42 USC 1983 ACTIONS

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History of 42 U.S.C. § 1983

Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871 to enforce the Reconstruction Amendments.

There was a "longstanding congressional recognition that a federal right is of little practical value without a corresponding remedy for violation of that right," so § 1983 was necessary to combat the racism that still existed after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.

The establishment of a federal cause of action for violations of one's constitutional rights through § 1983 was essential for the protection of African Americans from members of the Ku Klux Klan.

BOTTOM LINE: A plaintiff seeking § 1983 redress must assert the violation of a federal right, not merely of federal law. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989).

WHO IS SUED? Must Sue Someone defined as a person.

1. State officials are sued in their personal capacities – damages actions
2. State officials sued in official capacity – for Declaratory and Injunctive Relief
3. Neither States or Territories are people for purposes of 1983.
4. No Supervisor Liability for the actions of a subordinate. "Because vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. 661 (2009);

What if we need to use a John Doe Defendant?

1. An amendment to substitute a named individual for a "John Doe" defendant does not relate back to the time of the original filing because the "plaintiff's lack of knowledge as to the identity of a defendant, unlike a misnomer or a misidentification of a defendant, does not constitute a mistake under [Rule 15(c)(1)(C)(ii)].” Cholopy v. City of Providence, 228 F.R.D. 412 (D.R.I. 2005).
2. But, all is not lost – Look to doctrine of equitable tolling. Thompson v. Glodis, No. CIV.A. 10-40126-TSH, 2013 WL 5524807, at *3 (D. Mass. Oct. 2, 2013)“The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable.” Lambert v. United States, 44 F.3d 296, 298 (5th Cir.1995)

What is equitable tolling?

Applies where a potential defendant has received inadequate notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that she had done everything required of her; [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

Types of Actions under US Constitution

1. First amendment claims, including those for retaliation.
   a. Relevant at present – Not recognized until 1968
   b. No protection for speech made b/c of Employees duties or involving a grievance that is not of public concern.
   c. Now - test to determine if the state/local employee is entitled to protection is:

      1. Content: Whether the speech is about a matter of public concern

      2. Form and context: Whether the speech's time, place, and manner are relevant

      3.Employer's interest: Whether the speech disrupts the employer's ability to provide services

      4. Employee's interest: Whether the employee's interest in free speech outweighs the employer's interest

Types of Actions under US Constitution continued

2. Second Amendment – guns rights cases - District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. 742 (2010)
3. Fourth Amendment – Mike just covered
4. Fifth Amendment – Takings claims. Mike covered due process
5. Eighth Amendment – Prisoners cases coming up in a couples of weeks.

14th Amendment claims – Equal Protection claims.

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

See U.S. Const. amend. XIV, § 1.

14th Amendment claims – Equal Protection claims.

Expanded beyond just racial constructs, the equal protection clause is now interpreted more broadly to prohibit discrimination against individuals generally, including discrimination based on sex, gender, sexual orientation, national origin, religion, and alienage. *Because of the various ways in which discrimination can occur, analysis of an equal protection claim can be complex involving different types of scrutiny – strict scrutiny, intermediate scrutiny, and rational basis review – based upon the alleged reason for discrimination*.

Elements –

1. He or she is a member of a "protected class,"

2. Who was treated differently than another similarly situated person who was not a member of that class, and

3. The difference in treatment was due to his or her race, gender, or membership in that protected class.

The plaintiff must show that the defendant acted with a discriminatory purpose and treated the plaintiff differently because of, not merely in spite of, his or her race, sex, national origin, etc.

14th Amendment claims – Equal Protection claims. Class of One?

Class of One Equal Protection - Several years ago, the Supreme Court recognized the so-called "class of one" theory of equal protection. See Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (Case involving individuals' right to connect to water supply and need for an easement). The plaintiff does not have to be a member of a protected class under this theory. Rather, a defendant must single out the plaintiff for discriminatory treatment on an irrational and wholly arbitrary basis and prove that the defendant's conduct was motivated by a "spiteful effort to get the plaintiff for reasons wholly unrelated to any legitimate state objective.

Cannot involve government working in its discretationary decision making context. Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008).

14th Amendment claims – Equal Protection claims. Standard of Review

1. Strict Scrutiny – involves fundamental right – marriage – Obergefell
2. Rational Basis – some rational relationship to a legitimate governmental purpose – not a fundamental right
3. Intermediate Scrutiny – Statutory classification must be substantially related to governmental objective. Applies to things like gender. "Intermediate scrutiny typically is used to review laws that employ quasi-suspect classifications…such as gender…or legitimacy…. On occasion, intermediate scrutiny has been applied to review a law that affects 'an important though not constitutional right.'" Ramos v. Town of Vernon, 331 F. 3d 315, 321 (2d. Cir. 2003).

STATUTORY BASIS FOR 1983 CLAIMS.

Three principal factors determine whether a statutory provision creates a privately enforceable right. The Court must determine whether the federal statute has created rights enforceable through § 1983, by assessing whether the statute.

(1) Is intended to benefit the class of which the plaintiff is a member.

(2) Does it set forth standards, clarifying the nature of the right, that makes the right capable of enforcement by the judiciary; and

(3) is it mandatory, rather than precatory, in nature.

See Blessing v. Freestone, 520 U.S. 329, 341, 117 S. Ct. 1353, 1360, 137 L. Ed. 2d 569 (1997).

STATUTORY BASIS FOR 1983 CLAIMS.

But Blessing v. Freestone, 520 U.S. 329, 341 (1997), modified by Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166 (2023).

In Talveski, a plaintiff was allowed to prosecute a federal civil rights claim for violation of the Federal Nursing Home Reform Act, which was enacted under Congress's Spending Clause power. Notable because involves third party claim against institution for violating Congressional spending bills.

In deciding Talveski, the Supreme Court declined to apply all three factors, indicating that no one of them is strictly mandatory for finding a private right had been created. Instead, the analysis employed by the Talevski Court indicated that the Blessing factors are just that: considerations to be taken into account by courts, rather than rigid conditions to be checked off before a private right could be discerned.

ARE 1983 CLAIMS PREEMPTED BY STATUTE.

"In those cases in which the § 1983 claim is based on a statutory right, ‘evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's **creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983**.’ " Fitzgerald, 555 U.S. at 252 (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005)). The Court then explained:

> **In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights.** Our conclusions regarding congressional intent can be confirmed by a statute's text. Id. at 252–53, 129 S.Ct. 788 (citation omitted). The Court also cautioned that we "should ‘not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim.’ "

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

AMERICAN'S WITH DISABILITIES ACT (ADA) – Split of authority – Pollack v. Regional School Unit 75, 12 F. Supp. 3d 173 (D. Me 2014) at least where the claims rest on different proof, they are not preempted.

Most recent case I could easily find was Costabile v. New York City Health & Hosps. Corp., 951 F.3d 77, 79 (2d Cir. 2020) (1983 claims were preempted.

Nothing crystal clear from 1st Circuit.

But see Burlington v. Bedford County, 905 F.3d 467 (6th Cir 2018), (ADA expressly provides that "[n]othing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.)

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

REHABILITIATION ACT OF 1973- (PROTECTS AGAINST DISABILITY DISCRIMINATION IN EMPLOYMENT, PROGRAMS, AND SERVICES RECEIVING FEDERAL FUNDING).

From the First Circuit, M.M.R.-Z. Ex rel. Ramirez-Senda v. Puerto Rico, 528 F.3d 9, 13 n.3 (1st Cir. 2008) ("Section 1983 cannot be used as a vehicle for ADA or other statutory claims that provide their own frameworks for damages.") – so no??

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

Title VI

Title VI, 42 U.S.C. § 2000d et seq., was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. As President John F. Kennedy said in 1963:

> Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion that encourages, entrenches, subsidizes, or results in racial [color or national origin] discrimination

Title VI "prohibits only intentional discrimination." Alexander v. Sandoval, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

Title VI continued

In Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258–59, 129 S. Ct. 788, 797, 172 L. Ed. 2d 582 (2009), the Supreme Court held that Title IX, enacted in 1972 allowed for parallel claims under 42 U.S.C. § 1983 because it was modeled on Title VI which was then routinely interpreted to allow for parallel and concurrent § 1983 claims, see, e.g., Alvarado v. El Paso Independent School Dist., 445 F.2d 1011 (5th Cir. 1971); Nashville I–40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967).

Yet, courts determined before Fitzgerald that it was otherwise.

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

TITLE IX – CAN BRING AN ACCOMPANYING 1983 CLAIM.

Again, relying on Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258–59, 129 S. Ct. 788, 797, 172 L. Ed. 2d 582 (2009), the Supreme Court held that Title IX, enacted in 1972 allowed for parallel claims under 42 U.S.C. § 1983 because it was modeled on Title VI which was then routinely interpreted to allow for parallel and concurrent § 1983 claims, see, e.g., Alvarado v. El Paso Independent School Dist., 445 F.2d 1011 (5th Cir. 1971); Nashville I–40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967).

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

AGE DISCRIMINATION IN EMPLOYMENT ACT – MAYBE SPLIT?

POST-FITZGERALD CASES: ANALYZING THE ADEA IN LIGHT OF THE SUPREME COURT'S HOLDING THAT TITLE IX DOES NOT PRECLUDE § 1983 CLAIMS. See Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), the Seventh Circuit reasoned that "[n]othing in the text of the ADEA expressly precludes a § 1983 claim or addresses constitutional rights." Rather than concluding that Congress's silence was an indication of exclusivity, the court determined that congressional silence was evidence that Congress did not consider the ADEA's exclusivity.

PRE-FITZGERALD - All other circuits have held that the ADEA is the exclusive remedy for age discrimination claims, largely relying on the Fourth Circuit's reasoning in Zombro v. Baltimore City Police Department, 868 F.2d 1364 (4th Cir.1989).

DO CIVIL RIGHTS/DISCRIMINATION STATUTES PREMPTING 1983 CLAIMS

TITLE VII – EMPLOYMENT DISCRIMINATION CLAIMS.

In a line of cases, beginning with Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court has recognized generally that Title VII does not preclude a public employee from seeking other remedies. In Alexander, for example, the Court concluded a private employee does not forfeit his private cause of action under Title VII if he first pursues his grievance under a collective-bargaining agreement's nondiscrimination clause. 451 U.S. at 49.

This District Court has stated that section 1983 claims are not preempted by Title VII claims based on the same conduct. Tang v. State of R.I., Dept. of Elderly Affairs, 904 F.Supp. 55. (D.R.I. 1995)

But, other courts hold the other way, if the exact same conduct is present, there is no claim under both Title VII and 1983.

WHY ARE WE TRYING TO ASSERT CLAIMS UNDER 42 U.S.C. § 1983 AND FEDERAL STATUTE OR STATE LAW?

1. In order to assert a Title VII employment discrimination claim, the 24 plaintiffs must first exhaust administrative remedies, get a right to sue, and sue within 90 days. The same applies under R.I.G.L. § 28-5-1 et seq (RI Fair Employment Practices Act).

2. Section 1983 employment discrimination remedies differ from Title VII remedies. Statutory caps apply to compensatory and punitive damages awards under Title VII. No such caps apply to Section 1983 employment discrimination claims or under State Law.

3. There may also be differences in the allocation of tasks between judge and jury concerning matters such as front pay and back pay between Title VII and 1983.

4. Section 1983 claims can be made against individual defendants. In contrast to Title VII, which does not provide a cause of action against individual employees, 1983 may provide a cause of action for unconstitutional employment discrimination by an individual, so long as the plaintiff shows that the defendant acted under color of state law.

Nancy Williams v. Fitzgerald Washington, Alabama Secretary of Labor, argued US Supreme Ct in October 2024.

Since the enactment of Section 1983, Congress has imposed an exhaustion requirement on Section 1983 claims only when they are brought by prisoners with respect to prison conditions.

In Nancy Williams v. Fitzgerald Washington, Alabama Secretary of Labor, argued in October 2024, Alabama Secretary of Labor argues that Supreme Court Decision in Patsy v. Board of Regents that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to [42 U.S.C.] § 1983." 457 U.S. 496, 516 (1982), is wrong. In Williams, the Supreme Court of Alabama defied Patsy and dismissed petitioners' § 1983 claims for failure to exhaust state administrative remedies.

The Supreme Court of Alabama reasoned that Patsy does not apply to § 1983 suits brought in state court, and that § 1983's preemptive effect "would at most allow . . . plaintiffs to bring their unexhausted claims in federal court."

SPECIAL ISSUE WITH 42 U.S.C. § 1981 CLAIMS

In Buntin v. City of Boston, 857 F.3d 69 (1st 2017) the First Circuit Court of Appeals held that there is no implied private right of action for damages **against state actors** under 42 U.S.C. Section 1981 including those sued in the official capacities. In reaching that conclusion, the court of appeals determined that Congress, when it amended the statute in 1991, did not overrule the Supreme Court of the United States 1989 holding in Jett v. Dallas Independent School District, 491 U.S. 701 (1989).

THE RELIGIOUS RESTORATION ACT

The Religious Freedom Restoration Act (RFRA) of 1993 is a federal law that protects the religious freedom of individuals in the United States. The law prohibits the government from making it difficult for people to practice their religion unless the government can demonstrate that it's necessary to further a compelling interest.

The Religious Freedom Restoration Act of 1993 (RFRA) establishes rights beyond those protections afforded by the Constitution’s free exercise clause by creating a heightened standard of review for government actions that substantially burden a person’s exercise of religion.

THE RELIGIOUS RESTORATION ACT - Continued

Historically, free exercise clause prevents the government from compelling religious beliefs, punish religious expressions, or impose regulations that favor one religion over another. (Executive order anyone??).

In Sherbert v. Verner, 374 U.S. 398 (1963), the government denied a claimant unemployment compensation benefits for failure to accept available work because she had declined to work on Saturdays for religious reasons. The Court reasoned, based on the facts of the case, that if a generally applicable law imposes a religious burden on an individual, that person could seek an exemption from the law unless the government could show that the burden was justified by a compelling government interest—a high standard to meet.

In Employment Division v. Smith, 494 U.S. 872 (1990), the USC held that the free exercise clause does not exempt individuals from compliance with generally applicable laws and does not require the government to show a compelling interest in applying such laws to a particular individual. In Smith, two members of the Native American Church were denied unemployment benefits after they were fired for ingesting peyote as part of a religious ceremony. **The Court held that religious exemptions from generally applicable laws should come from the legislative process.**

THE RELIGIOUS RESTORATION ACT - Continued

In 1993, Congress enacted RFRA in direct response to Smith. In its statutory findings, Congress expressed its disagreement with the Smith decision by concluding that Sherbert's compelling interest test is more workable for "striking sensible balances between religious liberty and competing prior governmental interests." In its original form, RFRA applied to all government action at the federal, state, and local levels. Now only applies to Federal entities.

THE RELIGIOUS RESTORATION ACT - Continued

RFRA imposes a heightened standard of review for government actions—including rules of general applicability—that "substantially burden" a person's religious exercise.

This phrase appears to have originated from free exercise case law, which holds that such burdens exist when an individual is required to choose between following his or her religious beliefs and receiving a governmental benefit or when an individual must act contrary to his or her religious beliefs to avoid facing legal penalties.

Once a party has established a substantial burden, the action is valid only if the government shows

that the burden is

(1) in furtherance of a compelling governmental interest and

(2) the least restrictive means of furthering that interest.

This standard is high, but not impossible, for the government to meet.

The RFRA also creates a private right of action for persons whose religious exercise has been substantially burdened, allowing them to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

THE RELIGIOUS RESTORATION ACT - Continued

The scope of RFRA changed as a result of City of Boerne v. Flores, 521 U.S. 507 (1997), where the Court held that RFRA's application to states and local governments was beyond Congress's power under Section 5 of the Fourteenth Amendment. The Section 5 power, according to the Court, is "remedial," allowing Congress to act only in instances where there is evidence of a pattern of conduct that violates the Fourteenth Amendment. *The Court determined that because Congress had not established a widespread pattern of religious discrimination, RFRA could not be justified as a remedial measure designed to prevent unconstitutional conduct*.

Instead, the Court viewed RFRA as an attempt to substantively change the meaning of the free exercise clause, which was outside of Congress's power over the states. As a result of the Court's decision, RFRA no longer applies to states or localities but continues to constrain federal government action. Many states, however, have passed their own versions of RFRA that apply to state and local laws of general applicability.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

In 2000, in the wake of the City of Boerne decision, Congress, relying on its commerce and spending clause powers, passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

RLUIPA institutes a compelling interest test that mirrors the RFRA test for specific types of state actions. State and local governments may not implement land use regulations in a way that imposes a substantial burden on the religious exercise of a person or religious institution unless the government can demonstrate that the regulation is in furtherance of a compelling government interest and is the least restrictive means of furthering that government interest.

Under RLUIPA, any state or local government accepting federal financial assistance is prohibited from imposing substantial burdens on the religious exercise of individuals who are confined to an "institution." Under the statute, institutions include jails, prisons, correctional facilities, institutions for individuals who are mentally ill or disabled, pretrial detention facilities, and institutions for juveniles held awaiting trial or needing care or treatment.

SUPREME COURT INTERPRETATION OR RFRA AND RLUIPA

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), the Court emphasized that RFRA's test is satisfied only if the government demonstrates a compelling interest in the specific application of the law to the particular claimant whose religious rights are burdened rather than a compelling interest in the uniform application of the law. *It concluded that the government had failed to demonstrate a compelling interest in applying the Controlled Substances Act to bar a church from using a tea that contained hallucinogens regulated under that statute during religious services.*

In Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), observing that a corporation "is simply a form of organization used by human beings to achieve desired ends," the Court first held that the term person within RFRA applies to closely held for-profit corporations and that RFRA's protections extend to the religious practices of those who own and control for-profit corporations

In Holt v. Hobbs, 574 U.S. 352 (2015), the Supreme Court applied RLIUPA to hold that a policy prohibiting prisoners from growing half-inch beards substantially burdened a Muslim inmate's sincerely held religious beliefs. State did not prove security interest or how prohibition furthered compelling state interest in preventing inmate from hiding contraband or disguising identities.

OTHER ISSUES – MALICIOUS PROSECUTION.

To succeed on a Fourth Amendment malicious prosecution claim under § 1983, a plaintiff must show that a government official charged him without probable cause, leading to an unreasonable seizure of his person. Chiaverini v. City of Napoleon, Ohio, 602 U.S. 556, 144 S. Ct. 1745, 219 L. Ed. 2d 262 (2024)

The most recent case from this district is Kurland v. City of Providence, 711 F. Supp. 3d 57 (2024).

The elements of a constitutional and common law malicious prosecution claim are similar but not identical. See Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99 (1st Cir. 2013).

A plaintiff can establish a constitutional malicious prosecution claim under § 1983 if she can show that the defendants:

(1) caused

(2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and

(3) criminal proceedings terminated in plaintiff's favor.

OTHER ISSUES – MALICIOUS PROSECUTION - CONTINUED

A plaintiff can establish a malicious prosecution claim under Rhode Island law if she can show that the defendants

(1) initiated a criminal proceeding against [her];

(2) with malice;

(3) and without probable cause; which

(4) terminated in plaintiff's favor." Solitro v. Moffatt, 523 A.2d 858, 861–62 (R.I. 1987) (emphasis added); Nagy v. McBurney, 120 R.I. 925, 392 A.2d 365, 367 (1978).

These approaches are "largely identical with one caveat." While a plaintiff alleging a constitutional claim need only establish that her seizure was unsupported by probable cause, a plaintiff alleging a common law claim must also show that the defendant officer acted with subjective malice. Additionally, a common law plaintiff must establish the elements of malice and lack of probable cause by "clear proof." Powers v. Carvalho, 117 R.I. 519, 368 A.2d 1242, 1246 (1977).

However, the malice element is less significant than it first appears as under Rhode Island law, malice may be inferred from proof that prosecution was instituted without probable cause. See, e.g., Nagy, 392 A.2d at 367 ("Proof of actual ill will, however, is not a sine qua non, for a hostile motive may also be inferred from a showing of a lack of probable cause.").

OTHER ISSUES – BIVENS ACTIONS AGAINST FEDERAL LAW ENFORCEMENT

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) the Supreme Court recognized for the first time an implied private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights. 403 U.S. at 397, 91 S.Ct. 1999.

The scope of constitutional violations redressable by means of a Bivens action is, however, quite limited. Bivens itself recognized a right to relief against federal officers alleged to have undertaken a warrantless search and seizure in violation of the Fourth Amendment. Id. In the more than four decades since the Supreme Court has extended the Bivens holding beyond its original Fourth Amendment confines only twice.

1. Davis v. Passman, 442 U.S. 228 (1979) (employment discrimination in violation of the Due Process Clause of the Fifth Amendment)
2. Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment violations committed by federal prison officials)(Not Wyatt?? Maybe?? On appeal)

OTHER ISSUES – BIVENS ACTIONS AGAINST FEDERAL LAW ENFORCEMENT

The Court's hesitancy to extend Bivens further stems, at least in part, from its recognition that Congress is generally better-positioned to craft appropriate remedial schemes to address constitutional violations committed by federal officers. See, e.g., Bush v. Lucas, 462 U.S. 367, 373 (1983) ("Our prior cases.... establish our power to grant relief that is not expressly authorized by statute, but they also remind us that such power is to be exercised in the light of relevant policy determinations made by the Congress."). Most recent cases:

1. Ziglar v. Abbasi, 582 U.S. 120 (2017), non-U.S. citizens detained in the aftermath of the September 11 attacks cannot recover monetary damages from high-level federal officials for the conditions of their confinement. The claims of detainee abuse were in a new context to Bivens because prior precedent regarded the prison abuse of convicted felons in violation of the Eighth Amendment, rather than the detainees' claims under the Fifth Amendment.

2. Hernandez v. Mesa, 589 U.S. 93 (2020) held that the Court's precedent under Bivens did not extend to cross-border shootings. The Court concluded that the petitioner's Bivens claim arose under a new and significantly different context (a cross-border shooting) than in previous claims by other defendants and also concluded that expanding Bivens would interfere with the executive branch's lead role in setting foreign policy and also interfere with border security. The majority opinion also stated that the Supreme Court would violate the constitutional separation of powers by extending Bivens to additional categories of cases and that it is up to the United States Congress to design a remedy for this type of case.