity to Section 1983 Private Party Defendants in Wyatt v. Cole, 71 N.C. L. REV. 849 (1993).
resolving that issue: an analysis both of history and of the purposes underlying qualified immunity.166

The majority's review of history led it to conclude that private prison guards are not a new phenomenon, and neither is the imposition of liability for their wrongs.167 The majority also declared that private prison guards were not historically provided with any immunity from such liability.168 Accordingly, the Richardson Court concluded that history did not support the extension of qualified immunity to the defendants.169

The four dissenting justices took issue with the majority's historical analysis, both with the result and with the methods the majority used to reach those results.170 The dissenters also disagreed with the majority's conclusion that the policies behind qualified immunity were not applicable in the private prison context, as the forces of the marketplace would protect against insufficiently vigorous performance and against any possibility that talented people would be deterred from working in these jobs.171

The primary difference between the majority and the dissent revolves around the dissent's insistence that immunity should be based on a functional analysis, rather than on history or policy.172 The dissent argued that, because private and public prison guards perform the same function, private prison guards should be entitled to the same qualified immunity as publicly employed prison guards.173 The majority disagreed, holding instead that the functional approach applies only when a court was deciding what type of immunity applied—either absolute or qualified. The approach should not be applied when a court is addressing the threshold question of whether any type of immunity is warranted.174

The Richardson decision is interesting in two respects. First, it is very intriguing that, despite Justice Scalia's usual insistence on focusing on the role of tradition and history,175 he authored a

166. See Richardson, 117 S. Ct. at 2104 ("[Wyatt] does tell us, however, to look both to history and to the purposes that underlie government employee immunity.").
167. See id. at 2104–05.
168. See id.
169. See id. at 2108.
170. See id. at 2109 (Scalia, J., dissenting) (arguing that the lone pre-section 1983 case appeared to have granted immunity to the independent contractor).
171. See id. at 2110–12 (Scalia, J., dissenting) (arguing that a market analysis is inappropriate where public officials spending tax dollars are the only purchasers).
172. See id. at 2109–10 (Scalia, J., dissenting).
173. See id. (Scalia, J., dissenting).
174. See id. at 2106.
dissenting opinion which advocated a functional approach to qualified immunity. Not only did he argue that history was of lesser importance here, he did so in the face of numerous past cases where the Court has held that immunity should be viewed historically. Ironically, it was the five justices in the majority who used the historical approach to support a decision in favor of a section 1983 plaintiff.

Indeed, the fact that this decision was a close call decided in favor of the prisoner plaintiff is the second interesting fact about this decision. The apparent plaintiff victory, however, is undercut by the three caveats the majority placed on its decision. The first caveat concerns the liability of private prison guards under section 1983. Since the lower courts assumed the defendants were subject to section 1983, the Supreme Court also focused its decision solely on the issue of immunity, ignoring the prior question of whether these private prison guards were even subject to section 1983. The interconnection between states and private prisons, however, should ultimately lead to a decision that section 1983 applies in this context.

The second caveat is that the Court’s decision is limited to its context and does not address the situation of “a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.” This, too, is not all that troublesome, as it basically reiterates the fundamental principle of the American

Justice Scalia’s attack on the common law legacy is thus rooted in distrust of particularism—especially judicial particularism—and in enthusiasm for rule-bound interpretation that relies, in both statutory and constitutional interpretation, on a single foundation: the meaning of the relevant legal text as it was understood at the time of the enactment.

Id. at 531.

176. See Richardson, 117 S. Ct. at 2108–13 (Scalia, J., dissenting).

177. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (stating that past holdings on section 1983 immunities were based on “a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it”); Chemerinsky, supra note 19, § 8.6.1, at 459 (“The Court repeatedly has stated that . . . the nature of an officer’s immunity is determined, in large part, by an examination of the law as it existed in 1871.”).

178. The Court’s use of history in immunity cases has been criticized. See generally Matasar, supra note 117. The Court’s policy analysis in these cases has also been criticized. See, e.g., Beermann, supra note 4. The Court’s use of both history and policy in Wyatt has also been criticized. See Arakaki & Badger, supra note 165, at 755–63.

179. See Richardson, 117 S. Ct. at 2108.

180. See id.

181. Id.
legal system that similar cases should be treated similarly, but a major difference in the facts could lead to a different outcome.

The third caveat, however, is the potentially dangerous one. The Court's decision is limited solely to the issue of qualified immunity. The Court did not address whether some other type of "good faith" defense might be available to defendants. Given the fractured nature of the Court, its often conservative slant, and its hostility toward most section 1983 cases involving prisoners and suits against police departments, it is quite likely that the Court will formulate some type of good faith defense to protect private prison guards. Indeed, the Court's protectiveness toward police departments found voice in both of the municipal liability cases decided in the 1996–97 Term. Those cases are discussed in the next section.

C. Municipal Liability

The current era of municipal liability traces back to 1978 and Monell v. Department of Social Services. Prior to Monell, municipalities—usually counties and/or cities—were not subject to suit under section 1983. Monell, however, changed that, and two decades later, courts (including the Supreme Court) are still trying to define the boundaries and contours of municipal liability.

The problem is a fundamental one. How does a city and/or a county violate someone's constitutional rights? Technically speaking, the corporate entity itself is incapable of acting in the traditional sense. Rather, it must act through its agents and employees. At the same time the Supreme Court "created" municipal liability, however, it rejected the notion that a municipality could be liable for its employees' actions under a theory of respondeat superior. Instead, before a municipality can be held responsible for

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182. See id. at 2108.
183. Richardson was, after all, a 5-4 decision. See id. at 2102.
184. 436 U.S. 658 (1978). Monell was a section 1983 action challenging New York City's policy of requiring pregnant employees to take unpaid leaves of absence. See id. at 660–61. In its opinion, the Supreme Court reviewed the legislative history of section 1983 and determined that municipalities are "persons" subject to liability under that statute. See id. at 701. This holding was an about-face and required the Court to reverse its decision in Monroe v. Pape, 365 U.S. 167 (1961). See Monell, 436 U.S. at 700.
185. See Monroe, 365 U.S. at 187 (holding that Congress did not intend to cover municipal corporations under section 1983).
186. See Monell, 436 U.S. at 691 ("[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.").
a constitutional violation, a plaintiff must present some evidence of an activity or decision that can be attributed to the municipality itself. Following the Supreme Court's language in Monell, this has become known as the "custom or policy requirement." That is, a plaintiff must show that the unconstitutional deprivation occurred as a result of a custom or policy belonging to the municipality itself. The errant actions of one municipal employee are not enough.

For two decades, the courts have struggled to develop rules and requirements of proof to help determine when something is a municipal custom or policy. Generally speaking, a "policy" is at least something that can be traced to a writing or an affirmative decision by municipal policymakers. A "custom" is usually an unwritten understanding that is so pervasive it has the force of a "policy." Obviously, it is generally easier to prove the existence of a "policy" than a "custom." Regardless, in both instances, the official custom or policy must be attributable to the municipality's policymakers. Thus, the first challenge confronting plaintiffs

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187. See Monell, 436 U.S. at 691-92.
188. Id. at 691.
189. See id. at 691-92. Just as with state governments, a suit against a municipal employee in his or her official capacity is equivalent to a suit against the municipality itself. There is one major difference between the two situations, however. State employees may be sued in their official capacities for prospective relief only; they cannot be sued for retroactive relief (i.e., money damages). Municipal employees, however, can be sued for monetary damages in their official capacity, so long as the requisite burdens are met (i.e., proof of custom and/or policy and proof of causation). See supra notes 62-68 and accompanying text.
190. See, e.g., Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (holding that whether a particular official is a "policymaker" is a question of state law); City of Canton v. Harris, 489 U.S. 378, 392 (1989) (holding that a city can be liable for failure to train an employee); City of St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988) (plurality opinion) (holding that not all decisions by municipal officials will satisfy the custom or policy requirement); Pembaur v. City of Cincinnati, 475 U.S. 469, 485 (1986) (holding that under certain circumstances a single decision by a "policymaker" is sufficient to satisfy the custom or policy requirement); City of Oklahoma City v. Tuttle, 471 U.S. 808, 833 (1985) (holding that, in the absence of other evidence, a single, isolated incident is insufficient to satisfy custom or policy requirement).
191. See Cook & Sobieski, supra note 15, ¶ 2.05[B][1], at 2-156.
192. See id. (stating that the Monell court defined custom as "persistent and widespread or permanent and well-settled practices").
193. See id. ¶ 2.05[A], at 2-142.
usually is determining who is the relevant final policymaker for purposes of litigation.\textsuperscript{194}

As with most corporate entities, municipalities spread their policymaking functions among several groups or individuals, such as city councils, mayors, county commissioners, and sheriffs.\textsuperscript{195} Each state has the freedom to organize its municipal structures however it sees fit; indeed, each state may delegate these decisions to the municipalities themselves, leading to diversity of organization within a particular state.\textsuperscript{196} In recognition of this diversity, the Supreme Court has repeatedly declared that the determination of whether an official possesses final policymaking authority is an issue of state law.\textsuperscript{197}

The Supreme Court reaffirmed this declaration during the 1996–97 Term in \textit{McMillian v. Monroe County}.\textsuperscript{198} \textit{McMillian} arose out of the 1986 murder of Ronda Morrison in Monroe County, Alabama.\textsuperscript{199} Walter McMillian was originally convicted of the murder and sentenced to death, but the Alabama Court of Criminal Appeals reversed the conviction because the prosecutors failed to disclose material exculpatory evidence to the defense.\textsuperscript{200} After his release, McMillian brought a section 1983 action against Monroe County and several of its officials, including Tom Tate, the county sheriff.\textsuperscript{201} McMillian sued Tate in his official capacity and accused him of intimidating a person into making a false statement and of suppressing exculpatory evidence.\textsuperscript{202} The district court dismissed the suit against Tate, and the Eleventh Circuit affirmed.\textsuperscript{203} Both courts held that Monroe County had no law enforcement authority, so technically Tate could not be a final policymaker for the county in that area.\textsuperscript{204}

\textsuperscript{194} For a discussion of various problems caused by this approach, see Barbara Kritchevsky, \textit{A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation}, 41 VILL. L. REV. 1381, 1393–1444 (1996).

\textsuperscript{195} See generally COOK & SOBIESKI, supra note 15, ¶ 2.05.

\textsuperscript{196} See id.


\textsuperscript{198} 117 S. Ct. 1734 (1997).

\textsuperscript{199} See id. at 1736.

\textsuperscript{200} See id. Ronda Morrison’s murder, the botched investigation, and the trial are the subject of the book, PETE EARLEY, \textit{Circumstantial Evidence: Death, Life, and Justice in a Southern Town} (1995).

\textsuperscript{201} See McMillian, 117 S. Ct. at 1736.

\textsuperscript{202} See id.

\textsuperscript{203} See id.

\textsuperscript{204} See id.
The Supreme Court agreed to hear the case. Because both sides agreed that Tate was the final policymaker in the area of law enforcement, the Supreme Court was faced only with the question of whether Tate worked for the county or the state when he acted in his law enforcement capacity. In a 5-4 decision, the Court held that Alabama county sheriffs are actually state employees. As with virtually all the 5-4 decisions in section 1983 cases, the majority consisted of Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, while the dissent consisted of Justices Stevens, Souter, Breyer, and Ginsburg.

Chief Justice Rehnquist delivered the majority opinion, a very unconvincing analysis of Alabama constitutional and statutory provisions. Four conclusions, however, do emerge from the Court's opinion. First, the Court explicitly reaffirmed that state law governs the determination of whether a particular official is a municipal policymaker. Second, the review of state law will be a very deferential one on several levels. Third, the intricacies of the Court's analysis limit its relevance to suits arising in Alabama. Fourth and finally, the Supreme Court is making it more difficult to sue municipalities. I elaborate on these conclusions below.

The Court explicitly stated as part of its analysis that it would give considerable deference to the Eleventh Circuit's decision, as that Circuit encompasses the State of Alabama and presumably has more experience with Alabama law. While on one hand, this declaration is understandable, an interpretation of state law is just that—a determination of law, which is usually reviewed de novo. The deference to the Eleventh Circuit, however, is not the disturbing one; the disturbing deference is that given to Alabama law.

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205. See id. at 1736.
206. See id. at 1736–37.
207. See id. at 1736.
208. See id. at 1735. The exception for the purposes of this Article is Richardson v. McKnight, 117 S. Ct. 2100 (1997). See supra Part II.B.
209. See McMillian, 117 S. Ct. at 1735–42.
210. See id. at 1737 ("We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity.... [O]ur inquiry is dependent on an analysis of state law.").
211. See id.
212. See infra note 224 and accompanying text.
213. See infra note 225 and accompanying text.
214. See McMillian, 117 S. Ct. at 1737 ("Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."). The Court reinforced this declaration in a footnote, stating: "We note that two of the three judges on the Eleventh Circuit's panel are based in Alabama. In addition, this is the second Eleventh Circuit panel to have reached this conclusion." Id. at 1737 n.3.
The Court's determination that Alabama county sheriffs are state actors was based on certain provisions in the Alabama Constitution, the interpretation of those provisions by the Alabama Supreme Court, and on some nebulous Alabama statutes. As the dissent notes, the primary support for the majority's conclusion stems from a section of the Alabama Constitution which lists "a sheriff for each county" as part of the state's executive department. This reliance is very interesting, given that it comes just two paragraphs after the majority declared that states cannot "answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." Yet, that is what the Court allowed Alabama to do; it accepted Alabama's decision to "label" its sheriffs as state employees. This is problematic because it allows a state to define away liability for its municipalities through its definition of municipal employees — something that is to the great advantage of those municipalities, but to the detriment of section 1983 plaintiffs.

The majority reinforced its discussion of the Alabama constitutional provisions with a look at how the Alabama Supreme Court has interpreted those provisions (which, obviously, carries the same risk of allowing the state to define away the liability of its municipalities), and with a very muddled discussion of several Alabama statutes. I will not detail this discussion, except to say that the dissent's analysis of the relevant Alabama law is much more convincing than that of the majority. The dissent summarized its analysis in the following paragraph:

A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. Nothing in Alabama law warrants a different conclusion. It makes scant sense to treat sheriffs' activities differently based on the presence or absence of state constitutional provisions of the limited kind Alabama has adopted.

215. See id. at 1738.
216. See id. at 1738–39.
217. See id. at 1739.
218. Id. at 1743 (Ginsburg, J., dissenting).
219. Id. at 1737.
220. See id. at 1737–39.
221. See discussion supra Part II.A.
223. Id. at 1746 (Ginsburg, J., dissenting).
This battle over the interpretation of Alabama law leads me to my third conclusion: the details of the Court’s analysis, in both the majority and dissenting opinions, are virtually irrelevant to section 1983 suits arising out of any state except Alabama, and it is relevant only to a limited subset of suits arising out of Alabama. Indeed, the dissent recognized this, declaring that “the Court’s Alabama-specific approach . . . assures that today’s immediate holding is of limited reach. . . . Thus, the Court’s opinion, while in my view misguided, does little to alter § 1983 county and municipal liability in most jurisdictions.”

That limitation raises the question of why the Supreme Court even agreed to hear *McMillian*. After all, it essentially said that both the district court and the court of appeals did the right thing. Why did the Supreme Court spend its valuable time to issue a decision that appears to have little impact, even on the litigation at hand? The Court’s analysis does little to provide any help or guidance to the confused issue of determining exactly who is a municipal final policymaker, except in cases involving Alabama sheriffs sued for actions taken in their law enforcement capacity. The Court only reiterated that the issue was one of state law—but we already knew that, and the lower courts in *McMillian* had proceeded on that premise. Indeed, they had reached the same decision, for virtually the same reasons, as the Supreme Court. On the surface, this decision changed nothing and provided little, if any, general guidance for future courts wrestling with this issue.

On a deeper level, however, the Court did use *McMillian* to send a message. That message is the basis of my fourth conclusion about this decision: the Court is making it much more difficult to hold municipalities liable under section 1983. The Court seems to be sending a message that all possible benefit of the doubt should be given to municipalities to protect them from liability. If there are two conceivable interpretations of the law, courts should take the one that favors the municipality, even if that is not the more plausible of the two interpretations. I believe the Court is leaning in one of two directions: 1) either eliminating municipal liability altogether and returning to the pre-*Monell* days, or 2) limiting municipal liability not just to extreme cases, but to those cases where the culpability of the municipality itself is beyond doubt.

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224. *Id.* (Ginsburg J., dissenting).
225. *Monell* itself was just such a case. There, New York City and the New York Board of Education had a policy that compelled pregnant employees to take leaves of absence, even if such a leave was not medically necessary. See *Monell* v. Dep’t of Soc. Servs., 436 U.S. 658, 661 (1978). The Supreme Court declared such policies unconstitutional in its 1974 decision *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In *Monell*, there was no question
This trend is also evident in the other municipal liability case decided by the Court in the 1996–97 Term, Board of County Commissioners v. Brown. In May 1991, Jill Brown and her husband were driving from Texas to Oklahoma when they approached a police checkpoint. Mr. Brown, who was driving, opted to avoid the checkpoint and turned around to head back to Texas. Two Bryan County Sheriff’s deputies pursued the Browns. The parties dispute what happened next, but Mr. Brown testified that he was unaware of the deputies behind him. The deputies testified that the chase reached speeds in excess of 100 miles per hour. Once the Browns’ car was pulled over, the Court states:

Deputy Sheriff Morrison pointed his gun toward the Browns’ vehicle and ordered the Browns to raise their hands. Reserve Deputy Burns, who was unarmed, rounded the corner of the vehicle on the passenger’s side. Burns twice ordered respondent Jill Brown from the vehicle. When she did not exit, he used an “arm bar” technique, grabbing [her] arm at the wrist and elbow, pulling her from the vehicle, and spinning her to the ground. [Her] knees were severely injured, and she later underwent corrective surgery. Ultimately, she may need knee replacements.

As a result of this incident, Jill Brown filed a section 1983 action against Reserve Deputy Burns, the Bryan County Sheriff (B.J. Moore), and the county itself. Her suit alleged that the county was liable for Burns’ use of excessive force. She premised her allegations on Sheriff Moore’s failure to adequately review Burns’ background prior to hiring him. Burns was the son of Moore’s nephew and had a criminal record that included misdemeanor infractions for assault and battery, resisting arrest, and public drunkenness, among other things. Sheriff Moore testified at trial

about whether the municipality itself had approved the constitutional violation—that was plain on the face of the policy. See Monell, 436 U.S. at 661 n.2. While these cases may be more simple to litigate, both for the parties and the courts, these are often the cases that do not even make it into litigation now, as liability is plainly evident.

227. See id. at 400.
228. See id.
229. See id.
230. See id.
231. Id. at 400–01.
232. See id. at 401.
233. See id.
234. See id.
235. See id.
that he had obtained Burns' record but did not review it closely. After he hired Burns, Moore authorized Burns to make arrests, but he did not allow him to carry a weapon or operate a patrol car. A jury found the county liable for Brown's injuries, the county appealed, and the court of appeals affirmed.

The parties did not dispute that Sheriff Moore was the final policymaker for the County regarding the sheriff's department. Thus, unlike in McMillian, the dispute was not over the Sheriff's status. Rather, the dispute in Brown centered around whether the Sheriff's actions were sufficient to constitute a policy. Put in more technical language, the issue in Brown was whether a single hiring decision by a municipal policymaker can amount to a "policy" sufficient to subject the municipality itself to section 1983 liability.

Brown is not the first case in which the Supreme Court confronted this issue. The issue arose over a decade ago in City of Oklahoma City v. Tuttle. In Tuttle, the widow of a man killed by a police officer filed suit alleging that the city failed to train its police officers adequately. The Court refused to impose liability based on the facts of Tuttle, but it left the door open to the possibility of liability in a future case. That opportunity came one year later in Pembaur v. City of Cincinnati. In Pembaur, a badly fractured majority held that a municipality could be held liable for a single decision of a county prosecutor who instructed deputies to forcibly enter an office in violation of the Fourth Amendment. The prosecutor was the final policymaker for the municipality on such issues.

The tensions behind such a decision are obvious. On one hand, holding a municipality liable for a single decision by a municipal policymaker skirts very close to the line between holding a municipality liable for its policies and holding it liable under respondeat superior for the actions of its employees. On the other
hand, when these single decisions carry the force of policy, a municipality should not escape liability simply because the issue presents a close call. How does a court determine the difference between a municipal policy and an act of an employee when the employee in question is responsible for making municipal policy? Although we can argue over whether such a line should exist, the Court's "custom or policy" requirement makes such lines necessary in municipal liability cases.

The Brown decision from the 1996-97 Term amply illustrates these difficulties, as well as provides some strong indicators about how the Court will handle these cases in the future. As in McMillian, the Court split 5-4, with the majority holding that Bryan County was not liable for the single failure of its Sheriff to adequately screen his great nephew's background prior to hiring him. Although the majority, which consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas, did not foreclose the possibility that a municipality could be held liable for a single decision of one of its policymakers the Court's analysis will make it very difficult for future plaintiffs to establish such liability.

Justice O'Connor explained the underlying philosophy of the decision in a rather ominous paragraph placed early in the analytical section:

As our § 1983 municipal liability jurisprudence illustrates, . . . it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability

249. Justice Breyer, joined by Justices Stevens and Ginsburg, dissented in Brown, arguing that such line drawing exercises are inherently troublesome: "Given the basic Monell principle, these distinctions may be necessary, for without them, the Court cannot easily avoid a 'municipal liability' that 'collaps[es] into respondeat superior.' . . . But a basic legal principle that requires so many such distinctions to maintain its legal life may not deserve such longevity." Brown, 520 U.S. at 435 (Breyer, J., dissenting) (alteration in original) (citation omitted) (quoting majority opinion); see also Kinports, supra note 186.
250. See Brown, 520 U.S. at 415.
251. See id. at 399.
252. See id. at 412.
253. Whether this is a true statement about prior cases is debatable, but it does accurately represent the post-Brown status of section 1983 jurisprudence.
and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.\textsuperscript{254}

The majority opinion then distinguished among municipal policies that intentionally deprive a person of a constitutional right, policies that violate other federal laws, and policies that in and of themselves are legal.\textsuperscript{255} With the first two types of policies, the violation of federal law itself and the causal connection between the violation and plaintiff's harm are treated the same.\textsuperscript{256} If the municipal policy itself is illegal or commands that someone perform an illegal act, the plaintiff generally need only establish that the policy exists.\textsuperscript{257} The violation of federal law and the causal connection between the policy and plaintiff's harm will be immediately obvious. The third type of policy, however, requires additional levels of proof. If the policy itself is legal, the plaintiff must then produce additional evidence to establish that he or she suffered a deprivation of a federally-protected right and that the policy was the direct cause of the violation.\textsuperscript{258}

Jill Brown's suit falls into this third circumstance because Sheriff Moore did not violate federal law by hiring his great nephew, despite the nephew's prior encounters with the law.\textsuperscript{259} Sheriff Moore also did not directly order his great nephew to use excessive force in the encounter with Brown.\textsuperscript{260} While the court does not enumerate a formal test, it does indicate that to succeed in holding Bryan County liable for her injuries Brown needed to prove that:

- Sheriff Moore inadequately screened his great nephew's driving and criminal records;\textsuperscript{261}
- An adequate screening of those records would have plainly revealed that his great nephew was not qualified for the position of Reserve Deputy;\textsuperscript{262}
- Burns used excessive force in the encounter with Jill Brown, thereby depriving her of a constitutional right;\textsuperscript{263} and

\textsuperscript{254}. Brown, 520 U.S. at 404.
\textsuperscript{255}. See id. at 404–07.
\textsuperscript{256}. See id. at 404–05.
\textsuperscript{257}. See id.
\textsuperscript{258}. See id. at 406–07.
\textsuperscript{259}. See id. at 405.
\textsuperscript{260}. See id.
\textsuperscript{261}. See id. at 411–12.
\textsuperscript{262}. Id. at 412.
\textsuperscript{263}. See id. at 414.
A causal connection existed between Moore’s and Burns’ actions.²⁶⁴

As the majority noted, these inadequate screening cases carry an inherent risk of blurring the line between the type of municipal liability approved in Monell and improper respondeat superior liability:

Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official’s review of a prospective applicant’s record . . . there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a “but-for” sense: But for the municipality’s decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker’s inadequate decision and the particular injury alleged.

. . .

. . . A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant’s background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party’s federally protected right can the official’s failure to adequately scrutinize the applicant’s background constitute “deliberate indifference.”²⁶⁵

As Justice Souter noted in his dissent, although this test is stringent, it does comport with prior precedent.²⁶⁶ What is most troublesome, however, is the way in which the majority applied the test to the facts of this case.²⁶⁷

²⁶⁴. See id.
²⁶⁵. Id. at 410–11.
²⁶⁶. See id. at 419–20 (Souter, J., dissenting).
²⁶⁷. Justice Souter agrees:
The majority declared that the district court improperly instructed the jury, resulting in a jury decision that did not properly test this "link" between Moore's failure to screen his great nephew's background adequately and the great nephew's use of excessive force as to Jill Brown. The majority then reviewed the evidence in response to Brown's claim that Burns' record revealed "such a strong propensity for violence that Burns' application of excessive force was highly likely." The Court's review of Burns' record revealed that:

- Burns was involved in a fight on a college campus, resulting in misdemeanor charges of assault and battery, resisting arrest, and public drunkenness;
- Burns had pleaded guilty to a number of driving violations, "including nine moving violations and a charge of driving with a suspended license;" and
- Burns had also pleaded guilty to controlling a vehicle while intoxicated.

While Burns was clearly an inappropriate choice to serve as a deputy, it is arguable that his record may not have provided sufficient notice to the Sheriff regarding a propensity for violence.

Two factors, however, are immediately obvious upon reading the majority opinion. First, the district court's actual instructions to the jury, as quoted in the majority opinion, come very close to the standard articulated by the Court. The district court instructed the jury that, to impose liability, they must find that Brown proved the Sheriff's inadequate screening "was 'so likely to result in viola-

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At the level of practice, however, the tenor of the Court's opinion is decidedly different. . . . [T]he Court's skepticism converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this; and the record in this case is perfectly sufficient to support the jury's verdict even on the Court's formulation of the high degree of risk that must be shown.

Id. at 420–21 (Souter, J., dissenting). Justices Stevens and Breyer joined Justice Souter's dissenting opinion. See id. at 416 (Souter, J., dissenting). Justice Breyer also wrote a separate dissent, joined by Justices Stevens and Ginsburg, calling for a reexamination of the principle that section 1983 does not allow respondeat superior liability for municipalities. See id. at 430–37 (Breyer, J., dissenting).

268. See id. at 411–14.
269. Id. at 413.
270. See id.
271. Id. at 414.
272. See id.
273. See id. at 411–12.
tions of constitutional rights' that the Sheriff could 'reasonably [be] said to have been deliberately indifferent to the constitutional needs of the Plaintiff.'\textsuperscript{274} The judge also instructed the jury that Brown must prove that "the 'inadequate hiring . . . policy directly caused the Plaintiff's injury.'\textsuperscript{275} These instructions directed the jury to look for a close causal connection between Moore's and Burns' actions, and the jury's verdict in favor of Brown declared that they found just such a connection. The only difference between the jury instructions and the Court's test is that the instructions did not specifically require that Burns' record demonstrate his propensity to cause exactly the type of harm suffered by Brown. Brown's theory, however, was that Burns' record demonstrated a propensity for violence, and indeed he used unnecessary force in pulling her out of the vehicle.\textsuperscript{276} Thus, it is likely that the combination of Brown's theory and the judge's instructions resulted in the jury using the proper degree of specificity in measuring the causal connection.

This leads to the second factor that leaps out from the majority opinion. Burns' record revealed instances of assault and battery and a number of driving violations.\textsuperscript{277} After hiring Burns, Sheriff Moore refused to allow him to carry a gun or operate a patrol car.\textsuperscript{278} I find it very curious that these two prohibitions reflect the infractions listed on Burns' record. Thus, it appears that Moore was engaging in nepotism by hiring an unqualified family member but at the same time was aware that Burns might harm members of the public. Accordingly, Moore tried to limit the possibilities for harm by taking away his great-nephew's gun and by not allowing him to drive a patrol car. These precautions, however, proved inadequate. Burns still inflicted great harm upon a member of the public—Jill Brown.

Repeatedly throughout the \textit{Brown} opinion, the majority discussed the need to protect municipalities from undue liability.\textsuperscript{279} It would appear, however, that the Court is going to protect municipalities from liability even when a final municipal policymaker acts in his official capacity to hire a grievously unqualified family member to serve in a public safety role. The Court will continue to protect the municipality even when that final municipal policymaker expresses knowledge of the propensity for harm by not

\begin{enumerate}
\item[274.] Id. (quoting the jury instructions).
\item[275.] Id. at 412 (quoting the jury instructions).
\item[276.] See id. at 413.
\item[277.] See id. at 413–14.
\item[278.] See id. at 401.
\item[279.] See id. at 403–15.
\end{enumerate}
allowing that family member to use the same tools of office as other employees. The majority is either laying the groundwork to eliminate municipal liability for a single action by one of its policymakers, or the Court is planning to limit such liability to instances where the policy itself violates federal law. Either position might simplify matters for courts and for municipalities, but it does so at the cost of justice for plaintiffs.

D. Overlap with Habeas

To reiterate, section 1983 provides a procedural mechanism for vindicating the deprivation of constitutional rights by state officials. It is not the only statute, however, that addresses this situation. On one level of generality, the habeas corpus statutes also provide a procedural mechanism for vindicating the deprivation of constitutional rights by state officials. To be sure, the habeas statutes address a more specific instance—judicial proceedings—than section 1983, which addresses a broader spectrum of constitutional deprivations. How should a court handle a case that conceivably fits under both statutes? The Supreme Court addressed this question in its 1996–97 Term in the case of Edwards v. Balisok.

It simply is not possible to discuss Balisok in isolation; one must first understand the history of the Court’s jurisprudence in this area. That history begins in 1973 with the case of Preiser v. Rodriguez. Preiser was a section 1983 action filed by three prisoners who alleged that they had been deprived of good time credits without due process of law. All three plaintiffs sought restoration of their good time credits as the only remedy for the purported violation. The language of both the habeas statutes and section 1983 covered the facts as alleged. The Supreme Court resolved the dilemma by holding that, since the habeas statute is the more specific of the two, it provides the sole means for challenging the fact or duration of physical confinement. In seeking to reinstate their good time credits, the Preiser plaintiffs were trying essentially

280. See CHEMERINSKY, supra note 19, § 15.1, at 779–81.
284. See id. at 476.
285. See id.
286. See id. at 482–84, 488–89.
287. See id. at 489–90.
to decrease the duration of their confinement, so they were re-
quired to proceed under the habeas statutes.\textsuperscript{288}

The habeas statutes are not quite as favorable as section 1983 for
prisoner plaintiffs because such statutes contain a state exhaustion
requirement and do not allow for the award of monetary dam-
ages.\textsuperscript{289} The Supreme Court addressed these differences in dicta in the \textit{Preiser} decision, asserting that a prisoner who is seeking solely
damages as a remedy could proceed under section 1983, and that a
prisoner seeking \textit{both} damages and restoration of good time credits
could bifurcate his claims and proceed simultaneously under both
statutes.\textsuperscript{290}

After seeming to reaffirm this dicta the next year in \textit{Wolff v.}
\textit{McDonnell},\textsuperscript{291} the Supreme Court did not revisit this issue for two
decades until the case of \textit{Heck v. Humphrey}.\textsuperscript{292} While both \textit{Preiser} and
\textit{Wolff} involved state prison disciplinary proceedings, \textit{Heck} was a
challenge to various allegedly unconstitutional acts that resulted in
the plaintiff’s arrest and conviction on voluntary manslaughter
charges.\textsuperscript{293} The section 1983 action was filed during the pendency
of \textit{Heck}’s direct appeal from his criminal conviction.\textsuperscript{294} In his sec-
tion 1983 action, however, \textit{Heck} sought only damages, not
injunctive relief or release from custody.\textsuperscript{295} The Supreme Court
attempted to clarify the line drawn in \textit{Preiser} and \textit{Wolff} by declaring:

\begin{quote}
\hspace{1cm} [W]hen a state prisoner seeks damages in a § 1983 suit, the
district court must consider whether a judgment in favor of the
plaintiff would necessarily imply the invalidity of his convic-
tion or sentence; if it would, the complaint must be
dismissed unless the plaintiff can demonstrate that the convic-
tion or sentence has already been invalidated.\textsuperscript{296}
\end{quote}

\begin{itemize}
\item \textsuperscript{288} See \textit{id}. at 500.
\item \textsuperscript{289} See CHEMERINSKY, supra note 19, § 15.4.2.
\item \textsuperscript{290} See \textit{Preiser}, 411 U.S. at 498 n.14 & 499.
\item \textsuperscript{291} 418 U.S. 539 (1974). This suit was a section 1983 class action alleging that Ne-
braska prison disciplinary procedures violated the due process rights of Nebraska state
prisoners. The Court allowed the suit to proceed, provided that the challenge to the proce-
dures themselves was divorced from a challenge to the results of the proceedings. See \textit{id}. at
579.
\item \textsuperscript{292} 512 U.S. 477 (1994).
\item \textsuperscript{293} See \textit{id}. at 478–79.
\item \textsuperscript{294} See \textit{id}. at 479.
\item \textsuperscript{295} See \textit{id}.
\item \textsuperscript{296} \textit{Id}. at 487. Although it was not explicitly discussed, the Supreme Court did hear a
case in its 1996–97 Term that complied with the \textit{Heck} rule. \textit{McMillian v. Monroe County} was a
section 1983 action brought against county investigators for actions that resulted in the
conviction of an innocent man. See \textit{McMillian v. Monroe County}, 117 S. Ct. 1734, 1736
\end{itemize}
The corollary, of course, is that if the section 1983 suit would not "necessarily imply" the invalidity of the conviction or sentence, the court may proceed to hear the suit.\textsuperscript{297}

As is readily obvious, \textit{Heck} did not clarify matters.\textsuperscript{298} If anything, it further complicated the existing scheme. After \textit{Heck}, litigants and courts cannot look just at the remedy sought to determine whether the suit should proceed under the habeas statutes or under section 1983. Instead, that inquiry becomes the first step. If a litigant seeks only damages, a court must also examine the "necessary implications" of any decision in the plaintiff's favor. In addition, a prior question exists in suits challenging prison disciplinary proceedings—whether \textit{Heck} is even applicable in those suits. Perhaps the \textit{Heck} rule applies only in the context of criminal trials. Although the rationale in \textit{Heck} could be twisted either way, the Court did not provide much guidance for lower courts on this issue.\textsuperscript{299} In creating these "Preiser Puzzles,"\textsuperscript{300} the Court has created a series of strange distinctions—bifurcating suits based on remedies, introducing all sorts of \textit{res judicata} and collateral estoppel

(1997). The suit was filed only after McMillian's criminal conviction had been vacated. \textit{See} \textit{id.}; \textit{supra} text accompanying note 202.

\textsuperscript{297.} \textit{See Heck}, 512 U.S. at 487 n.7.


\textsuperscript{299.} Professor Jack Beermann has argued that \textit{Heck} should not be extended beyond its facts:

There has been one major extension of \textit{Heck} beyond challenges to convictions. In addition to damages actions challenging convictions, lower courts have applied \textit{Heck} to bar damages actions directed at unconstitutional procedures in prison disciplinary hearings and parole hearings. This extension of \textit{Heck} has been made in the face of Supreme Court precedent directly to the contrary, but inspired by dicta in \textit{Heck} itself... The courts that have applied \textit{Heck} to all damages claims challenging parole and disciplinary hearings have ignored \textit{Heck}'s basis in the elements of the malicious prosecution tort, from which the favorable termination requirement is derived. Instead, they have applied \textit{Heck} as if it were an extension of the \textit{Preiser v. Rodriguez} ban... Without the elements analysis, there is no basis for applying \textit{Heck} in this context.

Beermann, \textit{supra} note 298, at 715-17 (footnotes omitted); \textit{see also} Savoy, \textit{supra} note 298, at 138 (arguing that \textit{Heck} "has made a complex area of law more complicated"). We now know that the lower courts were correct and that the Supreme Court itself also ignored the original context of \textit{Heck} and extended its rule to prison disciplinary hearings. \textit{See} Edwards v. Balisok, 520 U.S. 641, 646 (1997).

\textsuperscript{300.} \textit{See} Martin A. Schwartz, \textit{The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners}, 37 DEPAUL L. REV. 85, 87-88 (1988).
The Court revisited this confusing thicket in its 1996–97 Term with its decision in Edwards v. Balisok. Although the factual record is somewhat sparse, this case appears to be a fairly typical prisoner civil rights action. Indeed, what stands out most about the suit is not its background, but rather the fact that the plaintiff was represented by counsel; most prisoner suits proceed pro se.

The case began in 1993 when Jerry Balisok, a prisoner in the custody of Washington state, was accused of violating the prison disciplinary code. In preparation for his hearing, Balisok requested that the hearing officer obtain a statement from an inmate named John Stein and submit questions to two other inmates. At the hearing, the hearing officer told Balisok that none of the three inmates responded to the inquiries. The officer then found Balisok guilty of the charged offense and imposed a punishment that included loss of 30 days good time credit.

Later, Balisok was able to review his file, which apparently contained the three requested statements, all dated prior to the time of the hearing. Balisok then instituted his section 1983 action in federal district court, alleging several violations of his procedural due process rights. In particular, Balisok asserted that the statements were concealed as part of a pattern of behavior by state correctional officers, who sought retribution against "jail house attorneys." Balisok's complaint was carefully structured to seek only damages and injunctive relief; in accordance with the dictates of Preiser, Wolff, and Heck, Balisok did not attempt to have his lost good time credits reinstated. Despite Balisok's (and his attorney's) careful attempts to structure the complaint, the district

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301. For more discussion about the problems these decisions have raised for prisoners, as well as for lower courts, see id. at 123–29; and Michael Weinman, To Stay or Not to Stay: Choosing a Procedural Course for Prisoners' Suits Stating Claims Under Both Section 1983 and Habeas Corpus, 21 MEM. ST. U. L. REV. 733, 734–35 (1991).
303. This is a result of the procedural posture of the case, as it arrived at the Supreme Court after the district court granted a motion to dismiss and was overruled by the Ninth Circuit. See id. at 644.
304. See id. at 643.
306. See id.
307. See Balisok, 520 U.S. at 643.
308. See Respondent's Brief, supra note 305, at *2.
309. See id. at *3–4.
311. See id. at 648.
court stayed the action, pending state-court action on the restoration of the credits.\footnote{12} The Ninth Circuit reversed,\footnote{15} and the stage was set for the Supreme Court to hear the case.\footnote{14}

\footnote{12} See id. at 644.
\footnote{15} See id.
\footnote{14} See id. The Supreme Court heard oral arguments in Edwards v. Balisok on November 13, 1996. See id. at 641. In the week prior to that hearing, I wrote a short preview of the case for West's Legal News. See Melissa L. Koehn, Dividing the Indivisible: The Supreme Court Once Again Faces the Overlap of Habeas and Section 1983, West's Legal News, Nov. 8, 1996, available in 1996 WL 646787. After reviewing the procedural history of the case, as well as the development of the law in this area, I examined the arguments made by both sides in their briefs. See id. at *3. I then concluded:

As in previous cases addressing this issue, both sides present compelling theoretical and practical arguments. The Court's answer will depend on how it chooses to view Balisok's claim.

On one hand, the vast majority of prisoner civil rights litigation takes place through section 1983. The essence of Balisok's case, like other prisoner actions, is a challenge to the conditions and restrictions of prison life. Balisok is contesting the abuse of power that often occurs by corrections officers. He is not challenging the state's decision to imprison him. In addition, most prisoners want both damages and a restoration of good time credits as part of their challenges to prison disciplinary procedures. Does it really make sense to bifurcate these claims according to the remedy? It would seem to make more sense to allow them to be brought as section 1983 actions, perhaps with a requirement that prisoners must first complete the internal prison appellate process before filing a claim in federal court. This would streamline federal judicial proceedings and prevent the unwarranted duplication caused by bifurcation.

On the other hand, the Court could also eliminate bifurcation by mandating that all attacks on prison disciplinary procedures be brought through habeas corpus. The Court could achieve this objective by analogizing Balisok's prison disciplinary proceeding to a trial. Both seek to determine whether an accused is guilty of wrongdoing, and both involve various procedures to protect the accuracy of the fact finding process. The habeas corpus statute exists to balance the importance of comity between the federal and state governments with the paramount interest of protecting constitutional rights. No doubt exists that the "core" of the habeas statute is to guard against inadvertent or deliberate constitutional deprivations by state judicial officers. The primary problem with this, however, is that the habeas corpus statute contains no mechanism for awarding damages, and cannot easily be construed to allow such a remedy. It would be a much shorter stretch to allow restoration of good time credits as part of the remedy in a section 1983 action.

... [It] is not immediately clear why the Supreme Court granted certiorari in Edwards v. Balisok. The Court may simply be planning to declare that the Heck rule, established in the context of a challenge to trial and sentencing, also applies in the context of prison disciplinary proceedings. The Court may also be planning to create a different rule for the prisoner context or to abandon Preiser and Heck altogether.

While it is impossible to predict how the Court will rule ..., one thing is foreseeable: [everyone involved with these cases] will be anxiously awaiting the decision and
Justice Scalia, writing for a unanimous Court, started his opinion by reiterating the *Heck* rule. After summarizing the factual and procedural history of the case, he noted that the allegations in *Heck* and in *Balisok* are similar: both plaintiffs alleged that state officials concealed or destroyed exculpatory evidence, greatly hampering the section 1983 plaintiffs' ability to defend themselves. The Court noted that *Balisok* did not seek restoration of good time credits, but announced that this was not enough in light of the *Heck* rule, which "clearly envisioned . . . that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment."

*Balisok* argued that his allegations did not necessarily imply the invalidity of his sentence, as evidence was presented at his hearing to support the hearing officer's finding of guilt. According to *Balisok*, Washington follows a "some or any evidence" standard, which means that a court will uphold a hearing officer's decision if some evidence was presented at the hearing that would support the result. *Balisok* contended that his evidence, although probative, would not necessarily have changed the hearing officer's mind. Thus, he argued, his case did not fall on the "habeas" side of the line established in *Heck*.

Justice Scalia declared that this argument was "incorrect," as *Balisok* was not attacking the sufficiency of the evidence. Under a literal interpretation of the *Heck* rule, however, that argument cannot be incorrect. Indeed, it is the very heart of the matter. If evidence existed to support the hearing officer's decision, regardless of whether *Balisok*'s evidence was presented, then the lack of the evidence does not necessarily imply the invalidity of the result. That result—specifically the revocation of good time credits—hoping that the Supreme Court issues some definitive, workable, and helpful guidelines for handling these cases.

*Id.* at *4–5.

Once the actual decision came down on May 19, 1997, I went back and read these words with some incredulity at my own naivete. I had forgotten two fundamental principles. First, the Supreme Court has never brought any common sense or logic to these decisions in the past, so there was no reason to expect they would now. Second, I forgot the principle that has formed the theme of this paper: the Supreme Court tends to seize every opportunity to make things difficult and complicated for prisoners and for those involved in prisoner cases.

315. *See Balisok*, 520 U.S. at 643.
316. *See id.* at 644.
317. *Id.* at 645.
319. *See id.* at 647.
320. *See id.* at 645.
321. *See id.* at 646–47.
might have been different if Balisok had been able to present his evidence, but under the wording of the Heck rule, “might” is not enough to force Balisok into the habeas statutes. Unless the result would have been different, the Heck rule should not prevent Balisok from seeking damages for any deprivations of his procedural due process rights.

Thus, in order to reach its result in Balisok, the Supreme Court could not have meant what it said. The Heck rule must be rephrased to state that a section 1983 plaintiff cannot proceed if his allegations could possibly result in invalidating the proceeding. In the context of a challenge to prison disciplinary proceedings, this essentially would mean that if good time credits were revoked as part of the sentence, then a prisoner seeking to challenge the hearing procedures must do so through a petition for a writ of habeas corpus.

The Court’s decision thus accomplishes two things. First, it not only fails to clarify the law in this area, it actually further complicates matters. By enunciating one test and applying another, the Court has provided more mixed signals that will impose greater difficulties on lower courts wrestling with these cases. Second, the Court has made it very difficult for plaintiffs and their attorneys seeking to bring these types of challenges. Jerry Balisok was ably represented by an attorney who appeared to follow the rule laid down by the Court in Heck, yet it took three judicial decisions (the district court, the Ninth Circuit, and the Supreme Court) to determine that his case fell on the “wrong” side of the Heck line. In issuing these decisions, however, the courts did not provide any meaningful guidance for future attorneys, litigants, and judges faced with these decisions. Thus, the Court all but guaranteed that these cases will continue to consume large amounts of resources for uncertain results.

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322. See Heck, 512 U.S. at 487 (“[T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.”) (emphasis added).

323. In my preview of the oral arguments, I called this argument “dangerous” and implied that it was not a sound one. See Koehn, supra note 314, at *4. It appears the defense attorneys were more in tune with the Supreme Court than I was.

324. See Werner, supra note 4, at 680 (discussing the confusion that the Court’s decision in Balisok will create among lower courts).

325. See id. at 678–79 (discussing how the Court’s decision in Balisok has essentially foreclosed these types of prisoner actions).

326. See Balisok, 520 U.S. at 644 (discussing the district court decision).

327. See Balisok v. Edwards, 70 F.3d 1277 (9th Cir. 1995) (table case).

328. See Balisok, 520 U.S. at 641.
These burdens are magnified by two additional complicating factors. First, the Court noted that its decision applied only to the portions of Balisok's complaint seeking damages. Balisok also requested prospective injunctive relief to prevent prison officials from continuing their alleged practice of withholding witness statements from "jail house attorney[s]." The Court noted that "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under [section] 1983." Of course, Balisok must satisfy the standing requirements as well as the usual prerequisites for injunctive relief before he can be awarded such relief. Because the lower courts had not addressed these claims, the Court left those issues for consideration on remand.

In addition, in a short concurring opinion, Justices Ginsburg, Souter, and Breyer indicated that they joined in the main opinion with the understanding that it was limited to Balisok's allegations of deceit and bias on the part of the hearing officer. Balisok's other allegations, such as the hearing officer's failure to specify the facts and evidence supporting his finding, could be maintained under section 1983, as they did not necessarily imply the invalidity of the sentence. Six justices, however, refused to sign onto this concurrence, giving the impression that all of Balisok's damages claims were improper under section 1983. This division, however, might lead to future confusion by lower courts over the definition of "necessarily imply." In any event, the divvying up of Balisok's claims according to remedy does not make much sense. This practice will certainly confuse lower courts, as well as multiply their workload. Not only will the lower courts be faced with the complicated task of applying the Heck rule as modified in Balisok, but a proper application of that principle might turn one lawsuit into two or even three separate suits, despite the fact that they all arise out of the same set of circumstances. This, of course, will lead to all sorts of complications regarding res judicata and collateral estoppel.

A second complicating factor arises following the enactment of two relevant statutes: the Prison Litigation Reform Act of 1995

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329. See id. at 648–49.
330. Id. at 648 (alteration in original).
331. Id.
332. See id.
333. See id. at 649.
334. See id. at 649–50 (Ginsburg, J., concurring).
335. See id. at 649 (Ginsburg, J., concurring).
and the Antiterrorism and Effective Death Penalty Act of 1996. Both laws set strict limitations on the number and/or timing of section 1983 lawsuits brought by prisoners and on habeas petitions. If prisoners represented by counsel cannot figure out the Court’s jurisprudence in this area, how can pro se prisoners be expected to figure it out? What if a prisoner, either represented by counsel or proceeding pro se, chooses the incorrect cause of action? How is the court required to operate under these statutes? The answers to these questions are outside the scope of this Article, but they do present considerations that courts will inevitably confront.

Thus, as all four sections in Part II demonstrate, the Court’s recent cases have complicated life for many civil rights plaintiffs. In the next part of this Article, I speculate about the Court’s possible motivations and how they might be used to predict future trends.

III. WHAT IS MOTIVATING THE COURT?

As Part II of this Article demonstrates, the theme of protecting state sovereignty resounds throughout the Court’s section 1983 jurisprudence from the 1996–97 Term. Indeed, this theme appears to be the primary motivating factor behind many of the key decisions from that Term. In its mildest form, this policy of protecting states led the Court to reaffirm the established proposition that states are not “persons” for purposes of section 1983. In its strongest form, it led the Court to restrict possible areas of municipal liability. In its most insidious form, it led the Court to weaken the long-established principles of Ex parte Young.

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340. See McMillian v. Monroe County, 117 S. Ct. 1734, 1740 (1997) (holding that Alabama sheriffs represent the state, not the county); Board of County Comm’rs v. Brown, 520 U.S. 397, 415 (1997) (holding that where a sheriff hired an employee who later employed excessive force, the decision to hire must reflect a “conscious disregard of an obvious risk that a use of excessive force would follow”).
This motivation is a subset of the increasing trend toward expanding states' rights that is finding voice across the spectrum of the Court's jurisprudence. It is perhaps more pronounced in section 1983 cases, as the Court tends to view them as largely frivolous and as causing a drain on state and local treasuries, not to mention on the court system itself. In some respect, these feelings are understandable. A large number of section 1983 suits do fit this description. A large number of civil cases in general, however, would fit the description of "frivolous," because we live in a litigious society. I find it very disturbing that the Court seems willing to throw out the baby with the bath water when it comes to section 1983 suits. Just because some percentage of section 1983 suits are frivolous does not mean that they are all a waste of time. Section 1983 provides a mechanism for vindicating constitutional rights, arguably the most important rights in our system. Yet the Court seems determined to create a system of picayune procedural rules designed to favor both section 1983 defendants and the courts, to make it easy to dismiss these cases prior to trial regardless of their underlying merits.

This "protect the defendants" mentality is also disturbing given the original motivations and purposes behind section 1983—that citizens needed a mechanism to restrain states and their employees from violating their constitutional rights. Over the past 100 years, however, we have moved from distrusting states to bending over backward to protect them. Although circumstances have changed, and perhaps states are more trustworthy now, it is also true that section 1983 liability provided a large incentive for state and local governments to clean up their acts. The more the Court cuts back on the feasibility of a victory by section 1983 plaintiffs, the more it weakens or even eliminates those incentives.

The "protect the states" motivation has also brought with it, either intentionally or unintentionally, a hierarchy of people and of rights entitled to protection. Regardless of intent, this trend is (or should be) very troublesome. A look at the winners and losers in the cases surveyed above helps to illustrate this trend. Of the seven cases analyzed in Part II, six of them were victories for state and/or local government: Arizonans for Official English, Coeur d'Alene

342. See supra Part II.
343. I would be very interested in comparing the percentage of section 1983 cases dismissed as frivolous to the percentage of civil cases as a whole, but that is a topic for another Article.
344. See CHEMERINSKY, supra note 19, § 8.2, at 426–27 (stating that section 1983 gave federal courts authority to protect federal rights).
345. See supra text accompanying notes 47–61.
Tribe, Fankell, McMillian, Brown, and Balisok. Arizonans for Official English was probably the least noxious of these, as it simply reaffirmed the established principle that states are not “persons” under section 1983. Coeur d’Alene Tribe expanded this principle, however, by reducing the scope of Ex parte Young and decreasing potential liability of state officials sued in their individual capacity.

Fankell, an ostensible plaintiff’s victory, is actually much more favorable to states. Although the Court refused to require that states allow interlocutory appeals on the issue of qualified immunity, defendants can easily circumvent that holding by exercising their right to remove suits to federal court. Indeed, since defendants are quite likely to do just that, Fankell likely will have the effect of ensuring that virtually all section 1983 suits are litigated in the federal system. Thus, the plaintiff’s victory is illusory, as it essentially will be limited to this particular case.

McMillian and Brown directly benefit municipalities at the expense of plaintiffs. Both cases cut back on the liability of county sheriffs’ departments in situations where the system arguably contributed to constitutional deprivations. Both cases appear to limit liability to situations where the municipality itself adopted an unconstitutional policy or directly ordered the doing of an unconstitutional act. In Brown, the Court was more explicit about this motive, and it reinforced the idea by formulating a strict test for liability and applying that test even more strictly. The principle was more subtle in McMillian, but the Court gave great deference to state law provisions “labeling” a county employee as a state employee. This deference has the potential to make it easier for states to protect their municipalities by passing laws to make municipal policymakers part of the state system in name only, which will then disallow suits against municipal employees in their official capacity. Although McMillian is limited on its facts to Alabama county sheriffs, the general principle has the potential to apply to other states and other types of municipal policymakers. We will have to wait and see how far the courts are

346. See supra text accompanying notes 75–91.
347. See supra text accompanying notes 134–47.
348. See supra text accompanying notes 198–225.
349. See supra text accompanying notes 226–72.
350. See supra text accompanying notes 302–22.
351. Although this might be seen as a potential boon—that federal rights are litigated in the federal system—the pro-defendant slant of most section 1983 procedures will likely cause this shift to be a detriment, rather than a benefit, to section 1983 plaintiffs.
352. See Brown, 117 S. Ct. at 1388–93; see also supra Part II.C.
353. See McMillian, 117 S. Ct. at 1737–40; see also supra Part II.C.
354. See supra Part II.C.
willing to expand *McMillian*, but plaintiffs should fear the worst, given the current trends.

Finally, *Balisok* is not an unmitigated state victory, but that will likely be its ultimate result. First, the state actually prevailed in the litigation. In one respect, the Court's decision is not quite as favorable to states, because it has the potential to increase litigation costs. This possibility flows from the likelihood of duplicative litigation, as well as the likelihood of confusion by the courts. This confusion will take many cases and many appeals to straighten out. On a deeper level, however, by applying the *Heck* rule so that prisoners must proceed in habeas corpus whenever restoration of good time credits is a possible remedy, the Court has sent these cases into a forum that is much more favorable to the states. The recent restrictions on habeas, embodied in the Antiterrorism and Effective Death Penalty Act of 1996, ensure that a writ of habeas probably will not be forthcoming in the vast majority of these cases. In addition, the Court has provided a mechanism through which states can funnel almost all disputes over prisoner disciplinary hearings into habeas proceedings by generating rules that make forfeiture of good time credits an automatic penalty whenever a prisoner is found guilty of some misconduct after a disciplinary hearing. The *Heck/Balisok* rule will then apply, requiring that any prisoner challenges be brought through a petition for a writ of habeas.

Thus, of the seven cases surveyed in this Article, only one—*Richardson*—is a true plaintiff victory, and even that is a hollow one. Although the Court held that private prison guards are not entitled to the protection of qualified immunity, it left a gaping hole by explicitly reserving the right to formulate some other type of good faith defense for these defendants. I think it quite likely, given the anti-plaintiff bent of most section 1983 law, that such a defense will not be long in forthcoming. Additionally, I cannot escape noticing that *Richardson* was not a victory at the immediate expense of a state or municipality. Remember, the defendants in *Richardson* were not employed by either the state of Tennessee or by any of its municipalities. Thus, it could be argued that they may have lost, not just for the history and policy reasons articu-
lated by the Court, but also because they were not in a position to take advantage of the "protect the state" motivation so prevalent in other cases.

Who were the losers in these cases? Both municipal liability cases resulted in a loss for plaintiffs who were injured by county sheriffs or their employees. Granted, those plaintiffs can still proceed against the municipal employee in an individual capacity, but both cases arguably involved wrongdoing attributable to the municipality itself. They were both close calls, but the Court has made it clear that close calls go to the defendant. Municipalities will be held liable only in extraordinarily egregious cases. *Coeur d'Alene Tribe*, especially coming on the heels of *Seminole Tribe*, was a resounding defeat for Indian tribes. State prisoners went one and one, with a win in *Richardson* and a loss in *Balisok*. Of course, as discussed above, the win in *Richardson* may ultimately prove to be illusory. The other plaintiff's victory, *Fankell*, will almost definitely prove illusory. Even as a temporary victory, however, it benefited a state employee suing her former employer, and not a prisoner or a person suing a police department.

Obviously, these seven cases are not a sufficiently large sample from which to argue definitively that the Supreme Court is creating a hierarchy of people and rights entitled to constitutional protection. Indeed, they may simply reflect that a significant percentage of plaintiffs who file section 1983 actions are either prisoners or are suing a police department. On the other hand, it is hard to escape the fact that the result in most section 1983 decisions can be explained through either or both of two theories: either the Court is concerned with protecting state and municipal governments from both liability and litigation costs or it is unconcerned with protecting prisoners and plaintiffs who sue police departments.

If a suit does not involve a state or municipality or if the suit does not fit the stereotypical mold of a frivolous suit, then the Court is much more willing to lower the procedural barriers preventing a resolution on the merits of the suit. *Richardson* did this (at least temporarily) by removing pretrial wrangling over qualified immunity. *Fankell* also did this (again, at least temporarily) by limiting the disruption and expense of interlocutory appeals on the qualified immunity issue. It almost seems as though the

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362. See *Richardson*, 117 S. Ct. at 2101.
363. See *Fankell*, 117 S. Ct. at 1802.
364. See *Richardson*, 117 S. Ct. at 2103; see also supra Part II.B, II.C.
365. See *Fankell*, 117 S. Ct. at 1802; see also supra Part II.B.
Court's philosophy is that prisoner suits and suits against police officers are almost never meritorious, so they should be eliminated as quickly as possible. The barriers created by the Court, however, apply equally to meritorious and nonmeritorious suits. Many "stereotypical" section 1983 actions have merit and are at least a close call as to whether liability should be imposed. The Court, however, has created a system whereby these cases never get to the merits; they are dismissed for stumbling on some procedural hurdle.

This system is reinforced when comparing the decisions analyzed above with the Court's decision in *Suitum v. Tahoe Regional Planning Agency*[^366]. Bernadine Suitum owned an undeveloped piece of land near Lake Tahoe.[^367] The land in question fell under the jurisdiction of the Tahoe Regional Planning Agency (TRPA), which determined that her lot was ineligible for development.[^368] The Agency did, however, determine that Suitum was entitled to receive some transferable development rights, which were allegedly very valuable.[^369] Suitum was not satisfied with this remedy and filed a section 1983 suit, alleging that the TRPA had taken her property "without just compensation, in violation of the Fifth and Fourteenth Amendments."[^370]

The sole issue before the Supreme Court concerned the ripeness of the claim—whether Suitum had sufficiently completed the state administrative procedures and obtained a "final decision."[^371] Both the district court and the Ninth Circuit ruled that the claim was not ripe, but the Supreme Court reversed those decisions.[^372] Apart from the substantive conclusion, what stands out most about the Court's decision is that the Court went out of its way not only to reach its conclusion that Suitum's claim was ripe, but in so doing, it interpreted prior precedent rather liberally. Thus, a section 1983 plaintiff not only won a potentially close call, the Court narrowed prior holdings to make that possible.

In contrast, in the seven cases analyzed in Part II, the Court either held fast to prior precedent or even broadened it to achieve a pro-state result. It is hard to escape the implication that the Court is more willing to allow a takings claim, especially one not filed by a prisoner, to proceed toward a resolution on the merits. The ar-

[^367]: See id. at 1663.
[^368]: See id.
[^369]: See id. at 1662.
[^370]: Id. at 1663.
[^371]: Id. at 1664.
[^372]: See id.
arguments existed and the case law would have supported a decision that Suitum's claim was not ripe for adjudication. Such a result would have provided protection for municipal planning boards, in keeping with the generally pro-government results of other section 1983 decisions. Perhaps the difference lies, at least partially, in the fact that Suitum does not fit the mold of the stereotypical frivolous section 1983 plaintiff. 373

CONCLUSION

This Article has not presented (and has not attempted to present) a scientifically and statistically valid model definitively concluding that the Supreme Court is creating a hierarchy of persons and rights entitled to protection. Instead, it has taken a more limited approach, analyzing the major decisions from one Court Term. These cases raise a troubling concern that, whether intentionally or unintentionally, the Supreme Court is creating a system in which prisoners, Indians, and persons suing police departments are not entitled to full constitutional protection. This failure to provide full constitutional protection stems not from suits lacking merit, but rather because the plaintiffs have stumbled onto one of many procedural hurdles. This blanket preference for states and municipalities at the expense of certain plaintiffs carries with it the enormous risk of undermining section 1983. The blanket preference also flies in the face of the idea that part of the mission of

373. As I admit in the text, the distinction between Suitum and the stereotypical section 1983 plaintiff can provide only a partial explanation for the different treatment the Court gave her case. Supreme Court decisions can rarely, if ever, be explained by one simplistic factor. Rather, a complex array of motivations generally underlie most opinions. I do not mean to suggest otherwise with this Article. Instead, the purpose of this Article is to identify one strand of explanations that is particularly insidious. My hope is that once that strand is identified, people will begin to pay attention to it and question some of the Court's decisions.

Two additional factors are likely lurking behind Suitum. The first of these is the Court's marked hostility toward environmental protection efforts; these efforts were at the root of the Tahoe Regional Planning Board's decision that Suitum could not develop the land in question. The Court's hostility has been most evident in several standing decisions, including Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

The second factor revolves around the concept of transferable development rights (TDRs). The Court originally addressed TDRs in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). TDRs play a substantial role in the Suitum case, and the Court avoided explicitly accepting or rejecting the Penn Central approach. A more complete discussion of this thread is clearly beyond the scope of this Article, but a cogent analysis can be found in Julian Conrad Juergensmeyer et al., Transferable Development Rights and Alternatives After Suitum, 30 Urb. Law. 441 (1998).
federal courts is to protect unpopular minorities from the depriv-
tion of their constitutional rights. The purpose of this Article,
however, is not to prove that such a blanket preference does exist.
Instead, the purpose is to suggest such a possibility, to raise a niggling voice in the back of your mind every time you read a new section 1983 decision from the Court.