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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

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Impact of 42 U.S.C. §1983 (Civil Rights Act) On Highway Departments, Personnel, and Officials

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by Dwight H. Merriam and C. Luther Propst. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Activities Division (B) of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report was written to aid administrators, engineers, attorneys and other department personnel who have the responsibility to deal with employees, the public, contractors and vendors to ensure that their constitutional rights are protected. The report will be especially

helpful to State Attorneys who must advise department administrators and other personnel on civil rights claims or legal actions. The report continues NCHRP policy of keeping the departments up to date on legal matters. It is a new study that will be published in a future addendum to Selected Studies in Highway Law.

Volumes 1 and 2 of SSHL, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts

environmental and other areas of highway law, was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will

be published when Volume 5 is issued in a year or so. The text, which totals about 3,000 pages, comprises 72 papers, 38 of which are published as supplements in SSHL. In addition, 3 original papers and 5 supplements have been initially published in the Legal Research Digest series and will be published in SSHL in the near future. Copies of SSHL have been sent, free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of \$145.00 per set.

CONTENTS

Impact Of 42 U.S.C. § 1983 On Highway Departments, Personnel, and Officials

	<u>Page</u>
I. Introduction	3
II. The Historical Perspective: Section 1983 -- A Reconstruction Era Remedy	3
III. Elements of a Section 1983 Claim	3
IV. Remedies	7
V. Section 1983 Immunities	9
VI. Other Defenses	11
VII. Procedural Aspects of Section 1983 Actions	13
VIII. 1983 Decisions Involving Highway Departments, Personnel, and Officials	13
IX. Conclusions	17

Impact of 42 U.S.C. § 1983 on Highway Departments, Personnel, and Officials

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I. INTRODUCTION

More than a century ago during the Reconstruction Era following the War between the States, Congress enacted a law designed to provide redress for people whose civil rights were violated. This law, the Civil Rights Act of 1871, codified, in part, as 42 U.S.C. § 1983, is commonly referred to as "Section 1983."

The availability of actions under Section 1983 provides a powerful lure for potential plaintiffs in two important respects: First, Section 1983, in addition to injunctive and declaratory relief, allows the court to award money damages; second, under Section 1988 of Title 42, the court can award attorney's fees to the prevailing party in a Section 1983 action. This latter remedy is a departure from the "American Rule" that each side pays for its own legal counsel. Regardless of who prevails, the availability of attorney fees and damage awards in Section 1983 actions has had a dramatic impact. In 1961, 296 civil rights actions, excluding those against the United States, were filed in federal courts. By 1983, the number had grown to more than 38,000.¹

Case law arising out of suits specifically involving Section 1983 actions against state highway departments and their personnel and officials is sparse because few such actions have been reported. Therefore, the principles set forth in this paper are derived from a wide variety of Section 1983 cases involving a variety of state and municipal agencies and officials sued in their official and individual capacities. The intent of this paper is to set forth those general principles of Section 1983 law pertinent to issues that could arise in lawsuits involving state highway departments and their personnel and officials. We have not attempted an extensive analysis of how these principles might be applied in hypothetical cases, except where case law already exists suggesting the type of fact situations in which such cases might arise. (See section VIII in this paper.)

II. THE HISTORICAL PERSPECTIVE: SECTION 1983—A RECONSTRUCTION ERA REMEDY

The years immediately following the War Between the States were difficult for this country. Politics and race remained issues on which

people were measured. Reacting to the continuing social and political turmoil, Congress enacted the Civil Rights Act of 1871. The Act reflects the pressure under which it was written. The Supreme Court, in 1951, said it was "loosely and blindly drafted."² In the same year it was described by the Supreme Court as having been enacted in a highly inflamed atmosphere not "conducive to the enactment of carefully considered and coherent legislation."³

Section 1983 currently provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a 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.⁴

For the first 90 years following its enactment, the impact of Section 1983 on governmental agencies was severely limited by court interpretations that excluded most actions by governmental personnel and officials from its reach. These restrictive interpretations pertained to three elements of the statute. First, the courts interpreted "under color of law" to mean that the person who committed the act of deprivation had to be acting within the scope of his or her official authority, i.e., a remedy could be found only when the state law itself was used to deprive the plaintiff of his or her civil rights. Second, the type of entity or individual that qualified as a "person" liable to suit under the statute was closely circumscribed by principles of governmental immunity. Finally, the courts had never expanded the term "and laws" to include federal laws other than those related to constitutional rights.

In the last two decades, however, a series of decisions have expanded governmental liability under Section 1983. In these, the U.S. Supreme Court has made clear that state personnel and officials can be sued for damages under Section 1983 for depriving citizens of their federal constitutional and federal statutory rights. The door is now open to property owners, agency employees, highway users and others to bring Section 1983 actions against highway departments and/or their personnel.

III. ELEMENTS OF A SECTION 1983 CLAIM

Section 1983 provides a federal cause of action for an injured party in law or equity to remedy deprivations of federal constitutional and statutory rights that occur under color of state law. Section 1983 is based on the constitutional authority of Congress to enforce the fourteenth amendment. It creates no additional substantive civil rights but is solely a remedy for deprivations of rights created elsewhere.⁵

To analyze the legal basis of a Section 1983 claim, the statute must be broken down into its elements. Section 1983 requires that: (a) there must be a deprivation of some right, privilege, or immunity secured by either the Constitution, i.e., the U.S. Constitution, or the laws, i.e., the

federal statutes; (b) this deprivation must have occurred under color of a state law, which may be a statute, ordinance, regulation, custom, or usage; and (c) there must be a "person" who violates a protected right.

A. Rights, Privilege, or Immunity Secured by the Constitution and Laws

In *Maine v. Thiboutot*,⁶ the Supreme Court addressed the question of whether the term "laws" under Section 1983 means all federal laws or just those related to constitutional rights. The court addressed the issue as follows:

The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.

Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.⁷

Thus, under *Maine v. Thiboutot*, a citizen can bring an action against a municipality on the basis of a violation of a federal constitutional right or a deprivation of a federal statutory right.

Not all federal statutes, however, may be enforced through Section 1983 actions. In *Middlesex County Sewage Authority v. National Sea Clammers Association*,⁸ the Court held that, where a federal statute includes a comprehensive enforcement mechanism, but does not provide a private right of action, Section 1983 claims cannot be used to obtain a private right of action to redress violations of that statute.

Accordingly, suit under Section 1983 has been precluded in regard to a variety of federal laws, including: Federal Insecticide, Fungicide and Rodenticide Act,⁹ Education for All Handicapped Children Act,¹⁰ National Environmental Policy Act (NEPA),¹¹ and River and Harbor Improvements Act.¹²

In addition, a federal statute which does not provide a comprehensive enforcement mechanism may not be actionable under Section 1983 if it does not confer any enforceable substantive rights.¹³ This rule flows from the principle that Section 1983 does not create rights but merely protects them. Therefore, the constitutional or statutory right which an official is alleged to have violated must have been clearly established at the time of the violation and must provide the basis for the cause of action upon which the plaintiff sues.¹⁴ Thus, although Section 1983 is a powerful tool for enforcing federal rights, not all federal statutes may be enforced through Section 1983 actions.

Moreover, there are categories of rights arguably protected by the federal constitution the deprivation of which courts have decided simply does not rise to the level of a right protected by Section 1983. For example, in *Yale Auto Parts, Inc. v. Johnson*,¹⁵ the court held that an auto junk dealer was not entitled to damages under Section 1983 simply because the Zoning Board of Appeals denied an application for a cer-

tificate of location approval. This was true even though the defendants engaged in egregious and politically influenced procedural irregularities. A Zoning Board of Appeals member said to the others before the vote that the Democratic Town Chairman "wants the Yale application killed." All four Board members, who were Democrats, then voted to deny the permit.¹⁶

The court reasoned that despite all of this:

the threshold question is whether plaintiffs' interest in obtaining ZBA approval of their application was one entitled to protection and enforcement by a federal court, which is a tribunal of limited jurisdiction. Section 1983, upon which plaintiffs depend, does not guarantee a person the right to bring a federal suit for demand of due process in every proceeding in which he is denied a license or permit. If that were the case, every allegedly arbitrary denial by a town or city of a local license or permit would become a federal case, swelling our already overburdened federal court system beyond capacity. A federal court should not . . . sit as a zoning board of appeals. (Citations omitted.)¹⁷

There are, of course, many cases in which state and local governments have been found liable for their conduct in handling applications for regulatory approval.

For example, in *Shelton v. City of College Station*,¹⁸ the plaintiffs sued the defendant city, members of its Zoning Board of Adjustment, and the Planning Director after the Board disapproved a parking variance application. The district court granted the city summary judgment on the Section 1983 count. The Fifth Circuit, however, reversed and remanded, holding there was sufficient evidence to establish a genuine issue of fact as to whether the Board was arbitrary and discriminatory in denying the variance, and that such an arbitrary denial was a deprivation of a property right under Texas law and thus actionable under Section 1983. The principles of land use takings law, as they have emerged from cases claiming the unconstitutionality of land use regulations and land use permit denials, have developed considerably in the last decade. Takings law is more fully discussed later in section VIII of this paper (see "Taking of Land").

B. Under Color of State Law

The deprivation giving rise to a Section 1983 action must have taken place "under color of law," which essentially means that there must be state action.¹⁹ This element has long been established in cases where the public official has acted in his or her official capacity and in an authorized manner.

The reach of Section 1983 was expanded, however, in 1961 when the U.S. Supreme Court handed down its decision in *Monroe v. Pape*.²⁰ In *Monroe* it was alleged that 13 Chicago policemen broke into the plaintiff's house without a search warrant and forced him and his family out of their bedrooms and into the living room where they were made to stand naked while the police searched the house for clues in connection with a murder that had occurred 2 days before. Mr. Monroe, a black man, was

then taken to the police station where he was held for 10 hours without being charged, even though a magistrate was available. He was eventually released with no charges having been filed.

In *Monroe*, the Court held that the term "under color of law" included the misuse of power exercised under state law, even though the persons committing the acts which constituted the deprivation of rights were acting beyond the scope of their authority. The Court expanded the meaning of "under color of law" in this way because it believed that Section 1983 was intended to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."²¹

Intent/Negligence

To satisfy the "under color of law" or state action element of a Section 1983 action there need not be a specific intent to deprive an individual of a federally protected right. Section 1983 actions are viewed against the background of tort liability; therefore, negligence may be the basis for liability in some cases.²²

Still unclear is whether an action under Section 1983 may be based solely on negligence. In *Parratt v. Taylor*,²³ a prisoner filed suit under Section 1983 against prison officials whom he claimed had negligently lost a package of hobby materials which had been sent to the prison. The Supreme Court denied the plaintiff's claim for relief on the grounds that, although the plaintiff had been deprived of his property by a person acting under color of state law, the deprivation was not in violation of procedural due process because of the existence of an adequate state remedy under the Tort Claims Act. Although the court did not uphold the Section 1983 claim, it suggested that a Section 1983 action could be based solely on negligence when it stated that "[n]othing in the language of section 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement."²⁴ On the other hand, the court rejected the idea that "any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under section 1983."²⁵ Thus, while negligence may be the basis of a Section 1983 claim, not all negligence claims are actionable.

The Supreme Court has explicitly drawn the distinction between the rights of citizens to be compensated for official negligence under state tort law and the rights of citizens under the due process clause of the United States Constitution. In *DeShaney v. Winnebago County Department of Social Services*,²⁶ the Court, having denied plaintiff's constitutional right to protection from private violence, went on to say:

It may well be that by voluntarily undertaking to provide petitioner with protection against a danger it played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. But the Due Process Clause does not transform every tort committed by a State actor into a constitutional violation.²⁷

A series of cases suggest that the negligence of a public official may not be the basis of a Section 1983 claim. In *Rizzo v. Goode*,²⁸ the Supreme Court held that a state official's negligent failure to prevent police misconduct was insufficient to support an action under Section 1983. Quoting *Rizzo*, the Court in *Polk County v. Dodson*,²⁹ stated that "a general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983."

Official Policy or Custom

*Monell v. New York City Department of Social Services*³⁰ requires that, in order for a city to be held liable for deprivations of civil rights, there must be a showing that the deprivation of rights resulted from a municipal policy or custom. In *Monell*, the Supreme Court found the Department's official policy compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons to be the moving force of the constitutional violation in question. Liability may be based on governmental "custom" even where the custom has not received formal approval through the body's official decision-making channels, or it may be based on practices that are not "authorized by written law." The official policy need not be formally adopted or written.³¹ A "persistent and well settled custom," may be the basis for a Section 1983 claim.

In *City of Oklahoma City v. Tuttle*,³² the majority of the court addressed whether a Section 1983 plaintiff may establish municipal liability based on municipal policy without submitting proof of a single action taken by a municipal policymaker. Officer Rotramel, a member of the Oklahoma City police force, shot and killed Albert Tuttle outside of a bar in Oklahoma City. Rotramel had gone to the bar to investigate a robbery and grabbed the suspect Tuttle as he was leaving the bar. Tuttle subsequently escaped and crouched outside the bar when Rotramel shouted to him. Rotramel shot Tuttle, suspecting that Tuttle was coming out of his crouch with a gun. Tuttle had only a toy pistol in his boot. Tuttle's widow sued the city of Oklahoma City under Section 1983. Justice Rehnquist, speaking for a plurality of four, discussed the scope of municipal action which may result in an actionable policy: "the word 'policy' generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate."³³ The majority concluded by holding that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."³⁴

Three Justices concurred in the judgment, but reasoned simply that to hold the city liable under Section 1983 for a single incident of police

misconduct would amount to respondeat liability, a concept which the Court has rejected.

A Court of Appeals decision since *Tuttle* found that a single incident of gross recklessness by a police officer followed by tacit approval by the police chief may create a policy sufficient to impose liability.⁴⁵ In *Grandstaff v. City of Borger*, several police officers recklessly killed a bystander while attempting to serve an arrest warrant. Afterwards, the police chief—the city's policymaker—issued no reprimands, discharges, or admissions of error. The court held that the jury could infer a municipal policy from the chief's subsequent acceptance of the reckless conduct. The Court held that this subsequent approval provides an "affirmative link" between a municipal policy and the constitutional deprivation required under *Tuttle*.

Two 1989 decisions of the Supreme Court bring the negligence/duty of care and official policy or custom issues clearly into focus as they pertain to Section 1983 actions. *City of Canton, Ohio v. Harris*,⁴⁶ in which plaintiff claimed a violation of her constitutional right to medical care while in police custody, establishes a clear and stringent standard for "failure to train" cases. The Supreme Court ruled that "the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. The Court went on to say that "(o)nly where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."⁴⁷

The presence of "deliberate indifference" or "official policy or custom" does not save a Section 1983 claim, however, if the agency sued has no affirmative duty to protect the plaintiff citizen from harm. In *DeShaney v. Winnebago County Department of Social Services*,⁴⁸ a child and his mother sued a county department of social services under Section 1983, claiming deprivation of the child's liberty interest in bodily integrity resulting from the department's failure to remove the child from the custody of his father who beat him to the point of brain damage. The Supreme Court distinguished *DeShaney* from cases in which the State's duty of care arises from the person's having been deprived of his freedom by being placed in the State's custody, which was the case in *Canton v. Harris* above. The Court ruled that the Constitution imposes no duty on the State to provide members of the general public with adequate protective services and that the State's failure to protect an individual against private violence does not constitute a violation of substantive due process when the individual was not in the custody of the department in question and the department did nothing to create the harm.

C. Persons Who Shall Be Liable

Under Section 1983 "every person" is potentially liable. Persons include natural persons, citizens groups, corporations, and other business entities. In *Monell* the Court held that units of local government are "persons" under Section 1983.⁴⁹

A state is not a "person" under Section 1983 nor are state officials "persons" under Section 1983.⁴⁰ *Will v. Michigan Dep't of State Policy, et al.*, establishes a basis distinct from eleventh amendment sovereign immunity for protecting states and state agencies from liability under Section 1983. Even if a state waived its sovereign immunity and consented to suit, it cannot be sued under Section 1983 because the *Will* court held that states are not within the statute's category of possible defendants.⁴¹ Thus, *Will* makes common law immunity absolute in Section 1983 actions.

Section 1983 defendants must be connected in some way with a unit of state or local government to meet the state action requirement. However, a private person may be a defendant if he or she has acted in conjunction with a governmental entity. For example, where a private person conspires with a governmental official to violate federal constitutional or statutory rights, that private person has acted under color of law and may be liable under Section 1983.⁴²

If a private citizen conspires with an immune state official, (such as a judge) the official's immunity will not shield the private citizen from liability under Section 1983.⁴³ In *Dennis v. Sparks*, the Supreme Court held that three defendants who allegedly bribed a judge could be sued under Section 1983 for conspiracy to deprive the plaintiff of his civil rights, even though the judge was immune. In *Tower v. Glover*,⁴⁴ the Supreme Court held that public defenders who conspire with state officials have no immunity from Section 1983 liability for intentional misconduct. There was nothing in the decision which suggested that the immunity of the judges with whom the defendants were conspiring could protect the defendants. On the other hand, property owners who used political and judicial channels to oppose a real estate developer's application for land use approvals were not liable for conspiracy with governmental officials.⁴⁵

Absent conspiracy, state action will not be found when private entities perform public services, even when such services are publicly funded and government regulated—so long as the regulating governmental entity does not exert coercive power over the private entity's acts.⁴⁶

A municipality is not liable under Section 1983 on a respondeat superior basis for the acts of its employees and agents.⁴⁷ To establish liability against a unit of local government, the government entity itself, and not merely an official, must be a "moving force" behind the deprivation of rights.⁴⁸ The entity's "policy or custom" must play a role in the violation. Only personal liability is established by showing merely that an official, acting under color of state law, caused the deprivation of a federal right.⁴⁹

D. Causation

For a Section 1983 action to succeed, there must be a causal link between its essential elements—i.e., the act under color of state law which the person being sued has carried out must be the legal cause of the claimed deprivation of a protected right. *Monell* makes clear that Section

1983 requires cause and effect and invokes the traditional tort law tests of "but-for" causation and the alternative "substantial factor" test.⁵⁰ The defendant's conduct must be the cause in fact of the plaintiff's deprivation.⁵¹ Once cause and effect are established, the analysis then moves to determining whether there is proximate cause—that is, whether the defendant is legally responsible for the consequences of his or her conduct.

Because Section 1983 provides for the award of damages, the issue of causation can be crucial in cases where the plaintiff is seeking compensation for the harm caused by the claimed violation of protected rights, as the following case illustrates. In *McCulloch v. Glasgow*,⁵² the Town of Ackerman, Mississippi, intended to build a street on a strip of land of disputed ownership. The town claimed to have acquired an easement by prescription for the public street along the front of property claimed by the plaintiffs by adverse possession. With knowledge of the plaintiffs' claim of title and without taking action to settle the dispute regarding ownership, the town removed the plaintiffs' fences, bulldozed the strip, and built a street on it. The plaintiffs brought an action under Section 1983 claiming a taking of property without due process.

In support of their claim for damages, the plaintiffs provided evidence that one of them, Carol McCulloch, suffered a heart attack as a result of this taking. The defendants argued that the heart attack was not foreseeable, but the court held that this argument applied only to negligence cases and here, where there was an intentional tort, the defendants would be held to a higher standard.⁵³ The court noted that "under Mississippi law . . . [t]he gist of the action [is] the unreasonable exposure of the [plaintiff] to a foreseeable risk of some harm."⁵⁴ The court held that "[t]he heart attack itself need not have been foreseeable if defendants reasonably should have foreseen that their actions would expose the plaintiffs to risk of some otherwise compensable injury."⁵⁵ Thus, the court found causation in fact for the heart attack, as well as the taking, and went on to find proximate cause or legal liability for the injuries suffered.

IV. REMEDIES

In a Section 1983 action, after the plaintiff has proven a violation, and any asserted immunities or defenses have been unsuccessful, the court may award declaratory and injunctive relief, damages, and attorney's fees.

A. Damages

Nominal, compensatory, and punitive damages are available under Section 1983.

Nominal damages may be awarded for a presumed but unproved injury.⁵⁶ In *Carey v. Piphus*,⁵⁷ the Supreme Court held that damages available under Section 1983 are governed by the principle of compensation:

Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty." The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions "found . . . to have been violative of . . . constitutional rights and to have caused compensable injury. . . ." (Citations Omitted.)⁵⁸

To recover compensatory damages, the plaintiff must prove that the unconstitutional activities were the cause in fact of actual injuries.⁵⁹ In proving damages, evidence must be received on special damages, such as lost income and medical expenses, and general damages, including emotional distress and pain and suffering.⁶⁰ Any individual defendant is potentially liable for compensatory damages in a Section 1983 action.

Double recovery is not permitted.⁶¹ The plaintiff has a duty to minimize damages.⁶² Damages that would have occurred regardless of the violation of the federal constitutional or statutory right may not be recovered.⁶³

In addition to compensatory damages, a court may award punitive damages in a Section 1983 suit to punish the defendant for outrageous conduct and to deter others from similar conduct in the future.⁶⁴ Even if the plaintiff cannot prove actual damages, the court may award punitive damages.⁶⁵ Municipalities, however, are generally immune from punitive damages in Section 1983 actions.⁶⁶ A municipality may, however, waive its immunity by agreeing to indemnify its employees for punitive damages.⁶⁷ Since the *Newport* decision in 1981, several lower courts have suggested that *Newport* does not necessarily preclude the assessment of punitive damages against a municipality if the taxpayers are responsible for the violation giving rise to the Section 1983 action.⁶⁸ In each of these decisions, the courts noted the exception left open by the Supreme Court when the Court in *Newport* stated that:

It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetuating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here.⁶⁹

In each case the court held that the facts did not warrant applying the exception. These cases suggest, however, that punitive damages could be assessed if a sufficient number of taxpayers were directly involved in a civil rights violation.

Individuals who are not protected by other forms of immunity may be subject to punitive damages. Punitive damages are available "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."⁷⁰ This standard for Section 1983 actions is the same as that for common law tort actions.

In awarding punitive damages, the court will evaluate the "nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent."⁷¹ The damage award must

not be grossly excessive, shocking to judicial conscience, or a denial of justice.⁷² Provided these standards are met, a punitive damage award may be quite substantial.

In *Newport*, the Supreme Court made clear that punitive damages could be awarded "against the offending official, based on his personal financial resources. . . ."⁷³ Thus, an official who is unable to claim a good faith immunity may have to defend against considerable damage claims.

B. Injunctive and Declaratory Relief

Under Section 1983, the court may grant a declaratory judgment in which it declares the rights of the parties or expresses the opinion of the court without ordering anything to be done. It may order injunctive relief, forbidding a party to perform a particular act, or ordering the performance of a particular act.

C. Attorney's Fees

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, permits the prevailing party in certain civil rights actions to recover attorney's fees. In *Maher v. Gagne*,⁷⁴ the Court held that attorney's fees under Section 1988 were available in all types of Section 1983 actions, including actions based solely on Social Security Act violations. Moreover, the Court held that the fact that the respondent prevailed through a settlement, rather than through litigation, did not preclude her from claiming attorney's fees as the "prevailing party" within the meaning of Section 1988.⁷⁵ According to the Supreme Court in *Hensley v. Eckhardt*, plaintiffs prevail when they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."⁷⁶ Thus, to be the prevailing party, it is not necessary to prevail on all issues in the case, or even on the central issue; attorney fees may be awarded to the plaintiff so long as the plaintiff succeeds on any significant issue "that materially alters legal relationships between the parties."⁷⁷

In *Ortiz de Arroyo v. Barcelo*,⁷⁸ the court held that the plaintiffs were the "prevailing party" entitled to attorney's fees even though they did not obtain a favorable judgment or a formal settlement agreement in their Section 1983 suit. The plaintiffs owned real property in Puerto Rico which the Commonwealth had reserved in 1971 for future public use as a proposed highway. The plaintiffs filed their Section 1983 suit in district court "alleging that the transportation and land use plan adopted by the Commonwealth effectively froze any development of the plaintiffs' lands for an indefinite period of time without compensation."⁷⁹ The Commonwealth sought to dismiss the case for lack of subject matter jurisdiction. While attempts to settle the case were ongoing, the Planning Board removed its designation of the plaintiffs' land as a potential highway. The court held that the plaintiffs had prevailed because they had achieved their stated aim concerning a significant issue in the suit. Even though there was no formal settlement or court-ordered relief for the plaintiffs, the appellate court reasoned that the plaintiffs prevailed be-

cause they had been a "catalyst" in prompting the redesignation of their land.

The "prevailing party" can be either the plaintiff or the defendant, although the criteria for awarding fees is different for each. Ordinarily, the prevailing plaintiff may recover attorney's fees as a matter of course.⁸⁰ The prevailing defendant, however, may recover attorney's fees only when the court, in its discretion, finds that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."⁸¹

The Supreme Court has handed down several decisions which significantly cut into the award of attorney fees in Section 1983 actions. The Court's decision, in *Marek v. Chesney*,⁸² encourages settlement of civil rights cases by denying the award of attorney's fees under Section 1988 for fees incurred after a settlement offer is rejected unless the final judgment obtained by the offeree is more favorable than the settlement offer. This works as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a reasonable settlement offer.

The *Marek* decision interprets Rule 68 of the Federal Rules of Civil Procedure, which provides that if a timely pretrial settlement offer is not accepted and the final judgment is not more favorable to the offeree than the offer, the offeree must pay the costs incurred after the making of the offer. The Court in *Marek* held that "costs" for purposes of Rule 68 include attorney's fees awardable to a prevailing party under Section 1988.⁸³

Claimants who bring suit under a comprehensive federal statutory scheme which does not include provisions for attorney's fees cannot recover fees under Section 1988. Asserting a Section 1983 claim in addition to a statutory claim does not give rise to attorney's fees under Section 1988.⁸⁴ The plaintiff in *Smith v. Robinson* asserted state claims, federal statutory claims, and federal constitutional claims to require placement of a child with cerebral palsy in an appropriate educational program. The plaintiff prevailed on a state statutory claim, and the federal claims were never reached. The Supreme Court concluded that where "petitioners have presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a non-fee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted under § 1983."⁸⁵

The eleventh amendment does not bar recovery of attorney's fees against the state.⁸⁶ The Supreme Court, in *Hutto v. Finney*, permitted recovery of attorney's fees under Section 1988 from a state in a Section 1983 case when the state itself was a defendant or state officials in their official capacity were defendants.⁸⁷ In *Kentucky v. Graham*, the Court held that attorney's fees are not recoverable against the state when the plaintiff prevails against a public official in his individual capacity.⁸⁸ The Court recognized that liability on the merits and responsibility for fees go hand in hand.

Under *Owen v. City of Independence*, *supra*, when a claimant prevails against a local government official in his official capacity, the govern-

mental entity is liable for attorney's fees. Where equitable relief is granted, attorney's fees are almost always awarded solely against the governmental entity.⁸⁹

A claim for attorney's fees may or may not survive the plaintiff, depending on the relationship of the alleged illegal activity to the plaintiff's death and the requirements of state law. For example, a Section 1983 action against a district attorney for his prosecution attempts against the plaintiff did not survive the plaintiff, who died before the trial on damages, where Louisiana law was applied and the death itself was not caused by the alleged unconstitutional conduct.⁹⁰

The determination of what constitutes reasonable attorney's fees is left to the sound discretion of the court. In *Hensley*, the Court stated that the starting point for determining a reasonable fee is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."⁹¹ This figure may then be adjusted up or down, depending primarily on the results obtained. Other courts have suggested other factors which should be considered such as the difficulty of the case and awards in similar cases.⁹²

In complex cases, awards can be substantial. In *Pennsylvania v. O'Neil*,⁹³ the court awarded approximately \$200,000 in fees. Moreover, the fees awarded can be greater than damages recovered. For example, in *City of Riverside v. Rivera*,⁹⁴ the Supreme Court approved attorney's fees in the amount of \$245,456.25 when the award for compensatory and punitive damages amounted to approximately \$47,000. In *Rivera*, the Court explicitly rejected the defendant's argument that attorney fees must be proportionate to the amount of damages recovered.⁹⁵ In *Copeland v. Marshall*,⁹⁶ the plaintiff recovered \$160,000 in fees and \$33,000 in back pay; and in *Coop v. City of South Bend*,⁹⁷ the plaintiff recovered \$6,000 in fees and \$510 in compensatory damages. Bonuses or multipliers of usual hourly rates are often awarded.⁹⁸ Costs are also recoverable, including clerk and marshal fees, fees for court reporters, copying and printing fees, and some docket fees. Expert witness fees might also be recoverable.⁹⁹ The trial court has substantial discretion in supervising attorney's fee awards in civil rights cases, to the point of choosing not to enforce, and thereby to limit fees derived under a private agreement between the prevailing attorney and his client.¹⁰⁰

Thus, although subject to the discretion of the court, awards of attorney's fees can be substantial and may be a significant factor in encouraging potential plaintiffs to bring suit under Section 1983.

V. SECTION 1983 IMMUNITIES

An individual or entity that might otherwise be a "person" liable to suit under Section 1983 may find protection from such legal action in the principle of immunity. Several types of immunity are available to governmental agencies and to public personnel and officials. These immunities may constitute a complete defense to a Section 1983 action or may change the elements and standards of proof, making it more difficult for the plaintiff to recover in such an action.

A. Sovereign Immunity

Sovereign immunity is grounded in the eleventh amendment, which provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The eleventh amendment protects an unconsenting state from damages and actions brought by private parties in federal courts. The immunity provides protection for both states and state agencies, but not units of local government.¹⁰¹ Sovereign immunity will defeat entirely a suit under Section 1983.¹⁰²

The eleventh amendment does not provide immunity for state personnel or officials sued in their individual capacities. State personnel and officials individually remain subject to suit even when sovereign immunity protects the state and its agencies.¹⁰³ Suits against public personnel or officials illustrate the important distinction between suits against state or personnel officials in their official capacity and in their personal capacity. Personal capacity suits seek to impose personal liability, while official capacity suits are only "another way of pleading an action against an entity of which an officer is an agent."¹⁰⁴ The real party in interest is the governmental agency, not the named official.¹⁰⁵ Recovery in successful official capacity actions is against the government agency.

When sued in their personal capacity, public personnel or officials may assert immunities which are unavailable to a governmental entity. (These personal immunities are discussed in the next section.) A public official sued in his official capacity may assert sovereign immunity to the extent that it is available to the governmental agency for which the official is an agent.

Until the Supreme Court's June 1989 decision in *Will v. Michigan Department of State Police*,¹⁰⁶ the law had been that the eleventh amendment did not prohibit Section 1983 suits against a state in its own name if the state had waived the immunity or if Congress had overridden the immunity pursuant to its fourteenth amendment powers. By holding that states and state officials named in their official capacity were not "persons" under Section 1983, the Court in *Will* appears to have blocked the power of Congress or the states to override eleventh amendment sovereign immunity.

The state's eleventh amendment immunity can, however, be overcome in actions for injunctive or declaratory relief by naming state officials as the defendant. "Thus, implementation of state policy or custom may be reached in federal court only because official capacity actions for prospective relief are not treated as actions against the State."¹⁰⁷ In addition, the eleventh amendment does not bar monetary relief that is "ancillary" to injunctive relief.¹⁰⁸

Problems often arise in connection with the sovereign immunity defense when the courts have to determine whether an agency is an agency of the state or of a local government. For example, the U.S. Supreme

Court has held that a regional planning agency was not protected by the eleventh amendment.¹⁰⁹ And a county department of social services was held not to be immune under the eleventh amendment.¹¹⁰ In *Henry v. Texas Tech. University*,¹¹¹ a district court held that a state university was protected under the eleventh amendment.

The eleventh amendment does not bar recovery from the state if the state has consented to liability, as Rhode Island has by statute. State agencies may be liable by consent.¹¹²

A state's consent to suit may be implied. For instance, operation of a railroad by a state constitutes consent to suit by railroad employees under the Federal Employers' Liability Act.¹¹³ The courts, however, apply a strict test to determine whether a state has implicitly waived its eleventh amendment immunity. In *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*,¹¹⁴ the Supreme Court held that a state agency's general waiver of sovereign immunity and a state's agreement to follow federal law in administering the Medicaid program do not constitute a waiver of eleventh amendment immunity. The Court stated that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.'" ¹¹⁵

Federal statutes enacted pursuant to the Enforcement Clause (§ 5) of the fourteenth amendment may remove the eleventh amendment immunity and allow recovery against a state which would not be obtainable in other contexts.¹¹⁶

B. Official Immunities

There are two types of immunity, absolute and qualified, available under the common law of governmental liability, which remain available to public officials under Section 1983.¹¹⁷ An absolute or qualified immunity is available even though the claim may be meritorious, although it usually does not bar injunctive or declaratory relief.¹¹⁸

Absolute Immunity

Absolute immunity is determined on the basis of the public official's status, rather than the nature of the particular actions at issue.¹¹⁹ Thus, absolute immunity is available if the action in controversy is legislative, prosecutorial or judicial. If the action is more accurately characterized as an executive or administrative act, absolute immunity is unavailable.¹²⁰ The courts take a "functional" approach to this issue.¹²¹

The burden of proving absolute immunity rests on the official asserting the defense.¹²² Absolute immunity translates to "complete protection from suit,"¹²³ encompassing suits for damages,¹²⁴ and suits for equitable relief.¹²⁵

Traditional common law immunities include an absolute immunity for judges, an absolute immunity for the highest executive officials of the Federal Government, and an absolute immunity for legislators at the

federal, state, and local levels. A public official with the status of a legislator is also protected by an absolute legislative immunity.¹²⁶

While, traditionally, a legislator is thought of as one who is a member of a state legislature or city council, the Supreme Court has construed the elected officials of a regional planning agency to be legislators.¹²⁷ Since *Lake Country*, many federal courts have held that local legislators enjoy absolute immunity.¹²⁸ These decisions follow the logic of the Supreme Court in *Lake Country*, which looked not to the level of government at which an official serves, but at whether an official may be "deterred from exercising his legislative duties freely by threat of being haled into court."¹²⁹

Absolute immunity for legislators, however, applies only to acts done in legislative capacity. Administrative or executive acts of legislators are not protected.¹³⁰ The line between legislative and administrative activity defies a precise definition. In *Cutting v. Muzzey*,¹³¹ the plaintiff challenged the town planning board's insistence upon the completion of a particular road before granting approval of a subdivision proposed by the plaintiff. The board's "insistence" apparently came in the form of a rejection of the developer's performance bond, which the court characterized as "an administrative act."¹³² The court contrasted this action with the passage of an overall development plan or the establishment of a general development policy—"both of which could be said to be legislative in nature."¹³³ Furthermore, the court said, the action was not "one of determining that some sort of sanction should be imposed for violation of a plan, permit, or license," which might be characterized as adjudicative action.¹³⁴ As a result, the court refused to give absolute immunity to the planning board, finding that qualified immunity was more appropriate.¹³⁵

The test which the court in *Cutting* applied to distinguish between legislative and administrative action was taken from a frequently cited article, "Developments in the Law—Zoning," 91 HARV. L. REV. 1427 (1978). If the nature of the facts used to arrive at a particular decision are "legislative facts," such as "generalizations concerning a policy or state of affairs," the decision is legislative. If, on the other hand, the facts underlying the decision are more specific, relating to specific persons or situations, it is administrative.¹³⁶

Although the President of the United States is absolutely immune for damages arising from official acts, the highest executive officials in the states are not protected by absolute immunity under federal law.^{137,138}

Qualified, Good Faith Immunity

If an absolute immunity is not available, public officials may still enjoy a qualified, good faith immunity. The general rule of qualified immunity is intended to provide officials the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages."¹³⁹ As the U.S. Supreme Court explained in *Scheurer*.¹⁴⁰

[I]n varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope

of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for belief formed at the time and in light of all the circumstances, coupled with good faith belief, that afford a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

In *Owen v. City of Independence*,¹⁴¹ the Supreme Court held that Congress did not intend to provide immunity from liability under Section 1983 to any particular group of public officials. *Owen*, like *Monell*, involved public personnel, in this instance, the firing of the police chief in Independence, Missouri. The Court, in *Owen*, held that Section 1983 "creates a species of tort liability that on its face admits of no immunities."¹⁴² The Court recognized that at the time the Civil Rights Act of 1871 was enacted, there was a well-established common law of immunity, and to the extent that this immunity existed, it was incorporated into the Civil Rights Act. However, since the Court found no tradition of immunity for municipalities, it went on to look to the "expansive sweep of the statutory language" in the Civil Rights Act itself and found that the intent was remedial and that the statute should be liberally construed. The Court held that immunity of the local government would render the deterrent effect of Section 1983 ineffective and that "the principle of equitable loss-spreading" did not require that good faith immunity be recognized for local government actions.

In *Harlow v. Fitzgerald*,¹⁴³ the Court established an objective standard for determining when qualified immunity is available. Under *Harlow*, government officials performing discretionary functions "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁴⁴ An official's objectively reasonable reliance on existing law provides a qualified immunity. Although the *Harlow* case involved federal officials, the same standard applies in cases against state officials.¹⁴⁵

The common law dichotomy between acts of public officials that are discretionary and those that are merely ministerial is important because it serves as a basis for determining whether a qualified immunity is available. Where the acts of public officials are discretionary and they have acted within their authority, they have a qualified good faith immunity. However, if a lower level administrative official performs acts that are ministerial, as compared to discretionary, they are generally held not to be protected by a good faith immunity defense.

Good faith immunity is available in suits brought against public officials in a personal or individual capacity. Good faith immunity is not available to defeat suits brought against public officials in an official capacity.

VI. OTHER DEFENSES

Several important doctrinal and statutory defenses may prevent the Section 1983 plaintiff from prevailing against a public official.

A. Standing

Plaintiffs in a Section 1983 action, as in all actions, must have standing.¹⁴⁶

B. Ripeness

The Supreme Court, in *Patsy v. Board of Regents of State of Florida*,¹⁴⁷ held that exhaustion of state administrative remedies is not a prerequisite to suit under Section 1983. A final administrative decision, however, is required before a Section 1983 claim is ripe.

The U.S. Supreme Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,¹⁴⁸ makes ripeness for federal judicial review a substantial threshold issue in Section 1983 cases which claim a taking of private property and seek compensation therefore. In *Williamson*, the Court held that a taking challenge "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."¹⁴⁹ According to the Court, the appeal before it was not ripe because the developer had not sought variances from the local planning agency to complete the project.¹⁵⁰

In *Agins v. City of Tiburon*,¹⁵¹ the Court held that a challenge to the application of a zoning ordinance is not ripe until the property owners submit a detailed plan for the development of the property. The *Williamson* decision takes the principle of the *Agins* decision one step further and requires the developer to also apply for any variances that might make feasible a project prohibited by the strict application of the regulations.¹⁵²

In *Williamson*, the bank's taking claim was not ripe because it had not sought compensation through the inverse condemnation procedures provided by state law. The Court reasoned that a "property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State."¹⁵³ State action is not final and ripe for judicial review until a property owner brings an inverse condemnation action under state law, if such an action is available. "Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure [which is provided for by statute in Tennessee], its taking claim is premature."¹⁵⁴

Thus, a landowner may not assert—and has not proved—that land use regulation has deprived him of all reasonable economic use of his land until he has completed two steps: (1) submitted a specific plan of development for approval as required by the *Agins* decision; and (2) applied for any variances that may relieve him from some of the burden of the regulations. If the property owner completes these steps, he must seek redress through condemnation procedures provided by state law, not in a Section 1983 action in federal court. For a taking, the Court also requires "completeness" of agency action, and a final judgment before appeal.

C. Abstention/Exhaustion

Federal courts may abstain from hearing a Section 1983 suit out of deference to the integrity of the judicial and administrative process of the states. Although the Supreme Court held that it is not necessary to seek a state remedy first (because the federal Section 1983 remedy is supplementary¹⁵⁵) the federal court may abstain under *Pullman*¹⁵⁶ if a state law issue raised in a federal claim is unclear.

The *Pullman* abstention doctrine relies on the equitable principle that it is wasteful and premature to have a tentative decision where there is an opportunity to have the matter resolved in a way that would avoid subsequent litigation.¹⁵⁷ Under *Pullman*, a federal district court "may, in its discretion, refrain from deciding constitutional questions which hinge on difficult state law issues, if the constitutional controversy would be terminated by resolution in state court of those issues."¹⁵⁸

Abstention is appropriate only under limited circumstances. Under *Bank of America*¹⁵⁹ case, abstention is appropriate only when three elements are present:

1. The complaint involves a sensitive area of social policy.
2. Constitutional adjudication could be avoided if the state issue is ruled on.
3. The ultimate resolution of the state law issue is still in doubt.

In *Bank of America* the court held that abstention was proper where the bank, trustee of a land parcel, brought a Section 1983 suit based on an alleged arbitrary classification of landowners for purposes of allocating water rights. The court held that land use, in general, and water allocation, in particular, are sensitive social issues; that abstention was proper where state court action might eliminate most, although not all, of the constitutional claims; and where California courts had not definitively determined whether water districts were governed by land use or riparian rights principles.¹⁶⁰

The Ninth Circuit Court also found abstention proper in *Kollsman v. City of Los Angeles*.¹⁶¹ In *Kollsman*, a developer challenged, in federal court, the denial of an application for an 85-acre subdivision on both state statutory and federal constitutional grounds. The district court ordered that the application be deemed approved pursuant to a newly enacted state statute. The court of appeals reversed and held that the lower court should have abstained under the *Pullman* doctrine. The court noted that land use planning is a sensitive area of social policy and that few state cases had interpreted the scope of the California legislation underlying the district court's decision. Because dispositive issues of state law were uncertain, the court of appeals ruled that the district court should have abstained in favor of a state court determination of the scope of the state statute.¹⁶²

Courts have also followed the abstention doctrine of *Burford v. Sun Oil Co.*, in Section 1983 land use cases.¹⁶³ *Burford* abstention prevents a federal court from interfering with a "complex state regulatory scheme concerning important matters of state policy for which impartial and

fair administrative determinations subject to expeditious and adequate judicial review are afforded."¹⁶⁴

In *Bob's Home Service, Inc. v. Warren County*,¹⁶⁵ the owners of a hazardous waste site challenged the county master plan which prohibited the owners from expanding and accepting new chemicals for which they did not have a permit. The district court denied the plaintiff's Section 1983 suit for lack of ripeness or, in the alternative, because Missouri law concerning the validity of the master plan was unclear. The Eighth Circuit held that the "Missouri statutes in question, having to do with zoning and planning powers of counties . . . have not previously been interpreted by the state courts, and they are not so clear that a federal court can construe them with much assurance."¹⁶⁶ Accordingly, the court abstained.

The *Pullman* and *Burford* doctrines are potentially powerful weapons for municipalities or state agency officials defending against Section 1983 claims arising out of the taking of land for highway purposes because complex and unresolved issues of state land use underlie so many such cases.

The Supreme Court announced a newer, less well-defined, abstention doctrine in *Younger v. Harris*.¹⁶⁷ *Younger* abstention may be relied on where the validity of a state statute is in question.¹⁶⁸ If *Younger* abstention is invoked, the federal court will dismiss the action and all federal and state issues will be decided in state court. A party may be able to "bootstrap" an anticipated action into state court by filing a claim against a potential Section 1983 litigant in state court.¹⁶⁹

D. Res Judicata and Collateral Estoppel

If a state court judgment precedes a Section 1983 federal court action, the doctrines of res judicata and collateral estoppel may preclude litigation of the federal action. Under the doctrine of res judicata, a final judgment on the merits precludes the parties or those in privity with the parties from relitigating issues that were raised or could have been raised in the first action. Collateral estoppel precludes parties from relitigating in federal court issues of fact or law which have already been decided by the state court and which were necessary to the decision.

Supreme Court cases have applied res judicata and collateral estoppel in Section 1983 actions.¹⁷⁰ In *Migra*, the Court held that state law governs the preclusive effect of a federal issue that a Section 1983 litigant could have raised, but did not raise, in a prior state-court proceeding. Thus, a litigant has no right to litigate state claims to judgment in state court and then turn to federal court to litigate his federal claims.¹⁷¹

In Section 1983 actions, res judicata and collateral estoppel doctrines are not applied when a federal court invokes *Pullman* abstention to send a case to state court. In such a case, res judicata and collateral estoppel will probably not bar relitigation in a Section 1983 action of federal issues which arise in the state court proceedings.¹⁷²

Although res judicata and collateral estoppel apply to judicial actions, the Supreme Court held that an arbitration decision does not preclude

a subsequent Section 1983 action.¹⁷³ The Court focused on the many substantive and procedural differences between arbitration and judicial proceedings.

E. Bars to Injunctive and Declaratory Relief

Doctrinal and statutory bars may prevent a Section 1983 plaintiff from obtaining declaratory and injunctive relief. In *City of Los Angeles v. Lyons*, the Supreme Court held that a plaintiff who has standing to sue for damages under Section 1983 does not necessarily have standing to seek injunctive relief.¹⁷⁴ A separate inquiry is required. The plaintiff in *Lyons* was injured by police who held him by a choke hold. He challenged the use of the choke hold in a Section 1983 action seeking damages and injunctive relief. The Court held that although the plaintiff personally suffered harm, and, therefore, could sue for damages, he did not have standing to seek injunctive relief because it was speculative whether he would be similarly injured in the future.¹⁷⁵

VII. PROCEDURAL ASPECTS OF SECTION 1983 ACTIONS

A. Parties

Plaintiffs

Section 1983 provides that "any citizen of the United States or other person within the jurisdiction thereof" can bring a Section 1983 action. Natural persons can bring suit as well as corporations and nonprofit associations.¹⁷⁶ Stockholders may not bring suit to redress an injury to a corporation.¹⁷⁷ Aliens are considered "other persons,"¹⁷⁸ but municipalities and states are not.¹⁷⁹ A state, however, can sue as a representative of its citizens.¹⁸⁰

Defendants

See discussion under section III C, "Persons Who Shall Be Liable."

B. Jurisdiction

Federal Jurisdiction

28 U.S.C. § 1343(3) grants federal courts jurisdiction over Section 1983 actions.¹⁸¹ Although *Lynch v. Household Finance Corp.* was a Section 1983 claim based on a constitutional violation, the Court's decision in *Thiboutot*¹⁸² (which greatly expanded the interpretation of the phrase "and laws") means that § 1342(3) provides federal jurisdiction for claims based solely on violations of federal statutes.

Pendent Jurisdiction

Pendent jurisdiction provides that a federal court hearing a federal claim may also decide state claims, against the same defendant, which derive from a "common nucleus of operative facts."¹⁸³

State Jurisdiction

The Supreme Court held that state courts have concurrent jurisdiction with federal courts over Section 1983 claims.¹⁸⁴

The defendant in a Section 1983 case who is sued in state court may have the case removed to the federal district court in the district and division in which the state claim is pending. 28 U.S.C. § 1441(b).

C. Venue and Rights to a Jury Trial

Generally, Section 1983 actions will be brought in the district in which all the defendants live or where the cause of action arose. Where only damages are sought, both the plaintiffs and defendants probably have a right to require a jury trial.¹⁸⁵ Where only equitable relief, such as an injunction, is requested, none of the parties has a right to a jury trial.¹⁸⁶ When both legal and equitable relief are claimed, the legal claim for which a jury trial is timely demanded must be submitted first to a jury.¹⁸⁷

D. Statutes of Limitations

Section 1983 actions are evaluated for statute of limitations purposes by reference to state statutes pertinent to tort claims for the recovery of damages for personal injury.¹⁸⁸ The rule that state law applies is effective prospectively.¹⁸⁹ Thus, a 6-year and not 2-year state statute of limitations applied to suits based on claims arising prior to *Wilson*.¹⁹⁰

VIII. 1983 DECISIONS INVOLVING HIGHWAY DEPARTMENTS, PERSONNEL AND OFFICIALS

Section 1983 actions relevant to highway departments are those actions brought against employment discrimination to protect free speech and to challenge the taking of property without just compensation.

A. Employment Discrimination

Employment discrimination suits, including those based on sex, race, and age discrimination are one category of litigation brought against highway departments. Highway departments should pay special attention to sex discrimination cases because they employ many persons for types of work traditionally performed almost exclusively by men. This historical fact can create ingrained attitudes and policies which violate protected federal rights. The following cases demonstrate that employment discrimination cases are usually brought under Section 1983 and either Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) or the Age Discrimination in Employment Act (29 U.S.C. § 621, *et seq.*). When a defending state highway or transportation department raises eleventh amendment immunity as a defense, the Section 1983 action will be dismissed unless the state has waived such immunity. Even if the Section 1983 action falls, the suit may be pursued under Title VII or the ADEA. Furthermore, eleventh amendment immunity will not shield agency officials from suit if they are sued in their individual

capacity. The following cases illustrate the potential impact on state highway and transportation departments from employment discrimination actions.

Mazus v. Department of Transp., Comm'n of Pa.,
629 F.2d 870 (1980)

In *Mazus* the plaintiff brought a sex discrimination claim against the Pennsylvania Department of Transportation under Section 1983 and Title VII, alleging the department's patronage hiring system was unconstitutional and she was the victim of discriminatory hiring practices. The court rejected her claims, finding no evidence of intentional discrimination and no discriminatory impact flowing from the state's patronage hiring system. Although unpersuasive in its reasoning, the case sets forth a number of principles and issues relevant to such claims.

The facts of *Mazus* are as follows. Until a certain point in 1974, the Pennsylvania Department of Transportation hired male and female employees in accordance with a "patronage system" that was controlled by the governing political party of the state. In October of 1974, the Department initiated an affirmative action program, which the plaintiff, Carolyn Mazus, responded to, seeking employment as a highway maintenance worker. Her attempts to obtain a job application were thwarted until April of 1975, at which time the Department was ordered by the Governor's Personnel office to hire Mrs. Mazus for the next job that became available, which hiring occurred in May of 1977. Mazus sought compensatory and punitive damages as well as injunctive relief, claiming that the patronage hiring system was unconstitutional and that she was the victim of discriminatory hiring practices. She also sought class certification for her claims.

The court in *Mazus*, citing *McDonnell Douglas Corp. v. Green*,¹⁹¹ said that a Title VII plaintiff could prove sex discrimination by demonstrating a prima facie case of "disparate treatment" by showing that: (i) the individual belongs to a [group protected by the statute] (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. The court denied Mazus' claim of disparate treatment, finding that the only persons hired after she applied were individuals who had been waiting much longer than she for the position, and that, once she filed her application, she was given the first available position.

Sex discrimination can also be demonstrated by a prima facie case of "disparate impact" by showing "gross statistical disparities" between the composition of the defendant's workforce and that of the population at large. The court denied Mazus' claim of disparate impact because it was not persuaded by her statistical evidence, which was based on census figures, finding that they included categories of workers such as clerical workers and, thus, overstated the number of women interested in employment analogous to highway maintenance work.¹⁹²

Immunity. The State of Pennsylvania did not claim an eleventh amendment immunity to the Section 1983 action. It may be that the state had waived such immunity. As a practical matter, even if the Pennsylvania Department of Transportation had been immune to suit under the eleventh amendment, it would have made no difference because the immunity would not have applied to the Title VII action.

Patronage Systems. *Mazus* discusses the constitutionality of patronage hiring systems for employment with state highway departments. The decision sets forth the principle that a state may not condition hiring or discharging of an employee on circumstances having to do with that person's rights of political association.¹⁹³ In *Mazus*, while the plaintiff was able to show that the hiring of positions with the Pennsylvania Department of Transportation was completely controlled by the governing political party, her claim of a violation of her first amendment right of political association was denied by the court because she did not show that the jobs in question went only to members of a particular political party.

Because the patronage system used by the Pennsylvania Department of Transportation excluded from employment anyone not hand-picked by the governing party, it is difficult to credit the reasoning of this case and one must assume that the court found against the plaintiff because the patronage system in question had ceased to exist by the time the suit was brought and because the plaintiff had eventually been hired by the state agency in question.

The dissenting opinion in all respects is more persuasive, and one must assume that the line of reasoning expressed there is likely to be followed by other courts. Namely, a political patronage system for hiring state highway and transportation department personnel is likely to form a strong basis for a Section 1983 claim against states that have waived their eleventh amendment immunity and, in any event, against the offending agency officials in their individual capacities.

Catlett v. Missouri Highway and Transp. Comm'n.
828 F.2d 1260 (8th Cir. 1987)

The allegations of discrimination in *Catlett* focus on Missouri's practices and policies in hiring highway maintenance workers. Catlett was one of four individual plaintiffs, all of whom were also members of the plaintiff class consisting of all females who applied or might have applied for maintenance positions in a particular district within a certain time period. The case was based on Section 1983 and Title VII.

The *Catlett* court found sex discrimination against the class under both Section 1983 and Title VII based on intentional exclusion of women from certain job categories as well as actual exclusion resulting from the employer's reliance on word-of-mouth job referrals by its predominantly male employees. In regard to the Section 1983 action, the court stated that "[t]o prevail under § 1983 the individuals in the class had to prove Missouri intentionally treated them less favorably because of their sex."¹⁹⁴ Under Title VII, the claimants had to prove either dis-

parate treatment, i.e., intentional discrimination as under Section 1983, or disparate impact, i.e., that facially neutral hiring practices were employed that operated to limit job opportunities for women.¹⁹⁵ The court found that the Missouri Highway and Transportation Commission relied primarily on word-of-mouth recruiting, and found that the existing predominantly male workforce communicated information on job openings primarily to other men. Because this was found not to have been the cause of discrimination against the four individual plaintiffs, since they had all filed applications, the court dismissed the Section 1983 action as to the individual plaintiffs. The court, however, did find that the word-of-mouth system created a disparate impact against the plaintiff class of women.

The court also found disparate treatment against the class, basing its decision on both statistical evidence revealing a disparity between the number of females hired and the number expected to be hired and anecdotal evidence recounting instances of discrimination against specific class members. The court concluded that either of these types of proof alone could establish a pattern or practice of intentional discrimination.¹⁹⁶

Examples of anecdotal evidence that was found persuasive are as follows. Male employees of the Missouri Highway and Transportation Commission responsible for hiring would try to discourage female applicants by explaining that the job was too heavy for a woman, and would discount former experience on the part of the female applicant demonstrating an ability to perform physical work, even though the same experience would count when presented by male applicants. Comments on application sheets made by hiring personnel, particularly, about the female applicants' looks or makeup were considered discriminatory. Comments emphasizing the lack of facilities, the rough language of male co-workers, and speculations as to how the female applicants' husbands would feel about their wives doing maintenance work were also deemed discriminatory as were comments unrealistically emphasizing the heaviness or dangers of the work. The fact that some female applicants were so discouraged by initial contacts with the transportation commission that they failed to pursue their applications was also treated as relevant evidence.¹⁹⁷

Remedies. The *Catlett* court rejected the district court's order establishing a specific goal for hiring by the Missouri Highway and Transportation Commission and replaced that order with a general injunction prohibiting further discrimination in hiring highway maintenance workers. This reordering of remedies was based on the fact that the court did not find affirmative action necessary since it did not find that a simple injunction from further discrimination would be futile. Missouri did not have a history of resistance to court orders.¹⁹⁸

The court also modified the award of attorney's fees because the fee award should not compensate counsel for hours spent in pursuit of unsuccessful claims that are distinct in all respects from successful claims. The court excluded time spent unsuccessfully attempting statewide class certification from the fee award. However, the court included

time spent pursuing the unsuccessful individual claims in the fee award, reasoning that the latter were plainly related to the successful claims.

In discussing fee enhancement, the court raised, but did not resolve, the issue as to whether the eleventh amendment protected Missouri from awards of interest, since the U.S. Supreme Court has held that a fee enhancement to compensate for delay in payment is equivalent to an award of interest and, thus, not available in suits against the United States absent express congressional consent (separate from a general waiver of immunity to suit).¹⁹⁹

Immunity. Despite the court's discussion of eleventh amendment immunity as it pertained to the enhancement of legal fees, the Section 1983 judgment in favor of the class was allowed. The case was remanded to discuss immunity in the context of fee enhancement only.

Mineo v. Transportation Management of Tenn., Inc. et al.
694 F.Supp. 417 (M.D. Tenn. 1988)

Mario Mineo sued the Metropolitan Transit Authority of Nashville, Davidson County, the Mayors of Nashville and Davidson Counties, and Transportation Management of Tennessee, Inc. (the private contractor operating the Nashville transit system and responsible for hiring and firing transit system employees), under Section 1983 and the Age Discrimination and Employment Act (ADEA) when he was discharged by the managing corporation after he suffered a heart attack. The court in *Mineo* dismissed the plaintiff's Section 1983 claim for lack of state action. The court dismissed his age discrimination claim for failure to show either discriminatory intent or impact of a rule which does not allow an employee to drive a public transportation vehicle after a heart attack. The court discussed the second element of a Section 1983 claim, namely, that the defendants acted "under color of law" in performing the acts that allegedly deprived the plaintiff of federal rights.

The facts are as follows. The Municipal Transit Authority of Nashville contracted with a private corporation, which was solely responsible for managing and operating Nashville's transit system, including employing the drivers. The managing corporation adopted, as its own rule, a non-binding executive order making employees with heart attacks ineligible to drive vehicles providing public transportation.

The court concluded that the requirement under Section 1983 that an action be performed "under color of law" is analogous to the "state action" requirement in actions brought against the state under the fourteenth amendment to the U.S. Constitution. The court asked whether a private managing corporation's refusal to reinstate the plaintiff to his former position as a bus driver following a heart attack constituted state action. Discussing the state action requirement in cases involving government regulated, publicly funded, private entities that perform public services, the court stated two principles. First, the mere presence of governmental regulation and public funding does not elevate a private entity's act to the level of state action unless the private entity's acts

are controlled by the governmental agencies in question. Second, the fact that a private entity performs a function which serves the public does not make its acts state action. The court determined that the private managing corporation's refusal to rehire the plaintiff after his heart attack was not performed "under color of law," and, therefore, the plaintiff's Section 1983 action could not be sustained.

The court also dismissed the age discrimination claim, concluding the plaintiff had failed to prove that the rule (prohibiting persons recovering from heart attacks to drive public transportation vehicles) was intended to discriminate against older persons or that the rule had the unintended effect of impermissibly discriminating against older persons.

B. First Amendment

State highway or transportation departments, or other governmental bodies regulating the use of state highways, may face first amendment issues. The following cases discuss first amendment issues related to employment and to selling printed material on the highways.

News & Sun-Sentinel Co. v. Cox
702 F.Supp. 891 (S.D. Fla. 1988)

In this case, a newspaper publisher sued the Fort Lauderdale City Commission, the City of Fort Lauderdale, the Commissioners, and the Mayor in their individual capacities for their decision to enforce, against a newspaper vendor, a Florida statute prohibiting commercial use of all state maintained roads. The plaintiff claimed violations under the first amendment and Section 1983. The court began by reiterating the basic principles of constitutional regulation of time, place, and manner of expression: (1) the regulation may not discriminate on the basis of content or subject matter,²⁰⁰ (2) must be narrowly drawn to serve a significant governmental interest,²⁰¹ and (3) it must leave ample alternative channels open for communicating the information.²⁰²

The court granted the plaintiff's claims based on a violation of its first amendment rights and declared the statute in question unconstitutional as unreasonably restrictive because it prohibited newspaper sales, by persons of all ages, to occupants of all motor vehicles located on public property, regardless of the time of day or night and regardless of whether the cars were moving, standing, parked, or not even in the traffic lanes, and because the prohibition extended to (though it was not limited to) sidewalks, rest areas, wayside parks, boat launching ramps, weigh stations, and scenic easements. The statute was found to be so broad that it was not amenable to any limiting construction that would cure its constitutional defect.

Having established a first amendment violation, the court analyzed the Section 1983 action to determine whether the deprivation occurred under color of state law. The court found that the Fort Lauderdale Police Department's enforcement of the Florida statute sufficiently established the element of state action for a Section 1983 claim.

Remedies. The court issued a permanent injunction against enforcing

the Florida statute (which had been declared unconstitutional). The court awarded the plaintiff nominal damages of \$1.00, for its Section 1983 claim, because the court found that the plaintiff's monetary damages, if any, were too speculative. The defendants were ordered to pay all costs.

Lewis v. Southeastern Pa. Transp. Auth.
440 F.Supp. 887 (1977)

The Plaintiff, Ms. Lewis, a black woman, fired by the Southern Pennsylvania Transportation Authority, brought this action against the Authority and certain of its personnel claiming she was discharged in retaliation for filing a complaint against the Authority with the Pennsylvania Human Rights Commission and because she openly opposed the defendant's discriminatory practices. The court in *Lewis* upheld the plaintiff's claim that her first amendment rights had been violated and also upheld her Section 1983 claim against those defendants named in their individual capacities. The *Lewis* case is important for state highway and transportation departments because it illustrates the practical effect of an eleventh amendment immunity defense in an action where the plaintiff's claim is meritorious.

The court relied upon *Pickering v. Board of Educ.* in analyzing Ms. Lewis's Section 1983 claim.²⁰³ The court affirmed the *Pickering* principle that public employment does not require a person to relinquish her first amendment rights unless the detrimental effects that the employee's statements would have on the efficient operation of the public employer's business outweighs the employee's interests as a citizen in speaking out on matters of public importance.²⁰⁴ When balancing these interests, the criticizing employee's hierarchical proximity to the person or body criticized must be considered. The court in *Lewis* found the plaintiff's dismissal infringed upon her first amendment rights, since her comments were not directed toward her immediate superiors but were aimed at the management of the Transportation Authority, whom she charged with discriminatory employment practices. The court noted that bus drivers do not work in close proximity to Southeastern Pennsylvania Transportation Authority's management and her criticisms, therefore, would not have affected anyone with whom she had daily contact. Therefore, her criticism could not upset harmonious relationships with her co-workers.

After stating the merits of the plaintiff's case, the court dismissed the Section 1983 action against the Authority, based on the Authority's eleventh amendment immunity, but affirmed plaintiff's right to pursue her action against the Authority's management in their individual capacities.

C. Taking of Land

When setting aside land for future state highways, state and local governments are concerned whether such action constitutes a compensable taking in the period prior to actual acquisition of the land. Usually,

land is set aside for future highways either by the state highway agency or by the local government responsible for the municipality's comprehensive land use plan. Many states have highway reservation laws that authorize local governments to adopt official maps showing land to be reserved for highways or authorizing state agencies to reserve such land.

It is not at the time when the land is acquired by the state or municipality that the taking issue arises, for at that time, the land owner is compensated for the taking of his land under normal eminent domain proceedings. The question arises between the time the land is mapped (or otherwise reserved for future highway use) and the time it is actually acquired, because upon designation for highway use, the land's market value begins to decline. How great a loss depends on the particulars of the land and the extent of the development restrictions imposed. If the land owner is allowed to develop land reserved for future highways without restriction, upon acquisition of that land, the state or local government must compensate the owner for the value of the land as improved. At the other extreme, if the land owner is allowed no use, whatsoever, of the land reserved for future highways, then, arguably, the taking has occurred at the time of the reservation.

The principles of taking law as they developed in cases pertaining to other types of land use regulations and land use permit decisions are essential to analyzing the constitutionality of highway reservation practices as carried out by state highway agencies and local governments. It is an established rule that planning, which involves delay imposed on development in order to study the possible acquisition of land for future highways, is not an unconstitutional taking if the delay is reasonable. No taking occurs if good faith planning fails to complete eminent domain proceedings even if there are fluctuations in land value during the governmental decision-making process.²⁰⁵

State courts have varied in determining what kinds of precondemnation activity regarding land reserved for highways so unreasonably affects the use of that land that it constitutes a taking. Depending on the state, the following activities may entail a taking: physical invasion of the land; direct legal restraint on the use of land; substantial destruction of the use of property; loss in market value caused by unreasonable delay; highway designation affecting all, as opposed to part, of a property.

Also, pertinent to reservation of land for future highways is the rule that zoning imposed upon land in order to depress land values prior to governmental acquisition is unconstitutional. Denial of a building or other land use permit to hold down the cost of land prior to acquisition is a taking.²⁰⁶ Nonetheless, state and local governments have the right, within certain bounds, to protect the public interest and to restrict land uses, without compensating the owners, to serve the public purpose.

In *Penn. Central Transp. Co. v. New York City*,²⁰⁷ the Supreme Court held that the Landmarks Preservation Law, which prohibited construction of a high-rise building over Penn. Central Station in New York City, was a constitutional taking of land. The Court noted three factors: the economic impact of the regulation; the extent of the regulation's interference with investment-backed expectations; and the character of

the governmental action.²⁰⁸ *Penn. Central* did not specify how these factors should be applied nor did it set forth a formula for determining when a permissible police power regulation becomes an unconstitutional taking requiring just compensation.

The Supreme Court set forth modern taking law in the 1987 trilogy of land use cases. In *Keystone Bituminous Coal Association v. DeBenedictis*,²⁰⁹ the Supreme Court reaffirmed the two-part test set forth in *Agins*, namely, that a land use regulation will not constitute a taking if it substantially advances a legitimate governmental interest or does not deprive a land owner of the economically viable use of his property.²¹⁰ Next, in *Nollan v. California Coastal Agins Commission*,²¹¹ the Court tightened up the two-part test by requiring an "essential nexus" between the legitimate governmental interests protected and the governmentally imposed restriction. In *Nollan*, the legitimate state interest was the public's right to visual access to the ocean from the roadway. The Nollans' building permit for a house was conditioned upon allowing the public lateral access across their beach. Pointing out that lateral access did nothing to preserve the public's right to visual access from the roadway, the Court found that the public access easement imposed on the Nollans was an unconstitutional taking.²¹² Finally, the Court in *First English Lutheran Evangelical Church of Glendale v. County of Los Angeles, California*,²¹³ held that compensation is payable for a temporary taking. However, normal delays in getting building permits, changes in a zoning ordinance, variances, etc. are not necessarily "temporary" takings.²¹⁴

In *First English*, the Supreme Court decided only the remedies issue. It did not decide whether a taking had occurred and remanded the case to determine that issue. Upon remand, *First English* was found not entitled to compensation for a taking because the ordinance restricting construction within the flood zone did not deprive the landowner of all uses of the land and whatever uses were denied, were done so to preserve public safety. The California Court of Appeals projected that "it would not be remarkable at all to allow government to deny a private owner 'all uses' of his property where there is no use of that property which does not threaten lives and health."²¹⁵

The ultimate denial of the takings claim in *First English* by the California Court of Appeals and its willingness to subject "taking" issues to rigorous analysis demonstrates the difficulty in relying exclusively on federal court decisions in predicting the direction of "takings" law. Moreover, some legal analysts believe the United States Supreme Court indicated by its recent "taking" decisions that it intends to shift the burden of "taking" litigation back to the state courts. For this reason, and because the "taking" issue was extensively analyzed elsewhere, analysis of this area of law was limited to those issues especially pertinent to the setting aside of land for highway purposes.

IX. CONCLUSIONS

The threshold question for any state highway department or its personnel and officials (when sued in their official capacities) is whether

they are proper defendants in a Section 1983 action. Neither state highway departments nor their personnel and/or officials in their *official* capacities can be sued either in state or federal court on a Section 1983 claim regardless of whether a state has waived its eleventh amendment immunity. This leaves highway department personnel and officials in their *individual* capacities as the primary targets of Section 1983 suits. Highway departments will naturally be concerned with protecting their employees from the risk of such liability. To that end, knowing the legal principles involved with Section 1983 claims is essential.

Cases regarding Section 1983 claims against highway departments and their personnel and officials fall into three areas: employment discrimination, first amendment, and taking of land. Employment discrimination and first amendment principles of law should be strictly adhered to in the policy and practices of state highway departments. Despite their protection from Section 1983 actions, they are not protected from claims brought under Title VII of the Civil Rights Act. Claims involving the taking of land will fall naturally on municipalities, which promulgate the zoning ordinances which regulate land use, and which are not protected from Section 1983 actions. State highway departments, therefore, will need to understand the principles of "taking" law in order to work cooperatively with municipalities in the planning and mapping of state highway systems.

The very broadness of Section 1983 gives scope to a wide range of legal action against persons employed by, or working in cooperation with, state highway departments in carrying out their mandate. Given the considerations of public safety and welfare that are at the root of that mandate, state highway departments may use the principles of Section 1983 and civil rights law as clear guidelines for establishing policies and practices that will protect not only their own employees but also the citizens of their states.

¹ *Annual Report of the Directors of the Administrative Office of the U.S. Courts*, 127-134 (1983).
² *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951).
³ *United States v. Williams*, 341 U.S. 70, 74 (1951).
⁴ The Civil Rights Act of 1871, 42 U.S.C. § 1983.
⁵ See e.g., *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617, 618 (1979).
⁶ *Maine v. Thiboutot*, 448 U.S. 1 (1980).
⁷ *Id.* at 4.
⁸ *Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, at 19-21 (1981).
⁹ See *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1031, at 1035-1038 (1985).

¹⁰ See *Mierner v. Special School Dist. of St. Louis County*, 580 F.Supp. 562, 568 (E.D. Mo. 1984), *modified*, 800 F.2d 749 (8th Cir. 1986).
¹¹ See *Mother Cabrini Neighborhood v. City of Laredo*, 21 ERC 1471 (S.D. Tex. 1983).
¹² See *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, at 673-74 (9th Cir. 1983).
¹³ *Pennhurst State School v. Halderman*, 451 U.S. 1, 28 (1981).
¹⁴ *Davis v. Scherer*, 468 U.S. 183, 191, 194 (1984), *reh'g denied* 468 U.S. 1226 (1984).
¹⁵ *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).
¹⁶ *Id.* at 55-56.
¹⁷ *Id.* at 58. See also, *Sanderson v. Vil-*

lage of Greenhills, 726 F.2d 284, at 285-87 (6th Cir. 1984).
¹⁸ *Shelton v. City of College Station*, 754 F.2d 1251, 1258 (5th Cir. 1985).
¹⁹ *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970).
²⁰ *Monroe v. Pape*, 365 U.S. 167 (1961).
²¹ *Id.* at 172.
²² *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Dissent).
²³ *Parratt v. Taylor*, 451 U.S. 527 (1981).
²⁴ *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled in part*, *Daniels v. Williams*, 474 U.S. 327, at 331-32 (1986) (Court overruled *Parratt* to the extent that the *Parratt* court concluded that a mere lack of due care by a state official may deprive an individual of life, liberty or property under the fourteenth amendment).
²⁵ *Parratt v. Taylor*, 451 U.S. 527, 544 (1981).
²⁶ *DeShaney v. Winnebago County Dep't of Social Services*, 57 U.S.L.W. 4218 (1989).
²⁷ *Id.* at 4221.
²⁸ *Rizzo v. Goode*, 423 U.S. 362, at 375-77 (1976).
²⁹ *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).
³⁰ *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978).
³¹ *Owen v. City of Independence*, 455 U.S. 622 (1980).
³² *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).
³³ *Id.* at 823.
³⁴ *Id.* at 823-24.
³⁵ *Grandstaff v. City of Borger*, 767 F.2d 161, at 162-163 (5th Cir. 1985).
³⁶ *City of Canton, Ohio v. Harris*, 67 U.S.L.W. 4270, 4273 (1989).
³⁷ *Id.* at 4273.
³⁸ *DeShaney v. Winnebago County Dep't of Social Services*, 57 U.S.L.W. 4218, at 4219-21 (1989).
³⁹ *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, at 688-690 (1978).
⁴⁰ *Will v. Michigan Dep't of State Policy*, 57 U.S.L.W. 4677, 4680 (1989).
⁴¹ *Id.* at 4684.
⁴² *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970).
⁴³ *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).
⁴⁴ *Tower v. Glover*, 467 U.S. 914, at 920-923 (1984).

⁴⁵ *Scott v. Greenville County*, 716 F.2d 1409, 1424 (4th Cir. 1983).
⁴⁶ *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *Rendell-Baker v. Kahn*, 457 U.S. 830, 842 (1982).
⁴⁷ *Kentucky v. Graham*, 473 U.S. 159, 168 (1985) *quoting* *Monell v. New York City Dep't of Social Services*, 436 U.S. 568 (1978).
⁴⁸ *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).
⁴⁹ *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).
⁵⁰ *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 692 (1978).
⁵¹ *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).
⁵² *McCulloch v. Glasgow*, 620 F.2d 47 (5th Cir. 1980).
⁵³ *Id.* at 51.
⁵⁴ *Id.*
⁵⁵ *Id.*
⁵⁶ *Arebaugh v. Dalton*, 730 F.2d 970, 972 (4th Cir. 1984).
⁵⁷ *Carey v. Phipus*, 435 U.S. 247, 254 (1978).
⁵⁸ *Id.*
⁵⁹ *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309 (1986).
⁶⁰ *Carey v. Phipus*, 435 U.S. 247, 264 (1978); *Ellis v. Blum*, 643 F.2d 68, 69 (2d Cir. 1981).
⁶¹ *Stinger v. Dilger*, 313 F.2d 536, 537 (10th Cir. 1963).
⁶² *Berry v. Macon County Bd. of Educ.*, 380 F.Supp. 1244, 1248 (N.D. Ala. 1971).
⁶³ *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, at 285-287 (1977).
⁶⁴ *Smith v. Wade*, 461 U.S. 30, 54 (1983).
⁶⁵ *Glover v. Alabama Dept. of Corrections*, 734 F.2d 692 (11th Cir. 1984) *vacated*, 106 S.Ct. 40 (1985).
⁶⁶ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981).
⁶⁷ *O'Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988).
⁶⁸ *Wade v. Cicero*, 571 F.Supp. 157, 158 (E.D. Ill. 1983); *Heritage Homes of Attleboro v. Seekonk Water Dist.*, 670 F.2d 1, at 2-3 (1st Cir. 1982), *cert. denied* 457 U.S. 1120 (as to petition of *Heritage Homes*), *cert. denied* 459 U.S. 829 (1982) (as to petition of *Seekonk Water District*); *Webster v. City of Houston*, 689 F.2d 1220, at 1229-30 (5th Cir. 1982); *Korotki v. Goughan*, 597 F.Supp. 1365 (D. Maryland 1984).
⁶⁹ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 n.29 (1981).

- ⁷⁰ Smith v. Wade, 461 U.S. 30, 56 (1983).
- ⁷¹ Thomas v. City of New Orleans, 687 F.2d 80, 81, 84 (5th Cir. 1982).
- ⁷² Garrick v. City and County of Denver, 652 F.2d 969 (10th Cir. 1981); Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978).
- ⁷³ City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981).
- ⁷⁴ Maher v. Gagne, 448 U.S. 122, at 128-29 (1980).
- ⁷⁵ *Id.* at 129.
- ⁷⁶ Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).
- ⁷⁷ Texas State Teacher's Ass'n v. Garland Independent School Dist., 57 U.S.L.W. 4383 (1989).
- ⁷⁸ Ortiz de Arroyo v. Barcelo, 765 F.2d 275, 276, 277 (1st Cir. 1985).
- ⁷⁹ *Id.* at 278.
- ⁸⁰ Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); Hensley v. Eckerhart, 461 U.S. 424 (1983).
- ⁸¹ Hughes v. Rowe, 449 U.S. 5, 14 (1980); Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1978).
- ⁸² Marek v. Chesney, 473 U.S. 1, 12 (1985).
- ⁸³ *Id.* at 11.
- ⁸⁴ Smith v. Robinson, 468 U.S. 992 (1984).
- ⁸⁵ *Id.* at 1015.
- ⁸⁶ Hutto v. Finney, 437 U.S. 678, at 689-92 (1978).
- ⁸⁷ *Id.*
- ⁸⁸ Kentucky v. Graham, 473 U.S. 159, 167 (1985).
- ⁸⁹ Hutto v. Finney, 437 U.S. 678, 700 (1978).
- ⁹⁰ Robertson v. Wegmann, 436 U.S. 584, at 593-95 (1978).
- ⁹¹ Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).
- ⁹² Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 718 (5th Cir. 1974).
- ⁹³ Pennsylvania v. O'Neill, 431 F.Supp. 700, 717, 718 (E.D. Pa. 1977), *aff'd* 573 F.2d 1301 (3d Cir. 1978).
- ⁹⁴ City of Riverside v. Rivera, 477 U.S. 561 (1986).
- ⁹⁵ *Id.* at 576-81.
- ⁹⁶ Copeland v. Marshall, 641 F.2d 880, at 907-08 (D.C. Cir. 1980).
- ⁹⁷ Coop v. City of South Bend, 635 F.2d 652, 653 (7th Cir. 1980).
- ⁹⁸ Neely v. City of Grenada, 624 F.2d 547 (5th Cir. 1980).
- ⁹⁹ Pennsylvania v. O'Neill, 431 F.Supp. 700 (E.D. Pa. 1977), *aff'd* 573 F.2d 1301 (3d Cir. 1978).
- ¹⁰⁰ Krause v. Rhodes, 640 F.2d 214, 218 (6th Cir. 1981), *cert. den.* 454 U.S. 836 (1981).
- ¹⁰¹ Quern v. Jordan, 440 U.S. 332, 338 (1979).
- ¹⁰² Wood v. Strickland, 420 U.S. 308, 317 (1975).
- ¹⁰³ *Ex Parte Young*, 209 U.S. 123, at 159-60 (1908).
- ¹⁰⁴ Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978).
- ¹⁰⁵ Kentucky v. Graham, 473 U.S. 159, 166 (1985).
- ¹⁰⁶ Will v. Michigan Dep't of State Police, 57 U.S.L.W. 4677 (1989).
- ¹⁰⁷ Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985).
- ¹⁰⁸ Edelman v. Jordan, 415 U.S. 651, 668 (1974).
- ¹⁰⁹ Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, at 400-02 (1979).
- ¹¹⁰ Holley v. Lavine, 605 F.2d 638, at 644-45 (2d Cir. 1979).
- ¹¹¹ Henry v. Texas Tech Univ., 466 F.Supp. 141, 142 (N.D. Tex. 1979).
- ¹¹² Marrapese v. Rhode Island, 500 F.Supp. 1207 (D.R.I. 1980), *rev'd on other grounds*, 749 F.2d 934 (1st Cir. 1984).
- ¹¹³ Parden v. Terminal R.R., 377 U.S. 184 (1964).
- ¹¹⁴ Florida Dep't of Health and Rehabilitative Serv. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981).
- ¹¹⁵ *Id.* at 150, *quoting* Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).
- ¹¹⁶ Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
- ¹¹⁷ Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).
- ¹¹⁸ Fort Eustis Books, Inc. v. Beale, 478 F.Supp. 1170, 1173 (E.D. Va. 1979).
- ¹¹⁹ Scheurer v. Rhodes, 416 U.S. 232 (1974).
- ¹²⁰ Harlow v. Fitzgerald, 457 U.S. 800, at 806-08 (1981); Butz v. Economou, 438 U.S. 478, at 506-07 (1978).
- ¹²¹ Harlow v. Fitzgerald, 457 U.S. 800, at 810-11 (1981); Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 542 (1988).
- ¹²² Harlow v. Fitzgerald, 457 U.S. 800, 812 (1981).
- ¹²³ *Id.* at 807.
- ¹²⁴ Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).
- ¹²⁵ Supreme Court of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719, 732 (1980).
- ¹²⁶ Tenney v. Brandhove, 341 U.S. 367 (1951).
- ¹²⁷ Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, at 402-05 (1979).
- ¹²⁸ Atchison v. Raffiani, 708 F.2d 96, at 90-99 (3d Cir. 1983); Reed v. Village of Shorewood, 704 F.2d 943, at 952-53 (7th Cir. 1983); Espanola Way Corp. v. Meyerson, 690 F.2d 827, 828 (11th Cir. 1982), *cert. denied* 460 U.S. 1039 (1982); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193, *cert. denied* 455 U.S. 907 (1982); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 608 (8th Cir. 1980); Bruce v. Riddle, 631 F.2d 272, 273 (4th Cir. 1980); Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1346 (9th Cir. 1982); Latino Political Action Comm. v. City of Boston, 581 F.Supp. 478, 479 (D. Mass. 1984).
- ¹²⁹ See Latino Political Action Committee v. City of Boston, 581 F.Supp. 478, 479, 482 (D. Mass. 1984).
- ¹³⁰ Ratere v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988).
- ¹³¹ Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984).
- ¹³² *Id.* at 261.
- ¹³³ *Id.*
- ¹³⁴ *Id.*
- ¹³⁵ *Id.* at 262.
- ¹³⁶ "Developments in the Law-Zoning," 91 HARV. L. REV. 1427, at 1508-13 (1978).
- ¹³⁷ Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 543 (1988).
- ¹³⁸ Scheurer v. Rhodes, 416 U.S. 232, 243 (1974).
- ¹³⁹ Davis v. Scherer, 468 U.S. 183, 195 (1984), *reh'g denied* 468 U.S. 1226 (1984).
- ¹⁴⁰ Scheurer v. Rhodes, 416 U.S. 232, at 247-48 (1974).
- ¹⁴¹ Owen v. City of Independence, 455 U.S. 622 (1980).
- ¹⁴² *Id.* at 635.
- ¹⁴³ Harlow v. Fitzgerald, 457 U.S. 800 (1981).
- ¹⁴⁴ *Id.* at 818.
- ¹⁴⁵ Davis v. Scherer, 468 U.S. 183, 191 (1984), *reh'g denied* 468 U.S. 1226 (1984).
- ¹⁴⁶ Warth v. Seldin, 422 U.S. 490 (1975).
- ¹⁴⁷ Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 502 (1982).
- ¹⁴⁸ Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).
- ¹⁴⁹ *Id.* at 186.
- ¹⁵⁰ *Id.* at 193-94.
- ¹⁵¹ Agins v. City of Tiburon, 447 U.S. 255, at 262-63 (1980).
- ¹⁵² Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, at 193-94 (1985).
- ¹⁵³ *Id.* at 195.
- ¹⁵⁴ *Id.* at 197.
- ¹⁵⁵ Monroe v. Pape, 365 U.S. 167, 183 (1961).
- ¹⁵⁶ Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498 (1941).
- ¹⁵⁷ Three Rivers Cablevision v. City of Pittsburgh, 502 F.Supp. 1118, at 1122-26 (W.D. Pa. 1980); C-Y Dep't Co. v. City of Redlands, 703 F.2d 375, 381 (9th Cir. 1983).
- ¹⁵⁸ Bank of Am. Nat'l Trust and Savings Ass'n v. Summerland County Water Dist., 767 F.2d 544, 546 (9th Cir. 1985).
- ¹⁵⁹ *Id.*
- ¹⁶⁰ *Id.* at 547.
- ¹⁶¹ Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984), *cert. denied* 469 U.S. 1211 (1985).
- ¹⁶² *Id.* at 833-34.
- ¹⁶³ Burford v. Sun Oil Co., 319 U.S. 315 (1945).
- ¹⁶⁴ Aluminum Co. v. Utilities Comm'n of N.C., 713 F.2d 1024, 1029 (4th Cir. 1983), *cert. denied* 465 U.S. 1052 (1984).
- ¹⁶⁵ Bob's Home Serv., Inc. v. Warren County, 755 F.2d 625 (8th Cir. 1985).
- ¹⁶⁶ *Id.* at 628.
- ¹⁶⁷ Younger v. Harris, 401 U.S. 37 (1971).
- ¹⁶⁸ *Id.* at 54.
- ¹⁶⁹ Huffman v. Pursue, Ltd., 420 U.S. 592, 617 (1975).
- ¹⁷⁰ Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980).
- ¹⁷¹ Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 85 (1984).
- ¹⁷² Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975).
- ¹⁷³ McDonald v. City of West Branch, 466 U.S. 284, 290, 292 (1984).
- ¹⁷⁴ City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
- ¹⁷⁵ *Id.* at 105, 109.
- ¹⁷⁶ Church of Scientology of California v. Cazares, 638 F.2d 1272 (5th Cir. 1981).
- ¹⁷⁷ Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir. 1981).
- ¹⁷⁸ Graham v. Richardson, 403 U.S. 365, 372 (1971).

- ¹⁷⁰ *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, at 1253-55 (5th Cir. 1976).
- ¹⁸⁰ *Pennsylvania v. Porter*, 659 F.2d 306, 316, 318-19 (3d Cir. 1981).
- ¹⁸¹ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 546, 547 (1972).
- ¹⁸² *Maine v. Thiboutot*, 448 U.S. 1 (1980).
- ¹⁸³ *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).
- ¹⁸⁴ *Maine v. Thiboutot*, 448 U.S. 1 (1980).
- ¹⁸⁵ *Curtis v. Loether*, 415 U.S. 189, 194 (1974).
- ¹⁸⁶ *Hodges v. Tomberlin*, 510 F.Supp. 1280, 1286 (S.D. La. 1980).
- ¹⁸⁷ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959).
- ¹⁸⁸ *Wilson v. Garcia*, 471 U.S. 261, 266, 267 (1985).
- ¹⁸⁹ *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 2025 (1987), *reh'g denied* 483 U.S. 1011, 107 S.Ct. 3244 (1987).
- ¹⁹⁰ *Cf. Felder v. Casey*, 487 U.S. 131 (1988) (court held that state statute imposing 120-day time limit for filing written notice of claim is preempted by Section 1983 under supremacy clause where claim is brought in state court).
- ¹⁹¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
- ¹⁹² *Mazus v. Department of Transp., Comm'n of Pa.*, 629 F.2d 870, 875 (1980).
- ¹⁹³ *E.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elrod v. Burns*, 427 U.S. 347 (1976).
- ¹⁹⁴ *Catlett v. Missouri Highway and Transp. Comm'n.*, 828 F.2d 1260, 1263 (8th Cir. 1987), *citing Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987).
- ¹⁹⁵ *Catlett v. Missouri Highway and Transp. Comm'n.*, 828 F.2d 1260, 1263 (8th Cir. 1987), *citing International Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).
- ¹⁹⁶ *Catlett v. Missouri Highway and Transp. Comm'n.*, 828 F.2d 1260, 1265 (8th Cir. 1987), *citing Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), to support the use of statistics; and *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986), to support the use of anecdotal evidence.
- ¹⁹⁷ *See Price Waterhouse v. Hopkins* — U.S. —, 109 S.Ct. 1775, at 1787-88, 104 L.Ed. 2d 268 (1989), for further discussion of burden of proof in employment discrimination cases; in this case, the Supreme Court ruled that, once a plaintiff employee in a Title VII case shows gender motivated an employment decision, the defendant employer may avoid a finding of sex discrimination only by proving that it would have made the same decision even if gender was not originally considered.
- ¹⁹⁸ *Catlett v. Missouri Highway and Transp. Comm'n.*, 828 F.2d 1260, 1269 (8th Cir. 1987).
- ¹⁹⁹ *Id. citing Library of Congress v. Shaw*, 478 U.S. 310 (1986).
- ²⁰⁰ *News & Sun-Sentinel Co. v. Cox*, 702 F.Supp. 891, 900 (S.D. Fla. 1988), *citing Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 460 (1981).
- ²⁰¹ *News & Sun-Sentinel Co. v. Cox*, 702 F.Supp. 891, 900 (S.D. Fla. 1988) *citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
- ²⁰² *Id.*
- ²⁰³ *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).
- ²⁰⁴ *Lewis v. Southeastern Pa. Transp. Auth.*, 440 F.Supp. 887, 891 (1977).
- ²⁰⁵ *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980), *citing Danforth v. United States*, 308 U.S. 271, 285 (1939), 36 A.L.R. 3d 751 (1971).
- ²⁰⁷ *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), *reh'g denied* 439 U.S. 883 (1978).
- ²⁰⁸ *Id.* at 138.
- ²⁰⁹ *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 107 S.Ct. 1232 (1987).
- ²¹⁰ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).
- ²¹¹ *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 107 S.Ct. 3141 (1987).
- ²¹² *Id.* at 3148.
- ²¹³ *First English Lutheran Evangelical Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 107 S.Ct. 2378 (1987).
- ²¹⁴ *Id.* at 2389.
- ²¹⁵ *First English Lutheran Evangelical Church of Glendale v. County of Los Angeles, Cal.*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893, 901 (1989).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation officials, their legal counsel, and state highway and transportation employees in dealing with the public,

contractors, vendors and departmental personnel to insure that one's civil rights are protected and, where an allegation of a violation arises or a law suit is filed, to provide legal guidance to resolve or settle the matter.

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