CIVIL RIGHTS AND FEDERAL COURTS: CREATING A TWO-COURSE SEQUENCE

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INTRODUCTION

A student of mine once described Federal Courts (or Federal Jurisdiction, as the course is sometimes called) as "the love child of Civ Pro and Con Law." As described in these pages last year,[1] Federal Courts combines horizontal and vertical concerns for distribution of federal power with a concern for organization, structure, management, and operation of the courts.[2] Part of that mix is the central theoretical and doctrinal theme of the basic structural 1L Constitutional Law course; the other part is the core of at least part of the basic 1L Civil Procedure course.

Civil Rights (or Civil Rights Litigation or Constitutional Litigation or Constitutional Torts[3] or § 1983 Litigation) is the grandchild on this doctrinal family tree. It takes the parent and mixes some remedies, criminal procedure, individual rights (distinct from structural) constitutional law, and employment/employment discrimination into the pedagogical DNA.

Section 1983 was enacted as § 1 of the Ku Klux Klan Act of 1871, Reconstruction-era legislation intended to enable Blacks and their supporters in the South to vindicate newly secured rights in the face of Klan control (or at least undue influence) over state governments and state courts.[4] The provision creates no rights. Rather, it provides a cause of action (a vehicle) for bringing

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1. *See* Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693 (2009).

2. Arthur D. Hellman, *Another Voice for the "Dialogue": Federal Courts as a Litigation Course*, 53 ST. LOUIS U. L.J. 761, 762–63 (2009).

3. *See* SHELDON H. NAHMOD, MICHAEL L. WELLS, & THOMAS A. EATON, CONSTITUTIONAL TORTS (2d ed. 2004). Jack Beerman suggests that constitutional tort litigation refers to constitutional litigation, distinct from civil rights litigation under more recent enactments, such as the Civil Rights Act of 1964. Jack Michael Beermann, *Qualified Immunity and Constitutional Avoidance*, ___ Sup. Ct. Rev. ___ (forthcoming 2010) (manuscript 1 n.3).

4. *See, e.g.*, Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 61 (2006).

claims to remedy deprivations of "rights, privileges, or immunities secured by the Constitution and laws"[5] committed by any "person" acting "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ."[6] An elaborate, technical, nuanced, detailed, and specialized body of legal rules (statutory, constitutional, and common law) has sprung up around this relatively sparse nineteenth-century statutory language.

Federal Courts casebooks and courses typically touch four areas of core § 1983 law: action under color of law,[7] federal-official liability under *Bivens*,[8] municipal liability,[9] and official immunities, notably executive qualified immunity.[10] In addition, § 1983 and the process of litigating constitutional claims underlie significant Fed Courts topics, such as the *Younger* and *Pullman* abstention doctrines,[11] the Anti-Injunction Act,[12] the obligation of state courts to apply federal law,[13] appealability,[14] and state sovereign immunity.[15] In

5. "Laws" refers to federal laws—primarily, although not exclusively, rights under the Fourteenth Amendment and the incorporated provisions of the Bill of Rights.

6. 42 U.S.C. § 1983 (2006) (emphasis added); Arizonans for Official English v. Arizona, 520 U.S. 43, 50 n.3 (1997).

7. Monroe v. Pape, 365 U.S. 167 (1961) (holding that police officers act under color of state law even when they violate state law, if clothed with apparent state authority); *see, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 947 (6th ed. 2009); ARTHUR D. HELLMAN, LAUREN K. ROBEL, & DAVID R. STRAS, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS 914 (2d ed. 2009); PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL–STATE RELATIONS 1151 (6th ed. 2008); MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 295 (4th ed. 1998).

8. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *see, e.g.*, FALLON ET AL., *supra* note 7, at 726; HELLMAN ET AL., *supra* note 7, at 504; LOW & JEFFERIES, *supra* note 7, at 189.

9. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); HELLMAN ET AL., *supra* note 7, at 965; LOW & JEFFERIES, *supra* note 7, at 1206.

10. Pearson v. Callahan, 555 U.S. ___, 129 S. Ct. 808 (2009); Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see, e.g.*, HELLMAN ET AL., *supra* note 7, at 982; LOW & JEFFRIES, *supra* note 7, at 1166.

11. Younger v. Harris, 401 U.S. 37, 49 (1971) (holding that federal courts cannot enjoin good-faith pending state criminal prosecution); R.R. Comm. Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.") (citations omitted).

12. 28 U.S.C. § 2283 (2006) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."); Mitchum v. Foster, 407 U.S. 225, 226 (1972).

13. Haywood v. Drown, 556 U.S. ___, 129 S. Ct. 2108 (2009); Johnson v. Fankell, 520 U.S. 911, 919 (1997).

short, § 1983 is a frequent (although not the sole) context in which the principles and theories of Federal Courts are put to work.[16] These doctrinal rules determine the availability and success of § 1983 claims and judicial remedies for constitutional violations. Additionally, they make complete sense only when considered in the fuller context of § 1983, as opposed to being additional units in the overall survey of federal jurisdictional doctrine and structural relations between Congress and the courts.

Thus it is time to let the grandchild leave home and take its independent place in the law school curriculum. There is too much to § 1983, doctrinally and normatively, for it to be given its due merely as part of a larger class on the work of the federal courts.[17] Attempting to give § 1983 sufficient depth within the larger Federal Courts class detracts from coverage of other important subjects that students should engage with and likely will not encounter elsewhere in law school. Civil Rights Litigation becomes "Applied Federal Courts," taking the general doctrines and core principles and themes from the big course and applying them to a particular category of cases that forms a substantial portion of the business of federal courts.[18] That application is best taught and learned independently and in detail in a distinct course.

I am the only full-time faculty member at my current school teaching both courses, so I want to use this paper to explain how I divide the material and why it makes pedagogical sense to do so. My goal has been to establish a two-course sequence, in which Federal Courts introduces the big-picture doctrines and the principles of the federal courts, the issues that surround and determine federal judicial jurisdiction, and the range of issues and cases landing in federal court. Civil Rights then entails a beginning-to-end examination of constitutional litigation under § 1983 and *Bivens*, touching on many of the same doctrines, themes, and principles, but in the narrower context of one area of common federal-court litigation.

14. Mitchell v. Forsyth, 472 U.S. 511, 519, 526–27 (1985).

15. U.S. CONST. amend. XI; *Ex Parte* Young, 209 U.S. 123, 155–56, 159 (1908).

16. Michael L. Wells, *A Litigation-Oriented Approach to Teaching Federal Courts*, 53 ST. LOUIS U. L.J. 857, 861–62 (2009).

17. The same is true for Habeas Corpus, both statutory habeas in which federal courts review state and federal convictions, 28 U.S.C. §§ 2254, 2255 (2006), and constitutional habeas that has been at the center of War-on-Terror litigation and the recent three-way power battle among Congress, the President, and the federal courts, although it cannot be covered in sufficient depth. *Cf.* 28 U.S.C. § 2241; Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Habeas is included in many Federal Courts casebooks. *See, e.g.*, FALLON ET AL., *supra* note 7, at 1153; LOW & JEFFERIES, *supra* note 7, at 804; REDISH & SHERRY, *supra* note 7, at 585.

18. CAROL KRAFKA, JOE S. CECIL, & PATRICIA LOMBARD, STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS, FEDERAL JUDICIAL CENTER 8 (1995), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rate_of_appeal.pdf/$file/rate_of_appeal.pdf (noting the increase in the proportion of civil rights cases).

The Law Journal dedicated last year's teaching issue to Federal Courts.[19] It is appropriate, then, to use these same pages to consider this pedagogical and curricular off-shoot. Rather than looking at what should be in a Federal Courts class and how the class should be taught, I want to focus on what should be excised from Federal Courts and spun into an independent course.

I. WHY CIVIL RIGHTS

There are several reasons that Civil Rights Litigation deserves its own course (whatever we call the course). First, there is the increased (and ever-increasing) amount, complexity, and specialization of the material, both in Federal Courts generally and in the narrower course. In the 2008–2009 Term, the Supreme Court decided a number of cases that warrant at least some mention in class discussions in a civil rights litigation course, and perhaps full treatment in subject casebooks.[20] A two- to three-week cursory overview of some areas of § 1983 as part of a broader thirteen-week discussion of the business of the federal courts does not provide full coverage or put the material in its full context. For example, most books include a major case on qualified immunity.[21] But the proper approach to qualified immunity has changed twice in the last decade, demanding a significant expenditure of time to explore this evolution.[22] And the significance of qualified immunity makes sense only in the overall framework of a civil rights action, particularly after consideration of whether a plaintiff had initially established a violation of her rights. Moreover, qualified immunity functions as the default defense when absolute immunities applicable to particular actors and particular conduct are not in play—but those other immunities typically are not covered in Fed Courts.[23] As

19. *See* Fallon, *supra* note 1; Laura E. Little, *Teaching Federal Courts: From Bottom Line to Mystery*, 53 ST. LOUIS U. L.J. 797 (2009); Wells, *supra* note 16.

20. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. ___, 129 S. Ct 2633 (2009) (granting qualified immunity to school officials who conducted a strip search of a student suspected of possession and distribution of ibuprofen); Dist. Atty's Office v. Osborne, 557 U.S. ___, 129 S. Ct. 2308 (2009) (rejecting § 1983 claim to obtain DNA testing); Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937 (2009) (requiring intentional action to establish supervisory liability for First Amendment and equal protection claims); Van de Kamp v. Goldstein, 555 U.S. ___, 129 S. Ct. 855 (2009) (applying absolute prosecutorial immunity to policy decisions by heads of prosecutor office); Pearson v. Callahan, 555 U.S. ___, 129 S. Ct. 808 (2009) (establishing standard for qualified immunity); Fitzgerald v. Barnstable Sch. Comm., 555 U.S. ___, 129 S. Ct. 788 (2009) (holding that Title IX does not preclude § 1983 constitutional claim for same conduct).

21. *See supra* note 10 and accompanying text.

22. *See Pearson*, 129 S. Ct. at 819 (rejecting mandatory two-step, merits-first approach established in 2001 in *Saucier v. Katz*, 533 U.S. 194 (2001)); *see also* Beermann, *supra* note 3 (manuscript at 2–3).

23. *See Van de Kamp*, 129 S. Ct. at 859–60, (discussing scope of absolute prosecutorial immunity); Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (recognizing legislative immunity as

the law of § 1983 becomes more detailed and complex, it makes it difficult for Federal Courts professors to cover the material in sufficient depth or detail to have it make sense without taking time away from other general jurisdictional issues, which themselves remain the subject of constant attention, expansion, and development in courts and in Congress.[24]

Second, Civil Rights is not one subpart of a broader discussion of Federalism, Separation of Powers, and the judicial process as it affects the general function of the federal courts. Rather, § 1983 is a specific area of substantive federal law with its own elaborate body of substantive, jurisdictional, and procedural rules that puts those themes and principles into action. It is uniquely common business that many students will encounter in a range of professional endeavors.[25] Some graduates will work as judges and many as federal law clerks, where § 1983 and *Bivens* claims comprise a significant portion of the docket.[26] Others will work for various levels of government as lawyers, perhaps litigating civil rights claims on behalf of government and government officials. Some will become plaintiff-side trial lawyers, with civil rights litigation forming a substantial (and potentially lucrative) part of their practice.[27] Some might even find themselves as § 1983 and *Bivens* defendants.[28] All are well served by a dedicated course exploring the full scope of the doctrine and principles.

The course I envision sounds much like the litigation-oriented approach to Fed Courts that Michael Wells described in these pages last year.[29] Wells begins his class with the core § 1983 material that is the crux of my Civil Rights course, using it as a bridge to explore the academic and theoretical questions at the heart of the common Federal Courts curriculum, as well as more general federal jurisdictional doctrines (standing, federal common law,

applicable to all levels of state and local government); Mireles v. Waco, 502 U.S. 9, 11–12 (1992) (considering scope of judicial immunity).

24. Haywood v. Drown, 556 U.S. ___, 129 S. Ct. 2108 (2009) (discussing the obligation of state courts to follow federal law); Summers v. Earth Island Inst., 555 U.S. ___, 129 S. Ct. 1143 (2009) (considering whether a party had standing to challenge federal regulations); Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005); Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. (2004).

25. *See* Wells, *supra* note 16, at 871–72 (arguing class time should highlight concepts students will encounter in real life legal practice).

26. *See supra* note 18 and accompanying text.

27. Unlike ordinary state tort litigation, § 1983 (and other civil rights statutes) offer the attorney fees for private plaintiffs' lawyers whose clients prevail in litigation. *See* 42 U.S.C. § 1988(b) (2006).

28. *See, e.g.*, Padilla v. Yoo, 2009 WL 1651273, at *1–2, *4 (N.D. Cal. 2009) (denying motion to dismiss in *Bivens* action brought by War-on-Terror detainee against former attorney in Office of Legal Counsel). Obviously, defendants in actions implicating prosecutorial and judicial immunity will have gone to law school.

29. Wells, *supra* note 16, at 860.

federal question jurisdiction, etc.).[30] By grasping the general principles of § 1983, Wells argues, students gain the tools to grasp the power and reach of general Federal Courts principles in their real-world applications.[31]

I share Wells's view that § 1983—understood in practical, litigation-oriented terms—is essential to understanding principles of federal judicial power and the function of the federal courts and vice versa. And I join him in rejecting the notion that the particulars of § 1983 are comparatively less significant than broad principles or scholarly ideas. But a distinct civil rights course provides the best of both worlds—the scholarly, ethereal, legal-process approach that defines the typical (including my) Federal Courts class, as well as the litigation-oriented focus on § 1983 which illustrates those principles in action. It spreads coverage across two classes, leaving two full semesters to explore both theoretical and applied approaches and to give students the benefits of each.

Third, federal litigation and the federal judiciary became significant enough to justify a stand-alone course and independent area of study only in the middle of the last century. That change corresponded temporally with an increase in the amount and scope of substantive federal law, beginning with the New Deal and picking up speed with the Warren Court and the Great Society.[32] Section 1983 is part of this substantive explosion. Virtually all of the material covered in Civil Rights dates from the early 1960s forward. Congress enacted § 1983 during Reconstruction,[33] but between 1871 and 1940, federal courts decided only twenty-one cases.[34] Section 1983's emergence as a meaningful part of federal law and the work of federal courts required several post-New Deal developments: (1) wide incorporation of the Bill of Rights under the Fourteenth Amendment; (2) the Warren Court's decision in *Monroe* expansively interpreting the concept of action "under color" of state law and recognizing § 1983 as a primary right of action in federal court, even as to conduct that might also violate state law;[35] and (3) the *Bivens* decision ten years later recognizing a direct constitutional action for damages against

30. *Id.* at 861–62.

31. *Id.* at 867.

32. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 512 (1986); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 284–85 (1989).

33. Monroe v. Pape, 365 U.S. 167, 204 (1961).

34. THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 65 (5th ed. 2004) (citations omitted).

35. *See Monroe*, 365 U.S. at 183; Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir*, *in* CIVIL RIGHTS STORIES 41, 53–54 (Myriam E. Gilles & Risa L. Goluboff, eds. 2008).

federal officers.[36] Judicial recognition of private damages litigation as a primary vehicle for enforcing constitutional rights[37] made the study of that vehicle a necessary part of the law school curriculum. The subsequent pullback on many important issues becomes fodder for further exploration of the substantive landscape.[38]

Finally, although both courses touch on similar ideas, principles, and themes, their respective focuses differ. As Arthur Hellmann argued in these pages last year, the focus in Federal Courts is structural and institutional; principles are examined from the point of view of Congress and the courts as "institutions of governance."[39] Federal Courts is primarily about the institutional relationships between Congress and the federal courts or between federal courts and state courts—when federal courts can and should act, when Congress can control when or how federal courts can act, and when federal courts can control what states or Congress do. In discussing federalism and separation of powers, the material often speaks of federal "interests," reflecting a concern for whether it is in the institutional interests of the federal government and federal law to have a class of cases in federal court and which federal institution gets to make that choice.[40]

The theme in Civil Rights Litigation is individual—usually constitutionally based—rights and the process of enforcing and vindicating those rights. The federal "interest" in having the case litigated and decided in federal court is less institutional and more individual, resting with the plaintiff whose constitutional rights allegedly have been infringed and who seeks judicial relief and remedy. The concern is for the plaintiff and what she must do to vindicate her rights—what she must plead and prove in her case, what defenses and procedural hurdles she must overcome, and what remedies she may obtain if successful.[41] There often is concern for bottom–line results—did the plaintiff/rights-holder prevail, and, if she did not, have her "rights been enforced?" Does civil rights doctrine and practice match the theory that for

36. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

37. *See id.* at 410 (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing."); *Monroe*, 365 U.S. at 183.

38. *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994); *see generally* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988); Younger v. Harris, 401 U.S. 37 (1971). *See also* Harold S. Lewis, Jr., *Teaching Civil Rights with an Eye on Practice: The Problem of Maintaining Morale*, 54 ST. LOUIS U. L.J. 769 (2010).

39. Hellman, *supra* note 2, at 762–63.

40. *See* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 692 (2006) (citations omitted); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005) ("It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

41. *Infra* Part II.

every right there is a remedy?[42] To the extent it engages the same structural and institutional debates about the judicial role and the balance of power between Congress and the courts or between federal courts and state courts, the focus remains squarely on how those disputes affect individual-rights claimants and vindication of their constitutional liberties.

Consider, for example, one topic covered in both courses—parity between federal and state courts and Burt Neuborne's seminal article, *The Myth of Parity*.[43] Parity provides the logical support for the various federal abstention doctrines. The discussion of parity in Federal Courts is institutional—it considers the structural issues that distinguish federal from state courts and the federalist balance; the historical fact that state courts were (and were expected to be) primary courts of original jurisdiction and the structural-federalism concerns that raised; and the fact that concerns about state courts' respect for federal law date to the Founding and early days of the Constitution, long before the Warren Court's "rights revolution." The discussion in Civil Rights is narrower and exclusively modern: the question is whether parity exists for vindicating individual federal constitutional rights, what it means for courts to vindicate rights, and how concerns for individual (as opposed to structural) rights dictate forum allocation choices.

It is not surprising that § 1983 has quickly become such a major part of the federal judicial docket that Federal Courts no longer can give full and meaningful pedagogical consideration to this area. The material demands its own, more practically oriented course.

II. TEACHING CIVIL RIGHTS

The question is what material to cover in Civil Rights—a course designed to give a complete presentation of the doctrinal and policy issues in § 1983, going into far greater detail than in the typical Federal Courts class. The course is best divided into seven subjects, roughly following the chronological flow of issues arising in a typical § 1983 action. Most of the main casebooks are organized (in varying order) along these major subjects.

42. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

43. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). *See also* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599–60 (1999) (exploring the advantages of bringing civil rights claims in state courts in the context of gay rights).

A. Basic Elements of Constitutional Claims: State Action

We begin with claims against individual officers and the requirement that the defendant act "under color"[44] of state law, which roughly corresponds to the state action requirement of the Fourteenth Amendment.[45] We start with *Monroe* and its expansive interpretation of the concept to reach public officials whose conduct violates state law but who nevertheless were "clothed" with the authority (or apparent authority) of state law such that their actions were "made possible" only by their positions under state law.[46]

We then turn to a different state action issue—when private individuals or entities are deemed to act under color of state law by virtue of some joint or coordinated action with government, such that the private entity becomes subject to constitutional liability.[47] This doctrine was particularly vigorous during the Civil Rights Era, although it has made something of a comeback in recent years.[48] The recent trend towards privatizing governmental functions has increased the issue's significance.[49]

While many Federal Courts casebooks include *Monroe* as a major case, a full discussion of the "under color" element is beyond the scope of that class. But it is central to a complete understanding of constitutional litigation: who can (and should) be sued for a constitutional violation, and who is subject to constitutional limits and possible constitutional liability.

B. Basic Elements of Constitutional Claims: Rights, Privileges, and Immunities

The second element of a § 1983 claim is a deprivation of a "right[], privilege, or immunity secured by the Constitution and laws."[50] The starting point is Fourteenth Amendment substantive due process, including incorporated Bill of Rights provisions against state and local governments, as well as liability for tort-like outrageous executive misconduct.[51] Then comes

44. 42 U.S.C. § 1983 (2006).

45. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 935 n.18 (1982).

46. *See* Monroe v. Pape, 365 U.S. 167, 184–85 (1961) (citations omitted); Gilles, *supra* note 35, at 53–54; Michael L. Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1103–04 (1985).

47. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–97 (2001); *Lugar*, 457 U.S. at 926–29; Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

48. Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past? Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1064–65 (2002).

49. *See* Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (accepting, implicitly, that private company acted under color of federal law in operating federal prisons); Jody Freeman, *Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–56 (2000).

50. 42 U.S.C. § 1983 (2006).

51. *See* Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998).

procedural due process, with particular consideration of underlying structural federalism issues and the effect of available post-deprivation state judicial remedies on federal due process claims.[52] The connection between due process and state remedies makes these claims different than other constitutional-rights claims, as to which the availability of state-law remedies is irrelevant.[53]

Next, we consider the "and laws" language of § 1983 and its use to vindicate violations of federal statutes, which raises unique issues of separation of powers.[54] Finally, we consider the relationship between § 1983 constitutional claims and other federal civil rights statutes and when a substance-specific statute, often containing its own detailed remedial scheme, precludes a constitutional claim (under *Bivens* or § 1983) for the same conduct.[55]

C. Claims Against Federal Officials

We briefly detour to discuss *Bivens*, the judge-made federal parallel to § 1983.[56] This section covers the Court's decision in *Bivens* itself, as well as recent cases applying the "factors counseling hesitation" concept to limit availability of *Bivens* actions in many circumstances.[57] One key point here is the disconnect between the claims that can be pursued against state and local officers under § 1983 as opposed to against federal officers; underlying that is the issue of the relative powers of Congress and courts and which is the appropriate source of any cause of action for pursuing constitutional claims.

D. Individual Officer Defenses

The focus of the course then shifts from plaintiff to defendant by introducing the immunity defenses available to all individual, state, and federal

52. *See generally* Zinermon v. Burch, 494 U.S. 113 (1990); Daniels v. Williams, 474 U.S 327, 330–32 (1986); Hudson v. Palmer, 468 U.S. 517, 533 (1984).

53. *Cf.* Bogart v. Chapell, 396 F.3d 548, 561 (4th Cir. 2005).

54. *Compare* Maine v. Thiboutot, 448 U.S. 1, 4–5 (1980) (recognizing that § 1983 vehicle can be used to remedy violations of federal statutes), *with* Gonzaga Univ. v. Doe, 536 U.S. 273, 284–87 (2002) (tying answer to congressional intent in underlying statute). I spend time in Federal Courts teaching implied statutory rights of action. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001). This is the flipside, which I mention briefly in a Federal Courts course, only to show the connection between the doctrines. *Thiboutot* also allows exploration of the jurisdictional question of where courts get the power to hear § 1983 claims. 448 U.S. at 7–8 n.6; *compare* 28 U.S.C. § 1331 (2006), *with id.* § 1343(a)(3) (2006).

55. *See* Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 793–97 (2009).

56. *Cf.* Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 1948 (2009) (quoting Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006)) (describing *Bivens* as the "federal analog" to § 1983).

57. *See* Wilkie v. Robbins, 551 U.S. 537, 550–68 (2007).

officer defendants—absolute legislative,[58] judicial,[59] and prosecutorial[60] immunity, as well as the default executive qualified immunity.[61] These affirmative defenses are the flipside to the elements of the plaintiff's claim; they apply only when the plaintiff has established (or at least pled) a violation of rights under color of law that should entitle her to recovery.[62]

E. Governmental Liability

The course then moves from claims against individual officer defendants to claims against governmental-entity defendants, with different rules applying to different levels of government.

For local governments, this means *Monell* and the Byzantine doctrine of municipal liability. Government is not subject to vicarious liability merely because one of its officers acts in an unconstitutional manner.[63] A local government is liable for misconduct occurring pursuant to formal policy established by a policymaker, for conduct engaged in by a "policymaker," or for deliberate failure of policymakers to train, supervise, control, or otherwise manage their inferior officers.[64]

For state governments, this discussion leads to the Eleventh Amendment and state sovereign immunity, another subject typically covered in depth in Federal Courts. This overlap presents a dilemma I am still working through. One approach is to excise sovereign immunity entirely from Federal Courts (beyond a brief primer) and place the entire subject into Civil Rights. At some level this makes sense because the real Eleventh Amendment action now centers on the scope of Congress' powers under § 5 of the Fourteenth Amendment, making it a clean fit for a course on litigating constitutional and statutory public law rights.[65] And § 1983/*Bivens*[66] and *Ex Parte Young*[67] share a common theme—litigation is targeted primarily at individual officers

58. *See* U.S. CONST. art. I, § 6; Bogan v. Scott-Harris, 523 U.S. 44, 48–49 (1998) (citing Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951)).

59. *See* Mireles v. Waco, 502 U.S. 9, 11 (1992) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

60. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 859–61 (2009).

61. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 807–08 (1982).

62. *See Pearson*, 129 S. Ct. at 818–22 (2009); Pierson v. Ray, 386 U.S. 547, 554 (1967); Am. Fire, Theft, & Collisions Managers, Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991).

63. Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 691 (1978).

64. *See* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 403–04 (1997) (citations omitted); Canton v. Harris, 489 U.S. 378, 380 (1989); St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988) (citing *Monell*, 436 U.S. at 690).

65. *See* U.S. CONST. amend. XIV, § 5; United States v. Georgia, 546 U.S. 151, 158 (2006); Tennessee v. Lane, 541 U.S. 509, 518, 520 (2004).

66. *See supra* Part II.C.

67. 209 U.S. 123 (1908).

("persons") rather than government entities. Alternatively, we could cover the Eleventh Amendment in both classes, but narrow the focus in Civil Rights. Following a broad overview of the Eleventh Amendment,[68] Civil Rights would examine the link between the Eleventh Amendment and constitutional litigation, including whether states are "persons" subject to suit under § 1983,[69] the extent to which states can be directly sued and held liable for constitutional violations,[70] and the role of *Ex Parte Young*.

We finish this part with two issues that bridge pure individual liability with entity liability. The first is supervisory liability and the rules for holding higher-level officials individually responsible for the misconduct of their underlings on the ground.[71] The second is the often-difficult task of dividing and distinguishing state from local government and local government functions. Litigants and courts often must determine whether a particular officer defendant works for local government (in which case the government entity might be liable on a *Monell* claim, on a proper showing) or for the state (in which case entity liability is unavailable).[72] The second is an important aspect of Eleventh Amendment doctrine, but again is understandable only within the full context of a focus on § 1983.

F. Procedural Hurdles

The next part of the course examines a series of procedural hurdles that plaintiffs must overcome to prevail on § 1983 actions. Some of these hurdles are covered in Federal Courts, others are not. Again, however, the key is the contextualized and practical coverage in the stand-alone course. If the overriding theme of Civil Rights is how individuals vindicate (or do not vindicate) constitutional rights, this section considers the many unexpected hurdles to that vindication.

First is the requirement of exhaustion of state judicial and administrative remedies as a prerequisite to bringing federal constitutional claims.[73] Second is the doctrine of *Heck v. Humphrey*,[74] and whether particular constitutional rights can be asserted through § 1983 (which does not require exhaustion of state remedies) or must be asserted only through Habeas Corpus (which does

68. For an ideal case surveying the overall doctrinal landscape of the Eleventh Amendment, although not a § 1983 case, see *Alden v. Maine*, 527 U.S. 706 (1999).

69. *See, e.g.*, Will v. Mich. Dep't State Police, 491 U.S. 58, 71 (1989); Quern v. Jordan, 440 U.S. 332, 342–44 (1979).

70. *See generally* United States v. Georgia, 546 U.S. 151 (2006).

71. Of course, there is some question whether supervisory liability still exists. *See* Ashcroft v. Iqbal, 557 U.S. ___, 129 S. Ct. 1937, 1948–49 (2009) ("[V]icarious liability is inapplicable to *Bivens* and § 1983 suits . . . ."); *see also id.* at 1957–58 (Souter, J., dissenting).

72. McMillian v. Monroe County, 520 U.S. 781, 786–89 (1997).

73. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982).

74. 512 U.S. 477 (1994).

require exhaustion of state processes).[75] This triggers an important side discussion on the effectiveness of § 1983 as a vehicle for remedying constitutional violations occurring within state criminal proceedings, especially for violations leading to wrongful convictions and claims of actual innocence. It also requires a brief lecture on the contours of Habeas Corpus.[76]

Next comes issue and claim preclusion and the extent to which legal and factual conclusions in state proceedings (civil, criminal, or administrative) are binding on a subsequent federal constitutional claim brought in federal court.[77] This allows discussion of litigation strategy, the overlap between federal and state claims, and the right (and occasional need) to bring claims together in one action in some court. Lastly, we examine the intersection of all these procedural issues, as well as statutes of limitations, through the decision in *Wallace v. Kato*,[78] which considered the accrual date and timeliness of Fourth Amendment claims in an actual-innocence/wrongful prosecution case.

The next procedural hurdle is abstention, covered in great detail in Federal Courts and more narrowly here. Consider several important points about covering abstention in Civil Rights. First, there is some debate among teachers as to whether abstention should be covered in the course, and only one of the major casebooks includes it.[79] Second, discussion can be limited only to the two abstention doctrines most frequently in play in § 1983 litigation—*Pullman* and *Younger*. Third, the discussion in Civil Rights ties the conversation less to the structural question of the judicial power to abstain and more tightly to the history and purpose of § 1983, Congress' intent in creating that litigation vehicle, and whether abstention is consistent with that statutory purpose.[80] Finally, abstention permits discussion of unique procedural issues related to

75. *Id.* at 480–81.

76. Habeas is included in some Civil Rights casebooks. *See, e.g.*, EISENBERG, *supra* note 34, at 427. It is similarly specialized and complicated—too much for full inclusion in this course beyond a basic outline lecture that enables students to see the connections between habeas and § 1983 as vehicles for pressing federal constitutional claims. Again, I believe Habeas demands its own third course, independent of both Federal Courts and Civil Rights Litigation. *See supra* note 17 and accompanying text.

77. *See* Migra v. Warren Sch. Dist. Bd. Educ., 465 U.S. 75, 75–76 (1984); Allen v. McCurry, 449 U.S. 90, 96–97 (1980).

78. 549 U.S. 384 (2007).

79. *See* EISENBERG, *supra* note 34, at 547. A second Civil Rights book is an offshoot of the LOW & JEFFRIES Federal Courts casebook. *See* JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (2d ed. 2007). This book does not include abstention, but the publishers permit teachers to pull material from one book to use with the other. *Id.* at iii–xviii.

80. *See* Wells, *supra* note 16, at 1097–98.

prospective relief under § 1983, including declaratory judgments[81] and three-judge district courts.[82]

G. Remedies

We finish the course with the remedies that a plaintiff can recover if she proves the elements of her basic claim and overcomes the immunity defenses and procedural hurdles—in other words, after everything we have discussed up to this point of the course. Remedies include damages, attorneys' fees, and injunctive relief (including structural or positive institutional-reform injunctions), all considered in light of the policies of § 1983 litigation. For example, we consider that there is no recovery for the intrinsic value of constitutional rights, meaning big money is not in play in many actions and plaintiffs often are limited to nominal damages.[83] In considering attorneys' fees, we discuss the concept of the "Private Attorney General" and the congressional goal and public benefit derived from increasing civil rights enforcement through individual damages litigation.[84] We also consider the extent to which attorneys' fees have become an intrinsically valuable remedy that imposes its own deterrence on government misconduct.

III. CONCLUSION: CONNECTING FEDERAL COURTS AND CIVIL RIGHTS

Because I teach both courses, my interest in Civil Rights Litigation affects my approach to Federal Courts and vice versa. My goal is to avoid unnecessary redundancy and to create a genuine two-course sequence with distinct parts and themes, while making both work as stand-alone courses. To the extent possible, I cover none of the core Civil Rights material described in Part II in my Federal Courts class, leaving it entirely for Civil Rights. I ignore the details of § 1983, *Bivens*, individual immunity, and *Monell*. I teach abstention in both classes, but more broadly in Federal Courts, covering all abstention doctrines, not only those typically applicable to § 1983 litigation. Most recently, I entirely omitted the Eleventh Amendment from Federal Courts. That last move was less about overlap and repetition than about the need for more time

81. *See* 28 U.S.C. § 2283 (2006).

82. *Id.* § 2284; Michael E. Solimine, *Congress,* Ex Parte Young, *and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101 (2008).

83. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731–36 (1989); Carey v. Piphus, 435 U.S. 247, 266–67 (1978).

84. *See* 42 U.S.C. § 1988(b); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't Health & Human Res., 532 U.S. 598, 602–10 (2001); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why it Matters*, 57 VAND. L. REV. 2129 (2004).

in Federal Courts to cover other material. But the topic becomes expendable precisely because Civil Rights is in the curriculum to pick up the slack.[85]

The final issue is sequencing. Pedagogically, my inclination is to move from the general to the specific, so I recommend that students take Federal Courts to be introduced to the doctrine, principles, and themes before looking at them in the specific § 1983 context.[86] On the other hand, Wells argues that understanding specific § 1983 doctrine enables students to better grasp the general ethereal principles and concepts of Federal Courts, meaning students will get more out of the theory of Federal Courts if they have seen the principles in action in the specific course first.[87]

Ultimately, sequencing matters less than the broader point that Civil Rights Litigation must have space alongside Federal Courts in the law school curriculum. Both should be part of pedagogical immersion in the world of federal public law litigation for all students interested in clerking, in practicing public law and constitutional litigation in federal court, or simply in understanding the process for vindicating civil rights.

85. In Fed Courts, I assigned a five-page primer on the doctrine and did a ten-minute summary lecture that largely served as a trailer for the civil rights course or a basic grounding for Bar Review.

86. Wells might say that I fall into the trap of many Federal Courts teachers. Wells, *supra* note 16, at 860–61.

87. *Id.* at 867.