# CONSTITUTIONAL LITIGATION UNDER SECTION 1983 AND THE *BIVENS* DOCTRINE IN THE OCTOBER 2008 TERM

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## INTRODUCTION

Section 1983[1] is the major enforcer of individual federal constitutional rights. It authorizes individuals to enforce their constitutional rights against state and local officials; for example, prison officers and police officers, and against municipalities. It is the most important civil statute in American law. To its credit, the United States Supreme Court understands the significance of § 1983.

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[1] 42 U.S.C.A. § 1983 (West 2009). The statute states, in pertinent part, that:

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

*Id.*

For the past three decades, in virtually every single Term of the Court, it has decided a substantial number of cases dealing with different facets of § 1983 litigation.[2] Last Term, there was an unusual number of § 1983 decisions rendered by the United States Supreme Court, which represent a mixed bag of pro-plaintiff/pro-defendant decisions. My own evaluation is that—on the whole—the defendants prevailed on the more important issues.

This Article will discuss the Supreme Court decisions of last Term in six areas of § 1983 litigation: (1) constitutional rights enforceable under § 1983; (2) pleading requirements; (3) supervisory liability; (4) prosecutorial immunity; (5) qualified immunity; and (6) state court § 1983 actions against corrections officers.

## I. CONSTITUTIONAL RIGHTS ENFORCEABLE UNDER SECTION 1983

The most fundamental principle of § 1983 law is that the statute, itself, does not create any rights, but authorizes the enforcement of federal constitutional rights against state and local officials, and in some cases, enforcement of federal statutory rights as well. This means that the significance of § 1983 is greatly dependent upon the extent to which the United States Supreme Court recognizes individual constitutionally-protected rights. Potentially, a very broad range of constitutional rights are enforceable under § 1983.

Sometimes an issue arises whether a particular federal statutory scheme was intended to preclude enforcement of a federal constitutional claim under § 1983. That was the issue for the Supreme Court last Term in *Fitzgerald v. Barnstable School Committee*.[3] The complaint asserted a sexual harassment claim by a public school student against school officials and the school committee, which is analogous to a school district. The plaintiff alleged a violation of Title IX of the educational amendments of

[2] *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); McMillian v. Monroe County, Ala., 520 U.S. 781 (1997); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Owen v. City of Independence, Mo., 445 U.S. 622 (1980); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[3] 129 S. Ct. 788 (2009).

1972—which prohibited gender discrimination in federally-funded educational programs—and a violation of the Equal Protection Clause under § 1983.[4] The defendants took the position that Title IX was intended by Congress to preclude the assertion of a § 1983 Equal Protection Clause claim.[5]

The Supreme Court, in a unanimous opinion written by Justice Alito, rejected the defendants' argument, holding that the plaintiff was entitled to assert the § 1983 equal protection claim.[6] What is most significant about the Court's decision is its language, which supports a strong presumption that federal statutory schemes should not be interpreted to preclude assertion of § 1983 constitutional claims. This presumption is especially strong when the scope of the federal statutory protection and the § 1983 constitutional claim are not the same.[7] In this case, there were significant differences. For example, Title IX only reaches federally-funded educational organizations, while § 1983 is not so limited; on the other hand, Title IX reaches private schools, while § 1983 applies only to state actors.[8]

The *Fitzgerald* decision does not deal with the question of whether Title IX, itself, is enforceable under § 1983. On the separate question of whether particular federal statutes may be enforced under § 1983, the Supreme Court, in recent years, has been very pro-defendant and stingy in recognizing enforcement of federal statues under § 1983.[9] The issue in *Fitzgerald*, however, was the

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[4] *Id.* at 792.

[5] *See id.* at 797 n.2.

[6] *Id.* at 797.

[7] *Id.* at 796-97.

> A comparison of the substantive rights and protections guaranteed under Title IX and under the *Equal Protection Clause* . . . support[s] . . . the conclusion that Congress did not intend Title IX to preclude [*§] 1983* constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way, we cannot agree . . . that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."

*Fitzgerald*, 129 S. Ct. at 796 (quoting Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 179 (1st Cir. 2007).

[8] *Id.*

[9] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002) ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms–

enforcement of the Equal Protection Clause, a constitutional claim under § 1983.

The second constitutional decision was a high-visibility case called *District Attorney's Office v. Osborne*.[10] The issue there was whether a convicted criminal defendant has a due process right of access to evidence for the purpose of DNA testing.[11] The Court, in a five-to-four decision—the typical five-to-four alignment (Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito in the majority, with Justices Stevens, Souter, Ginsburg, and Breyer in dissent)—held that there is no such due process right.[12] One issue in the case was whether this claim was even assertable under § 1983. The defendants argued that Osborne's due process claims had to be asserted in a federal habeas corpus proceeding, with all the limitations imposed on the federal habeas remedy.[13] The plaintiff argued that he could assert his due process claims under § 1983.[14] The Court sidestepped that issue by holding that even if it is assumed that the claims were assertable under § 1983, it would not matter because a convicted defendant does not have a procedural due process or substantive due process right to access evidence for the purpose of DNA testing—even at the defendant's own expense.[15]

Chief Justice Roberts's decision relied heavily on the fact that forty-six state legislative bodies and Congress had enacted some type of policy dealing with the right of post-conviction DNA testing.[16] The Court reasoned that, given these legislative developments,

no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.").

[10] 129 S. Ct. 2308 (2009).

[11] *Id.* at 2316.

[12] *Id.* at 2323.

> The Court of Appeals below relied only on procedural due process, but Osborne seeks to defend the judgment on the basis of substantive due process as well. He asks that we recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude, in the circumstances of this case, that there is no such substantive due process right.

*Id.* at 2322.

[13] *Id.* at 2318.

[14] *See Osborne*, 129 S. Ct. at 2318.

[15] *Id.* at 2323 ("Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues.").

[16] *Id.* at 2316.

constitutionalizing the issue would be unnecessary and unwholesome, and would intrude improperly into these legislative processes.[17] In the author's view, this is troublesome reasoning because either a convicted criminal defendant has a due process right to DNA testing, or he does not. In other words, either Osborne's due process rights were violated, or they were not violated. The answer to that question should not depend upon what legislative bodies around the country happen to be doing or not doing. The whole purpose of the Bill of Rights was to provide independent individual constitutional protections that exist regardless of how other branches of the government may be operating.

The Court employed the same fallacious reasoning in 2006, in *Garcetti v. Ceballos*,[18] where the Supreme Court severely narrowed the First Amendment protections of public employees, holding that a public employee's speech pursuant to the employee's official responsibilities was categorically unprotected.[19] In other words, such public employee speech is automatically unprotected without any balancing or weighing of competing interests. Part of the reasoning in *Garcetti* was that the states around the country have whistle-blower laws, and therefore, employees may seek protection under those laws.[20] The problem, of course, is that those whistle-blower statutes come in all shapes and sizes, and there is nothing to prevent a state from repealing its law, or narrowing its protections. The whole idea of the Bill of Rights protections is to give individuals protections that stand firm regardless of the legislative response.

## II. PLEADING REQUIREMENTS

The second category is pleading requirements for federal court civil complaints, which features the case of *Ashcroft v. Iqbal*.[21] The commentary around the country about *Ashcroft* was extreme; it was described by Professor Erwin Chemerinsky as the most

[17] *Id.* at 2322.

[18] 547 U.S. 410 (2006).

[19] *Id.* at 424. "We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." *Id.* at 426.

[20] *Contra id.* at 440-41 (Souter, J., dissenting).

[21] 129 S. Ct. 1937 (2009).

important civil case of the Term.[22] Another law professor described it as "a blockbuster decision,"[23] and Supreme Court practitioner Thomas Goldstein said, it was "the most significant Supreme Court decision in a decade."[24]

*Ashcroft* was a *Bivens* action against the former Attorney General, Ashcroft, and the director of the FBI, Muller.[25] The complaint alleged, *inter alia*, that they had illegally adopted, with a discriminatory intent, a policy calling for harsh treatment of post-9/11 detainees.[26] Although *Ashcroft* was not a § 1983 case, everything that the Supreme Court held regarding pleadings also applies to § 1983 actions. It was a five-to-four decision; the Court held that the complaint allegations against these high-level federal officials were insufficient to state a claim for relief under the 2007 decision in *Bell Atlantic Corporation v. Twombly*.[27] *Bell Atlantic* significantly tightened up pleadings standards for federal court civil complaints, and in the same vein, the Supreme Court retired the familiar *Conley v. Gibson*[28] "no set of facts" standard, which was a lenient pro-plaintiff standard that was used on a motion to dismiss.[29]

*Ashcroft* is significant because it made clear that *Bell Atlantic* was not applicable only to antitrust cases, and that the new pleading standards—requiring that the plaintiff allege facts, not mere conclusions, and facts that constitute a plausible claim, not just a speculative or a possible claim—apply to *all* federal court civil complaints, and therefore include complaints filed under § 1983 and

[22] Erwin Chemerinsky, *The Supreme Court Moves to the Right, Perhaps Sharply to the Right*, CAL. ST. B.J., July 2009, *available at* http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/July2009&sCatHtmlPath=cbj/2009-08_TH_01_supremecourt.html&sCatHtmlTitle=Top%20Headlines ("For those who handle civil litigation in federal court, no decision was more important than *Iqbal v. Ashcroft*.").

[23] Trey Childress, United States Congress Considering Legislation Relating to Pleading (July 23, 2009), http://conflictoflaws.net/2009/united-states-congress-consideringlegislation-relating-to-pleading/.

[24] Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 (" 'Iqbal is the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts,' said Thomas C. Goldstein, an appellate lawyer with Akin Gump Strauss Hauer & Feld in Washington.").

[25] *Ashcroft*, 129 S. Ct. at 1942.

[26] *Id.* at 1944.

[27] *Id.* at 1950-51.

[28] 355 U.S. 41 (1957).

[29] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 563 (2007).

under *Bivens*.[30]

Nobody really knows how to determine what a plausible claim is; one law professor said, " 'plausibility is in the eye of the beholder.' "[31] The Supreme Court cited the Second Circuit decision in *Ashcroft*, saying that "determining whether a complaint states a plausible claim . . . [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[32] The five-to-four split—the dissenters did not hold that the plausibility standard does not apply—shows that there are going to be differences of opinion among federal jurists as to whether a complaint alleges a plausible claim for relief.

One of the important facets of this decision is the Court's ruling that the ability of the trial judge to narrowly tailor discovery does not change the plausibility pleading standard.[33] It seems that *Bell Atlantic* and *Iqbal* are largely fueled by what is viewed as discovery abuses gone wild all over the country, and that the more rigorous pleading standard is the way to nip those abuses in the bud. Regardless, *Bell Atlantic* and *Iqbal* set up, potentially in many cases, a "catch-22" for plaintiffs' lawyers, because the Court is saying the plaintiff has to allege facts that constitute a plausible claim, while the plaintiff's lawyer needs discovery in order to be able to allege those facts. But the Court holds that unless the plaintiff asserts a plausible claim, the plaintiff cannot get to discovery.

Another important aspect to the *Ashcroft* case is the Supreme Court's ruling that it may not even be enough for the complaint to allege facts that constitute a plausible claim. The *Iqbal* complaint alleged that the defendants acted with discriminatory intent, but the Court said that there was a more plausible explanation for what these high-ranking officials were doing, namely that they were acting in the interest of national security instead of intending to discriminate on the basis of race, national origin, or religion.[34] The Court ruled that the more plausible explanation will control, and the plaintiff's claim

[30] *Ashcroft*, 129 S. Ct. at 1949, 1953.

[31] Melinda Hanson, *Civil Cases:* Iqbal, Ricci, Wyeth, NAMUDNO *Tagged as Landmark Opinions of Term*, 78 U.S.L.W. 1042 (July 21, 2009) (quoting Stephen C. Yeazell, Professor of Law, UCLA School of Law).

[32] *Ashcroft*, 129 S. Ct. at 1950.

[33] *See id.* at 1953.

[34] *Id.* at 1951.

will not be found plausible.[35] This is especially troubling because it enables a court to engage in fact-finding, unsupported by evidence, at the pleading stage.

## III. SUPERVISORY LIABILITY

The criticism that has been leveled, wide-spread, against *Ashcroft* has been on the pleading issue. Yet there is a second issue that, for plaintiffs' lawyers, may well turn out to be quite pernicious for civil rights plaintiffs, which is the liability of supervisory officials. *Ashcroft* can be interpreted as holding that, because there is no respondeat superior liability either in § 1983 actions or *Bivens* actions, there is no such doctrine as "supervisory liability." The Court went so far as to say, " 'supervisory liability' is a misnomer,"[36] and that a supervisor's liability is to be evaluated in the same way as any other government official.[37] This means that a supervisor cannot be held liable—legally responsible—for the conduct of her subordinates, for example, by deliberately not training, supervising, or taking corrective action. For liability to attach, the supervisor herself must be shown to have engaged in conduct that caused the violation of the plaintiff's constitutional rights.[38] This is the dissent's reading of the majority opinion.[39] In the end, this part of the *Iqbal*

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[35] *Id.* at 1951-52.

> [R]espondent alleges the arrests . . . were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

*Id.* (internal citation omitted).

[36] *Ashcroft*, 129 S. Ct. at 1949.

[37] *Id.*

> In . . . determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

*Id.*

[38] *Id.*

[39] *See id.* at 1957 (Souter, J., dissenting) ("The majority says that a *Bivens* action, 'where

decision may prove very harmful to plaintiffs' lawyers. At this point in time, lower court judges do not yet know what to do with this part of *Ashcroft v. Iqbal*; pre-*Ashcroft*, each circuit formulated decisional law articulating doctrines that govern constitutional claims against supervisory officials.[40] Each circuit will now have to reconsider its law in light of *Ashcroft v. Iqbal*.

The Court in *Iqbal* softened the blow to the plaintiff in two respects. First, the Court pointed out that the lower-ranked officials remained in the case as defendants.[41] Second, the last sentence of the Court's opinion said, "[t]he Court of Appeals should decide . . . whether to remand to the District Court so that [the] respondent can seek leave to amend his deficient complaint."[42]

## IV. PROSECUTORIAL IMMUNITY

Victims of wrongful convictions suffered a serious setback in the *Osborne* case—losing the due process right to post-conviction DNA testing. They suffered another important setback in *Van de Kamp v. Goldstein*.[43] In *Goldstein*, the Court rejected a § 1983 wrongful conviction claim on the basis of prosecutorial immunity.[44] Goldstein was incarcerated for twenty-four years for a homicide it turned out he did not commit.[45] He was eventually released on a habeas corpus petition and was not re-prosecuted.[46] Goldstein's

masters do not answer for the torts of their servants,' 'the term 'supervisory liability' is a misnomer,' and that '[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.' " (quoting *Ashcroft*, 129 S. Ct. at 1949 (majority opinion))).

[40] *Ashcroft*, 129 S. Ct. at 1957, 1958; MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES ch. 7 (4th ed. 2005).

[41] *Ashcroft*, 129 S. Ct. at 1952 (majority opinion).

[42] *Id.* at 1954.

[43] 129 S. Ct. 855 (2009).

[44] *Id.* at 858-59.

> We ask whether . . . immunity extends to claims that the prosecution failed to disclose impeachment material . . . due to: (1) a failure . . . to train prosecutors, (2) a failure . . . to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants. We conclude that . . . immunity extends to all these claims.

*Id.* (internal citation omitted).

[45] Goldstein v. City of Long Beach, 481 F.3d 1170, 1171 (9th Cir. 2007).

[46] *Id.*

attorneys claimed that this wrongful conviction came about because the trial prosecutor did not turn over *Brady* impeachment material relating to favorable treatment the District Attorney's Office gave to a jail informant in other cases.[47]

After being released, Goldstein brought a § 1983 action; Goldstein's attorneys understood prosecutorial immunity, so they did not sue the trial prosecutor. They knew that a *Brady* claim against the trial prosecutor was destined to fail, because it would be based upon the prosecutor's advocacy function and thus defeated by prosecutorial immunity.[48] Therefore, they sued the District Attorney and the District Attorney's chief deputy, alleging that the trial prosecutor's failure to turn over the impeachment material stemmed from the District Attorney and his chief deputy's failure to supervise, train, and establish informational systems within the District Attorney's Offices.[49] The plaintiff's lawyers argued that these claims were not covered by prosecutorial immunity, because they contested administrative action—not advocacy.[50] They won in district court[51] and in circuit court,[52] but when the United States Supreme Court granted certiorari, it appeared likely that the circuit court decision would be overruled. In the oral argument, sure enough, the Justices had no trouble seeing right through the strategy of the plaintiff's lawyers.[53] Therefore, it was not surprising, after the oral argument, that the Court reversed the Ninth Circuit, and held that the District Attorney and the District Attorney's chief deputy were protected by absolute prosecutorial immunity.[54]

*Goldstein* is an important decision in this respect: the Supreme Court acknowledged that the contested conduct by these defendants was administrative action, but reasoned that it was an

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[47] *Id.* at 1171-72.

[48] *See id.* at 1172.

[49] *Id.* at 1171-72 (noting the officials in charge of administrative matters at the time).

[50] *Goldstein*, 481 F.3d at 1172 ("Goldstein . . . alleges that [the defendants] violated his constitutional rights by failing to adequately train and supervise deputy district attorneys to ensure that they shared information regarding jailhouse informants with their colleagues.").

[51] *See Goldstein*, 129 S. Ct. 855, 859 (2009).

[52] *Id.*

[53] *See id.* at 861-62; Transcript of Oral Argument at 22-40, *Van de Kamp*, 129 S. Ct. 855 (2009) (No. 07-854).

[54] *Goldstein*, 129 S. Ct. at 864-65 ("[W]e conclude that [the defendants] are entitled to absolute immunity in respect to Goldstein's claims that their supervision, training, or information-system management was constitutionally inadequate.").

administrative action closely linked to the trial process—to the advocacy function of the trial prosecutor—and therefore the defendants were protected by absolute immunity.[55] What is significant is that this is the first time that prosecutorial immunity has been extended by the Supreme Court to prosecutors' administrative conduct.

## V. QUALIFIED IMMUNITY

*Safford Unified School District No. 1 v. Redding*[56] is a good example of how a plaintiff can prove a constitutional violation, yet wind up not recovering anything, partially because of qualified immunity. The key issue on qualified immunity was whether the defendant school officials violated clearly-established federal law. Eight Justices found that the strip search by school officials of the plaintiff for Ibuprofen violated the Fourth Amendment.[57] Nevertheless, when the "clearly-established federal law" qualified immunity test was applied in *Redding*, six of the Justices who found a Fourth Amendment violation concluded that the defendant officials were protected by qualified immunity because the pertinent Fourth Amendment law governing student searches was not clearly established.[58] Two Justices—Justices Ginsburg and Stevens—found that the law was clearly established.[59] They thought that it did not take a constitutional scholar to conclude that the strip search was so excessively intrusive as to clearly violate the Fourth Amendment. Conversely, Justice Thomas said there was no Fourth Amendment violation at all.[60] The range of these positions demonstrates that it is sometimes difficult to figure out whether the governing federal law

[55] *See id.* at 861-63.

[56] 129 S. Ct. 2633 (2009).

[57] *Id.* at 2637, 2644; *id.* at 2644 (Stevens, J., concurring in part and dissenting in part); *id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

[58] *Id.* at 2644 (majority opinion). "[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law." *Redding*, 129 S. Ct. at 2644.

[59] *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part) ("This is, in essence, a case in which clearly established law meets clearly outrageous conduct."); *id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

[60] *Id.* at 2646 (Thomas, J., dissenting) ("Unlike the majority, however, I would hold that the search . . . did not violate the Fourth Amendment.").

was clearly established or not.

Last term's other qualified immunity case was *Pearson v. Callahan*.[61] Prior to *Pearson*, when qualified immunity was a defense, the Supreme Court said that a court had to follow a two-step process: first, the court must determine whether a constitutional violation is alleged; and second, if so, the court must determine if the constitutional law was clearly established at the time of the alleged violation.[62] Many lower federal court judges objected to the mandatory nature of this two-step process. Many judges asked: "Why do I have to deal with this difficult constitutional question? Can I not just say, even if there was a constitutional violation, the law was not clearly established?"

Sure enough, the Court in *Pearson* overruled the mandatory nature of the two-step approach and gave the lower courts discretion whether to follow it, or to proceed directly to the second step of whether the defendant violated clearly established federal law.[63] In some circumstances, it may make sense first to decide the constitutional merits issue in order to further the interest in resolving constitutional issues that are not likely to be litigated in other contexts, such as § 1983 municipal liability claims and criminal prosecutions. In other circumstances, it may make sense for the court to jump directly to the second clearly established federal law step. A court has discretion to determine which approach to take.

## VI. STATE COURT SECTION 1983 ACTIONS AGAINST CORRECTIONS OFFICERS

A New York statute prohibits claims for damages against corrections officers from being asserted in the New York State courts.[64] This includes claims asserted under § 1983.[65] The Supreme

[61] 129 S. Ct. 808 (2009).

[62] *Id.* at 815-16 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

[63] *Id.* at 818.

[64] N.Y. CORRECT. LAW § 24(1) (McKinney 2009). The statute states, in pertinent part, that:

> No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.

Court, in *Haywood v. Drown*,[66] held, in a five-to-four decision, that the New York law violated the Supremacy Clause, because it was contrary to the purposes of § 1983.[67] States authorizing the assertion of § 1983 claims in their state courts—and all states do so—cannot pick and choose between or among different types of § 1983 claims.[68] The extremeness of Justice Thomas' dissent is alarming. Justice Thomas advanced the position that states can do whatever they want with their state court system; states can decide to hear federal claims or not hear federal claims as they so choose, and that the Supremacy Clause does not limit this exercise of state power.[69] Fortunately, he was the only Justice who took this position.

*Id.*

[65] Haywood v. Drown, 129 S. Ct. 2108, 2112 (2009).

[66] 129 S. Ct. 2108.

[67] *Id.* at 2115.

[68] *Id.*

[69] *Id.* at 2122 (Thomas, J., dissenting).

> Under our federal system, therefore, the States have unfettered authority to determine whether their local courts may entertain a federal cause of action. Once a State exercises its sovereign prerogative to deprive its courts of subject-matter jurisdiction over a federal cause of action, it is the end of the matter as a far as the Constitution is concerned.

*Id.*