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From the Selected Works of Sheldon Nahmod

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The Long and Winding Road from Monroe to Connick

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I. INTRODUCTION

What I propose to do is sketch a history of § 1983² local government liability in the Supreme Court, including *Connick v. Thompson*, and then situate *Connick* more generally in § 1983 jurisprudence.³ I will emphasize the importance to the Court, in the last several decades especially, of federalism and its impact on the scope of § 1983. Section 1983 is a kind of federalism lightning rod because it is a federal statute enforced against state and local governments by the federal judiciary.⁴

The Court's interest in federalism in the § 1983 setting includes an increasing concern with federal judicial intervention in, and second-guessing of, the decisions of local

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In an effort to preserve the unique nature of the symposium, this article is based largely on a transcript of Professor Nahmod's presentation and his notes and has been edited and supplemented with references in order to facilitate research in the area of § 1983.

² Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... 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 ... 42 U.S.C. § 1983 (2006).

³ 131 S. Ct. 1350 (2011).

⁴ See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397 (1997). See generally S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (4th ed. 2011) [hereinafter *CIVIL RIGHTS AND LIBERTIES LITIGATION*].

governments.⁵ Federalism, broadly defined, has affected not only § 1983 local government failure to train liability, but also the scope of constitutional rights and the extent of the absolute and qualified immunity of state and local government officials.

II. BACKGROUND: FEDERALISM, THE COURT, AND LOCAL GOVERNMENT LIABILITY FOR FAILURE TO TRAIN

It may be in order to briefly remind ourselves of several important points about federalism as contemplated by the Framers. Federalism is intended not only to preserve state powers but, like separation of powers, to protect citizens from possible tyranny of the federal government.⁶ It is structural in nature.⁷ Other important values include efficiency, promoting individual choice, encouraging experimentation and promoting democracy.⁸ To a considerable extent, the Civil War and the Reconstruction Amendments changed this—the degree to which it did so remains controversial to this day—by recognizing that the states could pose dangers to their citizens and that it was the federal government that should protect them.⁹

Section 1983 was enacted in 1871 by the 42nd Congress to enforce the Fourteenth Amendment; however, it remained largely dormant until 1961 when the Supreme Court decided *Monroe v. Pape*.¹⁰ It was dormant until this time because incorporation of the Bill of Rights only

⁵ *New York v. United States*, 505 U.S. 144, 155 (1992) (“...the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.”); *United States v. Lopez*, 514 U.S. 549, 575 (1995) (“This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.”); *Printz v. United States*, 521 U.S. 898, 920 (1997) (“The great innovation of this design was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other...” (citation omitted); *United States v. Morrison*, 529 U.S. 598 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”) (citations omitted).

⁶ See Erwin Chermersky, *The Values of Federalism*, 47 FLA. L. REV. 499, 524-25 (1995).

⁷ *Id.*

⁸ *Id.*

⁹ *Lopez v. Monterey Cnty.* 525 U.S. 266, 268 (1999) (“...the Reconstruction Amendments...by their nature contemplate some intrusion into areas traditionally reserved to the States.”).

¹⁰ See CONG. GLOBE, 42ND CONG., 1ST SESS. 83 (1871); *Monroe*, 365 U.S. at 171 (“... as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution, viz.,

began in earnest in the 1960s, and the state action doctrine was being developed in fits and starts to encompass more and more nominally private conduct, including joint conduct.¹¹

Monroe not only changed the § 1983 landscape but it also resurrected § 1983. Specifically, the Supreme Court in *Monroe* interpreted the statute as creating a Fourteenth Amendment damages action, a constitutional tort, against Chicago police officers for allegedly violating the plaintiff's Fourth and Fourteenth Amendment rights.¹² In so doing, the Court importantly ruled: (1) "color of law" is as broad as state action;¹³ (2) a plaintiff need not first exhaust state judicial remedies before filing a § 1983 claim in federal court;¹⁴ and (3) § 1983 should be interpreted against the background of tort liability that makes a person responsible for the natural consequences of his or her conduct.¹⁵

Two other aspects of *Monroe* are important for present purposes. First, Justice Frankfurter's dissent argued at great length that "color of law" was narrower in scope than state action.¹⁶ This meant that § 1983 did not cover all Fourteenth Amendment violations. His dissent was grounded on a view of federalism that insisted that the Framers' concept of federalism was not changed much, if at all, by the Civil War and the Thirteenth, Fourteenth and Fifteenth Amendment.¹⁷ This dissent turns out to have anticipated future developments in the Court,

the Fourteenth Amendment.") (quoting Senator George F. Edmunds, Chairman of the Senate Committee on the Judiciary).

¹¹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-23 (1961) (discussing private conduct in the context of the Fourteenth Amendment). See, on state action and color of law, NAHMOD, CIVIL RIGHTS AND LIBERTIES ch. 2.

¹² *Monroe*, 365 U.S. at 192.

¹³ *Id.* at 187.

¹⁴ *Id.* at 183.

¹⁵ *Id.*

¹⁶ *Id.* at 217-59 (Frankfurter, J. dissenting).

¹⁷ *Id.* at 221-39.

including the *City of Boerne* case that imposed rather severe limitations on Congress's Section 5 power under the Fourteenth Amendment.¹⁸

Second, the Court held unanimously (prompted in large measure by a lengthy memo on § 1983's legislative history to the other justices by Justice Frankfurter) that local governments were not suable persons.¹⁹ It may be significant that *Monroe* was decided six years after *Brown II*,²⁰ which started the Court down the road of equitable federal judicial supervision of, and intervention in, school district decision-making, sometimes on a day-to-day basis.²¹ *Brown* marked the beginning of institutional reform litigation in the Supreme Court, and perhaps, the Court simply did not want at such a delicate time, to confront the specter of § 1983 damages actions brought against school districts that had engaged in school segregation.²²

It was only in 1978 that the Court, in *Monell v. Dept. of Social Services*, overruled the local government liability holding of *Monroe*.²³ In an opinion by Justice Brennan that revisited the legislative history of § 1983 and concluded that *Monroe* had gotten it wrong, the Court held that local governments of all kinds, special or general purpose, were suable persons under § 1983.²⁴ Further, the Court held that local governments could be liable for damages where the constitutional violation was committed by a local government official or employee pursuant to

¹⁸See *City of Boerne v. Flores*, 521 U.S. 507, 519-29 (1997) (discussing Congress' power under Section 5 and how that power is constrained when enforcing the provisions of the Fourteenth Amendment upon the States).

¹⁹*Monroe*, 365 U.S. at 191-92.

²⁰*Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

²¹See, e.g., *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 225 (1964); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 441-42 (1968); *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969).

²²See David Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239, 1239 (1993).

²³*Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 663, 700 (1978). See, on local government liability, NAHMOD, CIVIL RIGHT AND LIBERTIES ch. 6.

²⁴*Id.* at 700.

an official policy or custom.²⁵ Moreover, the Court emphasized Congressional intent to subject local governments to damages liability under § 1983.²⁶

At the same time, the Court in *Monell* rejected respondeat superior liability altogether because of § 1983's "subjects, or causes to be subjected" language.²⁷ This insistence on avoiding respondeat superior liability was later to emerge with a vengeance in the Court's failure to train and supervise decisions in *City of Canton v. Harris*²⁸ and *Bryan County v. Brown*,²⁹ the precursors to *Connick v. Thompson*.³⁰

Monell expressed little concern with federalism and over-deterrence because the Court correctly assumed that Congress was well within its power under Section 5 of the Fourteenth Amendment to impose damages liability on local governments.³¹ Indeed, the Court soon thereafter went beyond *Monell* and held in *Owen v. City of Independence*³² that local governments were not protected by qualified immunity.³³

It is worth noting that by 1978, the Court and the country were, for the most part, past the Southern resistance to *Brown*.³⁴ De jure segregation in the public schools and elsewhere was technically over; however, de facto segregation and re-segregation were of greater concern.³⁵ So

²⁵ *Id.* at 694-95.

²⁶ *Id.* at 696-700.

²⁷ *Id.* at 658.

²⁸ 489 U.S. 378, 380 (1989) (holding that under certain circumstances municipalities can be held liable under § 1983 for constitutional violations stemming from failure to train its employees).

²⁹ 520 U.S. 397, 400 (1997) (holding that unless there is deliberate action that is attributable to the municipality and is the driving force behind the plaintiff's deprivation of federal rights, Congress did not intend for a municipality to be held liable under § 1983).

³⁰ 131 S. Ct. 1350 (2011).

³¹ *Monell*, 436 U.S. at 690 (holding that a municipality was a person under § 1983); *but cf.* *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989) (using Eleventh Amendment language, the Court held that states were not suable persons under § 1983 regardless of where sued).

³² 445 U.S. 622 (1980).

³³ *Id.* at 657; *but see* *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding that history and policy do support imposing punitive damages on municipalities for the bad-faith actions of its officials).

³⁴ *Brown v. Bd. of Ed. (Brown I)*, 347 U.S. 483 (1954) (holding that racial discrimination in public education is unconstitutional).

³⁵ The Honorable David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1081 (1999) ("Although the Supreme Court's second *Brown* decision in 1955 (*Brown II*)

there was little chance that there would be a flood of § 1983 damages actions against school districts that had previously engaged in school segregation.

Significantly, *Monell*, which clearly involved an official policy set out by the local government entity itself, also stated that official policy could be made by “[lawmakers] or by those whose edicts or acts may be fairly said to represent official policy.”³⁶ *Monell* thus created the *policymaker* category, under which a local government could be held liable for the unconstitutional conduct of a high ranking government official considered under state and local law to be a policymaker.³⁷ In other words, the unconstitutional conduct of a policymaker could be attributed to a local government. The Court’s subsequent decisions regarding policymakers made clear that even a single incident, that is, a single unconstitutional act of a policymaker, could be attributed to the relevant local government and render it liable.³⁸

As a lead-in to *City of Canton*, note that in 1985, the first Supreme Court decision to address failure to train liability was handed down in *City of Oklahoma City v. Tuttle*.³⁹ In *Tuttle*, the Court ruled that an instruction to a jury that a city’s failure to train liability could be based on a single incident was reversible error, and that the deliberate indifference state of mind requirement, as a matter of § 1983 interpretation, was an effective way of avoiding respondeat superior liability.⁴⁰

directed school officials and federal district courts to plan ‘a transition to...racially nondiscriminatory school system[s]’ with ‘all deliberate speed,’ many southern states instead radically altered their education laws to thwart desegregation.”) (quoting *Brown v. Bd. of Ed.*, 349 U.S. 294, 301 (1955)).

³⁶ *Monell*, 436 U.S. at 694.

³⁷ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (“*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts ‘of the municipality’—that is, acts which the municipality has officially sanctioned or ordered.”).

³⁸ *Id.* at 480 (“...it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.”).

³⁹ *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

⁴⁰ *Id.* at 822-24.

Finally, in 1989, *City of Canton v. Harris* firmly established the principle, somewhat counter-intuitive, that a local government's *failure* to train its police officers could constitute an actionable official policy or custom.⁴¹ Specifically, a local government's deliberately indifferent failure to adequately train its police officers with regard to the rights of citizens with whom the police come into contact could constitute an actionable official policy or custom.⁴² It was thus the inadequate training that constituted the official policy or custom.⁴³ In articulating this deliberate indifference standard (rather than, say, a negligence standard), the Court in *City of Canton* was very careful to emphasize that it was concerned with the specter of respondeat superior liability in the guise of liability based on a single incident of police misconduct.⁴⁴ The Court also insisted that there be a close causal connection between the identified deficiency in training and the plaintiff's constitutional violation.⁴⁵

On the other hand, in a footnote that turned out to be significant over two decades later in *Connick*, the Court in *City of Canton* observed that there could be rare situations in which the need for training was so obvious that it would constitute actionable deliberate indifference.⁴⁶ For example, where a city knows that police officers will be required to arrest fleeing felons and it supplies the police with firearms but does not provide them with any training in the use of deadly force, it is obvious that training was required, and thus the failure to provide it constitutes actionable deliberate indifference.⁴⁷

⁴¹ *City of Canton v. Harris*, 489 U.S. 378, 380 (1989).

⁴² *Id.* at 388.

⁴³ *Id.* at 390-92.

⁴⁴ *Id.*

⁴⁵ *Id.* at 385-86.

⁴⁶ *Id.* at 390 n.10.

⁴⁷ *Id.*

Finally, it is worth mentioning that in his opinion for the Court, Justice White explicitly emphasized that important federalism interests were implicated in local government liability failure to train situations.⁴⁸ Specifically, the Court questioned whether it was appropriate for the federal courts to second-guess local government training programs.⁴⁹

Consider why this is so: what is on trial in failure to train cases is the local government's training program itself. A plaintiff must prove what adequate training is and why the training offered was inadequate. This requires federal courts to carefully evaluate every aspect of that training in order to decide whether the plaintiff's claim can go forward. Even though this inquiry is made in connection with damages and not equitable relief, it nevertheless remains intrusive. Indeed, it is typically more intrusive than a §1983 damages action based on an official policy or custom of the local government itself or on the single act of a policymaker.⁵⁰

Eight years after *City of Canton, Bryan County v. Brown* addressed a § 1983 damages action against a county based on an allegedly improper hiring decision by a county sheriff who was a policymaker for the county.⁵¹ Inadequate screening was the specific claim.⁵² A deputy sheriff hired by the county sheriff used excessive force against a woman and seriously injured her when he pulled her out of her car.⁵³ The plaintiff claimed that had the county sheriff adequately screened the applicant for deputy sheriff, he would have found that assault and battery charges had once been leveled against the applicant.⁵⁴

⁴⁸ *Id.* at 392.

⁴⁹ *Id.*

⁵⁰ *Id.* at 391-92.

⁵¹ *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 400 (1997).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Notice the tension in *Bryan County* between the Court's previously established principles that (1) a single decision by a policymaker could render a local government liable⁵⁵ and (2) there was no respondeat superior liability under § 1983.⁵⁶ The latter principle established a posture of extreme skepticism toward local government liability based on a single incident.⁵⁷

Here is what is important for present purposes: in *Bryan County*, the Court tightened up the deliberate indifference standard of *City of Canton* and declared:

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 person's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."⁵⁸

And in *Bryan County* itself, even adequate screening that would have discovered the assault and battery charge would not necessarily have avoided this particular Fourth Amendment violation, the use of excessive force.⁵⁹ Put another way, this particular constitutional violation was not the plainly obvious consequence of the allegedly inadequate screening, with the result that the county sheriff was not deliberately indifferent to it.

Bryan County thus made the proximate cause inquiry much more difficult for a plaintiff to overcome by focusing on the particular constitutional violation that occurred, and not constitutional violations in general.⁶⁰ As a result, there is both a deliberate indifference requirement and a related, and tough, proximate cause requirement for § 1983 plaintiffs.⁶¹ And even though, as a technical matter, this requirement was announced in an inadequate screening,

⁵⁵ See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 (1986).

⁵⁶ *City of Canton v. Harris*, 489 U.S. 378, 490-92 (1989).

⁵⁷ See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821-22 (1985).

⁵⁸ *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. at 411 (emphasis added).

⁵⁹ *Id.* at 411-14.

⁶⁰ See *id.*

⁶¹ *Id.* at 415.

hiring case, the circuits have tended to apply the “plainly obvious consequence” standard in failure to train cases generally.⁶²

Consequently, the Court in *Bryan County* gave lower federal courts even greater judicial control over the failure to train liability issue than before. Not only was the policymaker question one of law, but now federal courts could more readily take failure to train cases from juries by applying the plainly obvious consequences standard.

As an historical footnote, *Bryan County* led three of the dissenting justices to advocate Justice Stevens’ position from years earlier. Specifically, the dissenters believed that local government liability law had become so complex, so arcane, that it was now time to reexamine *Monell*’s holding that respondeat superior liability is not available under § 1983!⁶³

This brings us finally to *Connick*, handed down, as we all know, in 2011.⁶⁴ I want to set out the case in some detail, with your indulgence. After I offer some observations about *Connick*, I will conclude, through a federalism lens, by situating *Connick* within § 1983 jurisprudence generally.

III. AN ANALYSIS OF *CONNICK V. THOMPSON*

In *Connick*, a 5-4 decision with an opinion by Justice Thomas, the Court effectively held that local government liability for failure to train may *never* be based on a single incident.⁶⁵ This is the case even in the face of an otherwise persuasive claim of deliberate indifference where the

⁶² See, e.g., *Barney v. Pulsipher*, 143 F.3d 1299, 1309 (10th Cir. 1998); *Gros v. City of Grand Prairie*, 209 F.3d 431, 435 (5th Cir. 2000); *Morris v. Crawford Cnty.*, 299 F. 3d 919, 924-25 (8th Cir. 2002).

⁶³ *Bd. of Cnty. Comm’rs*, 520 U.S. at 437; see *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489-91 (1986) (Stevens, J. concurring).

⁶⁴ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

⁶⁵ *Id.* at 1365-66.

need for training is “obvious.”⁶⁶ Instead, the plaintiff must also show a pattern of similar constitutional violations.⁶⁷ Justice Scalia, joined by Justice Alito, concurred.⁶⁸ Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor and Kagan.⁶⁹

A. THE FACTS AND ISSUES

The § 1983 plaintiff, Thompson, was convicted of murder and spent fourteen years on death row (and eighteen years total in prison) for a crime that he did not commit.⁷⁰ Although it was unknown at the time, the prosecutors did not turn over to Thompson’s attorney a lab report from an earlier related case in which he had previously been convicted of attempted aggravated armed robbery.⁷¹ This lab report indicated that the perpetrator of the attempted armed robbery had type B blood, while the plaintiff had type O blood.⁷² Because of that conviction, the plaintiff did not testify in his own defense at his murder trial, where he was convicted.⁷³ Many years later, the lab report that the prosecutors had failed to turn over was discovered, which resulted in the plaintiff’s 1999 attempted armed robbery conviction being vacated and his 2002 murder conviction being overturned.⁷⁴ A subsequent murder retrial in 2003, at which plaintiff testified in his defense, resulted in a not guilty verdict.⁷⁵

Thompson then sued the prosecutor’s office for damages under § 1983.⁷⁶ In essence, he made a local government liable for failure to train claim with regard to proper training under

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1366.

⁶⁹ *Id.* at 1369.

⁷⁰ *Connick v. Thompson*, 131 S. Ct. 1350, 1356 (2011).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1356-57.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1357.

⁷⁶ *Id.*

Brady v. Maryland,⁷⁷ which imposed a due process requirement on prosecutors to turn over exculpatory evidence to criminal defendants.⁷⁸ A jury awarded Thompson \$14 million, which was upheld by the district court.⁷⁹ On appeal, a panel of the Fifth Circuit affirmed the award in a decision later vacated by the Fifth Circuit when it granted en banc review.⁸⁰ However, since the en banc Fifth Circuit (in several opinions) was evenly divided, the district court's decision was affirmed.⁸¹

The basis of the jury verdict and district court judgment was twofold. First, Connick, the district attorney, was a policymaker (thus representing the prosecutor's office) who was deliberately indifferent to an obvious need to train prosecutors regarding their obligations under *Brady*.⁸² Second, the lack of *Brady* training was the *moving force* behind the plaintiff's constitutional injury.⁸³ The en banc Fifth Circuit divided evenly on each of these findings.⁸⁴ The Court granted certiorari to decide the following question presented: "Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?"⁸⁵ As noted, the Court answered yes.⁸⁶

B. THE ORAL ARGUMENT

The oral argument in *Connick*, with the participation of all of the justices but Thomas, signaled the outcome. During the defense argument, Justice Ginsburg pointed out, as did Justice

⁷⁷ *Id.*

⁷⁸ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁷⁹ *Thompson v. Connick*, No. 03-2045, 2005 WL 1200826, at *1 (E.D. La. Apr. 23, 2007).

⁸⁰ *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008), *vacated*, 562 F.3d 711 (5th Cir. 2009), and *aff'd en banc*, 578 F.3d 293 (5th Cir. 2009).

⁸¹ *Connick*, 578 F.3d at 293 (en banc).

⁸² *Id.* at 296.

⁸³ *Id.*

⁸⁴ *Id.* at 293.

⁸⁵ *Connick v. Thompson*, 131 S. Ct. 1350, 1356 (2011).

⁸⁶ *Id.*

Breyer later, that even though this was arguably just one incident, four prosecutors were involved.⁸⁷ She also wondered why it was necessary to shoehorn this case into a single incident because it did not fit either into the single incident category or into the pattern of constitutional violations category.⁸⁸ Justice Breyer asked about the jury instruction that was objected to, which eventually elicited the response that the case was about the evidentiary basis for the jury's finding of deliberate indifference.⁸⁹ Justice Kennedy, who was to be the swing vote in this 5-4 decision, pointed out that the district court had rejected the defense's pattern of constitutional violations instruction.⁹⁰

During the plaintiff's argument, the attorney emphasized that this case was never about a single incident, and that the plaintiff had never relied on a single incident theory.⁹¹ Justices Alito and Roberts then hit plaintiff's counsel hard with a series of questions about precisely what kind of *Brady* training the district attorney should have provided.⁹² They repeatedly emphasized the complexity—to them—of the training issue in this case.⁹³ They also tried to identify the precise inadequacy of training that the plaintiff was challenging.⁹⁴ Counsel responded, at least in part, that there was zero *Brady* training in the office.⁹⁵ Justice Kennedy then commented, without elaboration, that he was concerned about causation, perhaps suggesting that he could not find the necessary causal link between the alleged inadequate training in *Brady* and the resulting *Brady* violation.⁹⁶

⁸⁷ Transcript of Oral Argument at 4, 23, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571).

⁸⁸ *Id.* at 5.

⁸⁹ *Id.* at 13-18.

⁹⁰ *Id.* at 25-26.

⁹¹ *Id.* at 29.

⁹² *Id.* at 31-35.

⁹³ *Id.* at 31-40.

⁹⁴ *Id.* at 34-36.

⁹⁵ *Id.* at 41.

⁹⁶ *Id.* at 42-43.

C. THE DECISION

1. The Majority

Even though there had apparently been no *Brady* training whatever of prosecutors before 1985 when the plaintiff was convicted of aggravated armed robbery, the Court, per Justice Thomas, rejected the plaintiff's argument that this was one of those rare cases hypothesized in footnote 10 in *City of Canton v. Harris*.⁹⁷ Recall that the Court in *Canton* had previously determined that a pattern of constitutional violations is not necessary to prove deliberate indifference where the need for training is "so obvious."⁹⁸ The Court once again emphasized the stringency of the deliberate indifference requirement for local government liability for failure to train, arising out the concern with avoiding respondeat superior liability under § 1983.⁹⁹

According to the Court, prosecutors, unlike police officers going through training in the use of firearms and deadly force to stop fleeing felons (the example in *City of Canton*), were already trained in law in law school and had to pass a bar exam before they could practice.¹⁰⁰ In addition, there were continuing legal education requirements imposed on all lawyers.¹⁰¹ Thus, "recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law."¹⁰² Moreover, it was undisputed in this case that prosecutors were "familiar with the general *Brady* rule," in marked contrast to armed police officers who have no prior knowledge at all about the constitutional use

⁹⁷ *Connick v. Thompson*, 131 S. Ct. 1350, 1361 (2011).

⁹⁸ *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989); *Connick*, 131 S. Ct. at 1360-61.

⁹⁹ *Connick*, 131 S. Ct. at 1360-61.

¹⁰⁰ *Id.* at 1362-63.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1363.

of deadly force.¹⁰³ Under these circumstances, the absence of *formal* training in *Brady* was not dispositive: this was not like the *City of Canton* hypothetical.¹⁰⁴

The Court concluded:

To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was ‘highly predictable’ that the prosecutors in his office would be confounded by those [*Brady*] gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants’ *Brady* rights.(emphasis in original). [And Thompson] did not do so.¹⁰⁵

2. The Concurrence

Justice Scalia, joined by Justice Alito, concurred for the purpose of responding to the arguments of the dissenters.¹⁰⁶ Justice Scalia accused the dissenters of a “puzzling” and “lengthy” excavation of the trial record in a misguided attempt to broaden the scope of failure to train liability.¹⁰⁷ He also rejected their contention that the defendant acquiesced in the plaintiff’s single incident theory.¹⁰⁸ Furthermore, he criticized the dissenters’ position that, with proper training, “surely at least one” of the prosecutors would have turned over the exculpatory evidence.¹⁰⁹ Finally, he suggested that any possible *Brady* violation in this case “was surely on the very frontier of our *Brady* jurisprudence.”¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989). The footnote states:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.

Id.

¹⁰⁵ *Id.* at 1365.

¹⁰⁶ *Id.* at 1366.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1367.

¹⁰⁹ *Id.* at 1368.

¹¹⁰ *Id.* at 1369.

3. The Dissent

Justice Ginsburg’s dissent (which she read in part from the bench), joined by Justices Breyer, Sotomayor and Kagan, argued that the evidence submitted to the jury indicated that the “conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.”¹¹¹ “From the top down,” in the view of the dissent, prosecutors inadequately addressed their *Brady* obligations.¹¹² Accordingly, a jury could have found that such inattention was “standard operating procedure” in Connick’s office.¹¹³ For this reason, *City of Canton*’s deliberate indifference standard was met here, even though there was no proof of a pattern of similar constitutional violations: the resulting *Brady* violation was the obvious consequence of the inadequate training.¹¹⁴

Furthermore, according to the dissent, Connick had “effectively” conceded that his office’s *Brady* training was inadequate.¹¹⁵ In addition, at the time of Thompson’s trial, Louisiana did not require continuing legal education for lawyers, thereby placing responsibility on Connick’s office for keeping prosecutors current on legal developments.¹¹⁶ Moreover, the majority’s reliance on law school and bar admission requirements “blinks reality and is belied by the facts of this case.”¹¹⁷ This case therefore fit well within *City of Canton*’s category of cases in which the need for training was so obvious that the failure to provide it could be said to demonstrate deliberate indifference; proof of a prior pattern was not necessary here.¹¹⁸

¹¹¹ *Id.* at 1370.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1379.

¹¹⁶ *Id.* at 1379-80.

¹¹⁷ *Id.* at 1386.

¹¹⁸ *Id.* at 1387.

F. SOME OBSERVATIONS ON *CONNICK*

The question presented for review by the defense was very well crafted to attract the Court's attention at the certiorari stage. Motivated in large measure by the federalism concerns I mentioned earlier, the Court has long been concerned about the (mis)use of a single constitutional violation to impose liability on local governments for failure to train.¹¹⁹ *Connick* presented the Court with the opportunity to bury the *City of Canton* hypothetical once and for all, an opportunity that the Court seized.

Also, observe that *Connick* involved the training of prosecutors.¹²⁰ But the Court's reasoning suggests that plaintiffs in *all* failure to train cases will have to show a pattern of prior constitutional violations in order to demonstrate deliberate indifference.¹²¹

Further, with *Connick*, the Court has extended protection from damages liability to *all* levels of prosecution.¹²² Clearly, the *individual* prosecutors in *Connick* who failed to discharge their *Brady* obligations were absolutely immune from § 1983 damages liability in their individual capacities because their conduct was advocative in nature.¹²³ Moreover, *Connick* himself as *supervisor* was similarly absolutely immune from damages liability personally.¹²⁴ This is supported by the Court's holding in *Van de Kamp v. Goldstein*, which stated that supervisory prosecutors charged with failing to train prosecutors in connection with the proper use in criminal trials of jailhouse informants are absolutely immune from damages liability in

¹¹⁹ *Id.* at 1361.

¹²⁰ *Id.* at 1355.

¹²¹ *Id.* at 1359-60.

¹²² See Susan Bandes, *The Lone Miscreant, The Self-Training, and Other Fictions: A Comment on Connick v. Thompson*, 80 *FORDHAM L. REV.* 715 (2011) ("The upshot of *Connick v. Thompson* is that now, unless non-compliance is frequent and notorious enough to reach the level of custom, prosecutors' offices are insulated from § 1983 liability--entity as well as individual--for failing to comply with *Brady*. The decision also bodes ill for prosecutorial accountability more generally, and for failure to train liability across the board."). See, on local government liability, NAHMOD, *CIVIL RIGHTS AND LIBERTIES* ch. 6.

¹²³ See *Van de Kamp v. Goldstein*, 555 U.S. 335, 342-43 (2009). See, on individual immunities, NAHMOD, *CIVIL RIGHTS AND LIBERTIES* ch. 7.

¹²⁴ *Id.*; *Connick v. Thompson*, 131 S. Ct. 1350, 1363 (2011).

their individual capacities, despite the fact that this function is administrative in nature.¹²⁵ The Court's reasoning in *Van de Kamp* almost certainly applies to supervisory failures to train prosecutors about *Brady*. And now, the Court in *Connick* has made it considerably more difficult to make out a cause of action against a prosecutor's office for failure to train.¹²⁶

In addition, there was a hidden *Bryan County* causation issue in *Connick* that was not addressed by the Supreme Court. The Supreme Court did not address it (nor did it have to) perhaps because it had a bigger project in mind, namely, eliminating the *City of Canton* hypothetical. But here it is.

Thompson sought damages for his wrongful conviction and imprisonment for murder.¹²⁷ But, so far as I can tell, the failure to train and *Brady* violation occurred in connection with his prior conviction for attempted aggravated armed robbery.¹²⁸ It was *this* failure to train and *Brady* violation that allegedly led to his attempted aggravated armed robbery conviction that, in turn, led to his not taking the stand in the murder trial that then resulted in his murder conviction and imprisonment.¹²⁹ *Query*: was Thompson's not taking the stand and the resulting murder conviction and imprisonment really the *plainly obvious consequence* of the failure to train prosecutors about the requirements of *Brady* in the prior attempted aggravated armed robbery case? The proximate cause answer would appear to be no, unless Thompson claimed that one or more of the prosecutors in his attempted aggravated armed robbery case deliberately withheld exculpatory evidence in order to prevent him from taking the stand in his murder case.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1360.

¹²⁷ *Id.* at 1357.

¹²⁸ *See id.*

¹²⁹ *Id.*

Finally, I maintain *Connick* is best understood in the context of §1983 jurisprudence developments generally. Over the past several decades, and at the same time the Court has been gradually limiting local government liability for failure to train, culminating in *Connick*, the Court has also been engaged in limiting the scope of § 1983 damages liability in other ways, prompted in large measure, as I have suggested, by federalism concerns.

IV. CONNICK THROUGH A FEDERALISM LENS

One way the Court has been limiting local government liability for failure to train is through limiting the scope of the underlying constitutional provision. The Court, out of concern with both judicial intervention in, and judicial supervision of, local government decisions, and with the chilling effect of § 1983 litigation on the decision-making of individual state and local government officials, has limited the scope of procedural due process, substantive due process, the Eighth Amendment, equal protection and the First Amendment.¹³⁰

Another way the Court has limited the scope of § 1983 damages liability in the name of protecting federalism is by gradually broadening the scope of qualified immunity for individual government officials and employees. Qualified immunity was originally intended to minimize the costs of liability.¹³¹ However, the Court has, to a considerable extent, converted it into the functional equivalent of absolute immunity in an attempt to minimize the costs of defending.

¹³⁰ See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976) (holding that simple defamation by a state official without more does not implicate § 1983), *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that the Eighth Amendment requires subjective criminal recklessness for deliberate indifference), *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that there must be intent to harm in order to give rise to liability under the Fourteenth Amendment), *Village of Willbrook v. Olech*, 528 U.S. 562 (2000) (holding that a homeowner could assert an equal protection claim as a class of one); but see *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008) (holding class of one equal protection claims in the public employment setting are now barred); and, perhaps most questionable, public employee free speech in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that when public employees make statements dealing with issues of public concern pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and their statements are not shielded by the First Amendment from employer discipline).

¹³¹ See Alan K. Chen, *The Facts About Qualified Immunity*, 55 Emory L. J. 229, 235 (2006). See, on qualified immunity, NAHMOD, CIVIL RIGHTS AND LIBERTIES ch. 8.

Thus, in *Harlow v. Fitzgerald*, perhaps the most important qualified immunity decision of them all, the Court eliminated the subjective part of the prior two-part qualified immunity test, rendered that test objective and thus legal in nature and emphasized that qualified immunity should be decided quickly as possible, preferably before discovery, in order to minimize the costs of defending.¹³² In *Anderson v. Creighton*, the Court made the clearly settled law inquiry rather case-specific, thereby increasing qualified immunity protection for defendants.¹³³ The Court even bent the final judgment rule in *Mitchell v. Forsyth*, a decision that federal courts have not been too happy with, and held that denials of defense motions for summary judgment based on qualified immunity were immediately appealable on issues of law.¹³⁴ The purpose: to let qualifiedly immune defendants out from under § 1983 litigation as quickly as possible.

Connick was therefore not an aberration. It, like the other § 1983 decisions I have discussed all too briefly today, reflects the Court's sensitivity—some would say oversensitivity—to federalism concerns. This includes an obvious wariness about federal judicial intervention into state and local government matters regardless of the fact that it is Fourteenth Amendment rights (including incorporated provisions of the Bill of Rights) that are protected by § 1983 damages actions.

Now recall Justice Frankfurter's view of federalism, written way back in 1961 in *Monroe v. Pape*, about the limited scope of § 1983's color of law requirement.¹³⁵ Here is what he wrote in his dissent:

The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts,

¹³² 457 U.S. 800, 818-19 (1982).

¹³³ 483 U.S. 635, 638-39 (1987).

¹³⁴ 472 U.S. 511, 530 (1985).

¹³⁵ 365 U.S. 167 (1961).

would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.¹³⁶

It is such a view that appears, in significant measure, to be animating the Court's current § 1983 jurisprudence.

¹³⁶ *Id.* at 237.